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You Speak An "Infinite Deal of Nothing": Prioritizing Free Speech Over Other Fundamental Rights

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YOU SPEAK AN "INFINITE DEAL OF NOTHING"*: PRIORITIZING FREE SPEECH OVER OTHER FUNDAMENTAL RIGHTS

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I. INTRODUCTION

Imagine that you are a young woman, alone on the sidewalk walking toward a Planned Parenthood or similar clinic. Although there are any number of reasons from breast cancer to STD testing to go to such a clinic, you are there for an abortion. Hopefully, you have a support group of friends, family, or loved ones, but it is entirely possible you do not. And as you approach the clinic doors, a crowd of protestors you have been eyeing apprehensively grows louder and closer, jeering and gesturing.

When you get close enough to hear their words, you realize they are screaming at you about your baby, the fetus growing inside you. It is entirely likely that the facts they are shouting are incorrect, but it is also likely that you do not know enough to know that. You probably never thought you would be here, now, wondering if it was true that the fetus you carried had eyelashes after just 4 weeks, like the sign you just passed says.[1]

Once your destination is clear, they crowd you. They never touch you, never even block your path, but you stop because even though you could squeeze between the young man holding pamphlets and the elderly woman brandishing a sign, you feel

*WILLIAM SHAKESPEARE, THE COMPLETE PELICAN SHAEKSPEARE 294. "The Merchant of Venice", Act I, Scene I, line 115.

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1 RICHARD E. JONES & KRISTIN H. LOPEZ, HUMAN REPRODUCTIVE BIOLOGY 273 (3d ed. 2006) (stating the fetus develops eyelashes around 24 weeks. A generous person may attribute the incorrect sign to a typo, though anti-choice protestors do sometimes use intentionally misleading or false information).

trapped. They want you to feel trapped. They want to engage you, persuade you, convince you, and all too often, threaten you. And maybe you try to engage them, answering their shouts and jeers. Many women do, clearing their throats and raising their voices, justifying their choice or correcting the misinformation. But most women simply stand there, confused, shaking, or distraught. With papers and pamphlets flying in your face, shouting all around you, and a feeling of the protestors circling, closing in on you like you sit at the center of baited water, you may not know what to say, how to say it, how to make yourself heard, or how to extricate yourself from the situation. The clinic escort (if you have been lucky enough to choose a clinic that has escorts) will take this moment to touch your arm gently, and guide you away.

"There is no reasoning with them," the escort will mutter soothingly in your ear, if you look upset. "I've tried. Just remember you don't owe them anything. You know what is right for you." That short speech will carry you to the doors of the clinic; hopefully you will not hear the crowd follow you to the doors, screaming all the way.

Depending on where you live and what the laws of your state are like, you may have the procedure done that day, or you may have simply had a consultation. Like any medical procedure, the information is a little overwhelming, although the kind doctor tried to explain it to you. The information has filled your head and you have completely forgotten the protestors, until you look out the glass door as you exit and feel a sinking feeling in your stomach. It is all you can do to open the door and step outside.

If you have had the procedure already, you are weakened and tired, on a small dose of painkillers and in no position to deal with the screaming. Rest is generally prescribed for women[2] who have just had an abortion, but you will find none outside the clinic doors.

Imagine that you are this woman, leaving after a minor surgical procedure, alone, facing or having just faced an often-difficult

[2] *See FAQ: Post-Abortion Care and Recovery*, University of California San Francisco, http://www.ucsfhealth.org/education/post-abortion_care_and_recovery/ (last visited Mar. 7, 2015); *see also Common Questions Women Have After an Abortion*, FAMILY PLANNING SPECIALISTS MEDICAL GROUP, http://familyplanningspecialists.com/wp-content/uploads/2014/04/Common-Questions-Women-Have-After-An-Abortion.pdf (last visited Mar. 6, 2015).

decision fraught with personal turmoil or at least with social stigma.

Now imagine that these people, who have harassed, belittled, and frightened you once already, stop you again. This time you push past. And then a frail old woman grabs your arm, pulls you back, looks you in the eye and says, "you're going to die."[3]

It is hard to say where the threat begins and proselytizing, "sidewalk counseling," or protesting ends, or even whether interactions like the above constitute a threat. In many states women are not protected from this kind of verbal abuse. Scenes like these are common to clinics during protests, and it certainly feels like a threat to many women who are already facing difficult, trying, or isolating circumstances.

Massachusetts had a law in place to protect clinic patients from such situations, the Massachusetts Reproductive Healthcare Facilities Act (MRHFA),[4] which created a buffer zone around abortion clinics. A buffer zone creates a space around a given location, such as a clinic building, where protestors or people who do not have legitimate business in the location cannot enter. Buffer zones take many forms, but most commonly protect entrances and driveways. The Massachusetts buffer zone was reviewed in the 2014 decision *McCullen v. Coakley*,[5] and the Supreme Court struck down the MRHFA as a violation of the free speech rights of the protestors who brought the suit.

One of the most basic tenets of our country is the entitlement to free speech.[6] The government may not make illegal or curtail most forms of speech, even if it is distasteful or upsetting. Nevertheless, to pursue genuine and compelling state interests, some restrictions on free speech are allowed. The law restricting speech

[3] It is hard to know what this utterance means, especially when frightened and alone. Context clues may provide an answer: if her pamphlet warns of the risks of abortion, she may be trying to over-emphasize the risks and scare you; religious signs may mean she speaks metaphorically of your soul or of god's wrath; if she is surrounded by younger, stronger protestors she may even want to goad you into a fight. You may simply be unable to tell, but you will almost certainly feel guilt, shame, fear, anxiety, or some combination of all of these.

[4] MASS. GEN. LAWS ANN. 266 §120E1/2.

[5] 134 S. Ct. 2518 (2014).

[6] U.S. CONST. AMEND. I.

must be content neutral[7] and narrowly tailored.[8] Traditionally, buffer zones around various public spaces have been upheld as constitutional speech restrictions.[9]

However, the Court in *McCullen v. Coakley* overturned the MRHFA, ruling it was an unconstitutional restriction on free speech. Although the context of abortion and clinic violence is surprisingly under-discussed in the decision, given the changing attitudes toward abortion and the increased passivity toward protecting abortion as a right, the decision is not entirely surprising. The Court has backed away from protecting abortion rights and has enabled and allowed more restrictions as time passed, and this decision is just another chip in the foundations of the Court's *Roe v. Wade* decision, and just another example of increasing hostility toward abortion. What is surprising about the case is its departure from free speech precedent, as the Court has prioritized free speech over state concerns in a way that conflicts with other free speech decisions. This Comment will assert that the Court has likely caused a future increase in violence against women and other people who utilize, work for, or support abortion clinics, weakened the fundamental right to abortion, and prioritized free speech over equally important rights and interests. Part II will provide background on abortion and demonstrate the change in attitudes toward and increasing restrictions of abortion. Part III will discuss the history of buffer zones and *McCullen* and will look at how *McCullen* departs from free speech precedent. It will argue that the Court has incorrectly prioritized free speech as a result of a hostility and bias toward abortion rights. This Comment will conclude that the Court has wrongly decided *McCullen* and will need to revisit the decision at a later date. It will assert that the Supreme Court has wrongly prioritized free

7 Meaning that it cannot restrict certain kinds of speech. All speech must be restricted equally. For a pertinent example, a state may not restrict anti-abortion speech around an abortion clinic. However, it may restrict all speech around a clinic, if the law is narrowly tailored and serves a legitimate state interest.

8 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that an ordinance imposing a noise buffer on a concert was not a violation of free speech, since it was not an overly broad restriction).

9 *See generally* Rock Against Racism, 491 U.S. at 802 (holding that a noise buffer zone around a charity concert was constitutional); Phillips v. Borough of Keyport, 107 F.3d. 164 (1997) (holding that a buffer zone around an adult entertainment store was constitutional); Burson v. Freeman, 504 U.S. 191 (1991) (upholding a buffer zone prohibiting soliciting votes around a polling location).

speech in an attempt to facilitate the chipping away of abortion rights, and that the decision is not in line with precedent.

II. Abortion Restrictions Increase, Standards of Scrutiny in Restricting Abortion Become Less Strict

McCullen is a complicated case, and the decision addresses the complex interplay that occurs when two rights seem to clash. Here, these rights are the right to privacy (and by extension, an abortion) and the right to freedom of speech. It is important to understand the history of abortion law in the country and how it has evolved to signal an era of hostility toward abortion rights and a Court unwilling to vigorously protect such rights.

A. Background on Abortion

The history of abortion extends to the beginning of mankind,[10] but the history of legal abortion in America is fairly recent. One in three women in the United States will have an abortion by the age of forty-five.[11] Abortion was legal until 1821,[12] when it was banned in Connecticut after quickening, with other states following shortly thereafter.[13] Between 1821 and 1973, only four states allowed abortion upon request, although some allowed abortion in cases of rape or danger to the life of the mother.[14] In fact, until 1965, states could also legally prohibit men and women from obtaining and using birth control.[15]

10 *See Numbers 5:24*, KING JAMES BIBLE (referencing abortion within the Bible); *see also* JAMES M. RIDDLE, CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE 27-28 (1994) (explaining that the Greek city-state of Cyrene drove a subspecies of giant fennel, called silphium, extinct because its abortifacient properties were so high in demand).

11 *See* Planned Parenthood, Health Info: Abortion, http://www.plannedparenthood.org/health-info/abortion (last visited Mar. 6, 2014).

12 N.E.H. Hull & Peter Charles Hoffer, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 20 (2001).

13 *Id*. Quickening is the point at fetal development where the mother can feel the fetus move.

14 *See generally* PEW RESEARCH CENTER, A History of Key Abortion Rulings of the U.S. Supreme Court (2013), *available at* http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/#regulations. These states were New York, Hawaii, Alaska, and Washington.

15 *See Anthony Comstock's "Chastity" Laws*, PBS, http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html (last visited Mar. 3, 2015); *see also* SANA LOUE ET AL., ENCYCLOPEDIA OF WOMEN'S HEALTH, *Comstock Laws* 183-

In 1965, the Supreme Court decided *Griswold v. Connecticut*,[16] and found there was a constitutional right of marital privacy[17], which was violated when married couples were prevented from accessing birth control.[18] This privacy right was extended to single people in the 1972 decision *Eisenstadt v. Baird*,[19] where the court ruled that privacy rights are inherent in the individual,[20] especially in something "so fundamentally affecting a person as the decision whether to bear or beget a child."[21] These two cases set the foundation on which a landmark case would be decided only one year after *Baird*. The case[22] was *Roe v. Wade*[23], and it extended this individual right to private determinations about childbearing to its logical conclusion. It overturned a complete ban on abortion and made abortion legal throughout the country.[24]

The court ruled, as *Griswold* and *Baird* did before it, that the right to privacy was encompassed in the penumbra of unspoken rights granted by the language of the Constitution[25], and that this privacy right included the right to make sexual and reproductive decisions.[26] Though the right to abortion is based in a fundamental privacy right, there is no right to privacy explicitly laid out in the

84 (2004). On March 3, 1873, Congress passed the Comstock Act. This law specifically designated contraception as obscene material and made it a federal crime to disseminate birth control through the mail or across state lines. Many states soon followed suit and passed their own Comstock Laws, prohibiting the use, prescription, or dissemination of birth control. Though key elements of the Comstock Law were repealed in 1971, some vestiges remain, which have not been repealed despite several attempts. The latest attempt to repeal the vestiges of the law was in 1997. *See* H.R. 2272, 105th Cong. (1997).

16 381 U.S. 479 (1965).

17 *Id*. at 485.

18 *See id*. at 484. Though this constitutional right is not spelled out, the Court found that the Bill of Rights contains certain rights by implication, called the penumbra of rights. *Griswold* is based on the implied right to privacy created in the penumbra, which is implicated in the First, Third, Fourth, Fifth, and Ninth Amendments.

19 405 U.S. 438 (1972).

20 *Id*. at 453.

21 *Id*.

22 Although technically the *Roe* decision was a joint decision on two cases, Roe v. Wade and Doe v. Bolton, it is often referred to as *Roe* for convenience. *See, e.g.*, Lynne M. Kohm, Roe*'s Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1343 (2014) (referring to Roe v. Wade as *Roe*).

23 410 U.S. 113 (1973), *overruled in part by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

24 *See id*. at 164. Though the law in question was a Texas law, the Supreme Court's decision to find the law unconstitutional meant that all states with laws banning abortion became invalid.

25 *Roe*, 410 U.S. at 152.

26 *Id*.

Constitution.[27] Nonetheless, the Court found such a right to exist. It finds the roots of this right to privacy in the First Amendment,[28] the Fourth and Fifth Amendments,[29] the penumbra of rights,[30] the Ninth Amendment,[31] and in the Fourteenth Amendment concept of liberty.[32] Only personal rights that are deemed "'fundamental' or 'implicit in the concept of ordered liberty,"'[33] can fall under this guarantee of privacy, and this privacy right is broad enough to encompass abortion.[34]

Roe determined that a state needed to have a compelling state interest to restrict access to abortion.[35] This is the most stringent standard of review for any restrictions placed on a right, and is called strict scrutiny review.[36] In fact, *Roe* was decided with "particularly careful scrutiny,"[37] an even more heightened and careful evaluation of abortion restrictions.[38] It was understood from the decision that abortion, as a fundamental right encompassed in privacy rights, was to be reviewed under at least strict scrutiny, and that the Court should take extra care with it. Under this standard, most abortion restrictions would fail, particularly those affecting the first trimester.[39] *Roe* ruled that in the first trimester, a patient and the consulting physician were free to determine "without regulation by the state" that a pregnancy should be terminated.[40] The right to an abortion is

27 *Id* (acknowledging this, the Court goes on to explain how and where it exists in the Constitution despite not being explicitly stated).

28 *Id*. (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

29 *Id*. (citing Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350-51 (1967); Boyd v. United States, 116 U.S. 616, 633 (1886)).

30 The penumbra of rights are rights which, although not explicitly stated in the Constitution, follow logically from the rights that are explicitly granted. Therefore, these implicit rights are in the penumbra, or shadow, of the Constitution. *Roe*, 410 U.S. at 152.

31 *Roe,* 410 U.S. at 152 (citing *Griswold*, 381 U.S. at 486-87 (Goldberg, J., concurring)).

32 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

33 *Roe*, 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

34 *Id*.

35 *Id*. at 155.

36 *Griswold*, 381 U.S. at 504.

37 *Roe*, 410 U.S. at 170.

38 *Id*. at 156.

39 Roe v. Wade ruled that an expecting person was to be less restricted in terminating a fetus pre-viability, and that the state interest in protecting the unborn fetus became greater as the fetus approached full term.

40 *Roe*, 410 U.S. at 163.

fundamental, the Court said, and may be effectuated "free of interference by the State."[41]

Women were not long without interference by the State, and strict scrutiny did not remain the standard for long. In 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[42] changed the standard applied by the courts to determine if state abortion restrictions were too onerous.[43] The Court changed the standard to an "undue burden,"[44] which was a new standard. The Court ruled that this was an "appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[45] In *Casey*, Pennsylvania required a 24-hour waiting period before an abortion, as well as spousal consent, parental consent for minors, and other restrictions.[46]

All restrictions but the spousal consent passed the newly lowered standard of review. Restrictions must now simply avoid placing an "undue burden"[47] on people who seek abortions. Rather than requiring that the state have a compelling and legitimate interest in the regulation,[48] under this standard the plaintiff—the person providing an abortion, seeking one, or otherwise challenging restrictions—must prove that the state regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[49] Not only does this have the effect of shifting the burden of proof to the challenger of the statute, but it is also a less rigorous standard of review, which has allowed more restrictions of abortion than would have been allowed if the *Roe* standard of strict scrutiny had continued. This vague new standard posed problems for legislatures and courts trying to interpret the circumstances under which they may regulate abortion, and the decision also signaled an unwillingness on the part of the Court to stringently protect abortion rights, emboldening anti-choice legislators to

41 *Id*.
42 505 U.S. 833 (1992).
43 *Id* at 874.
44 *Id*.
45 *Id*. at 876.
46 *Id*. at 881.
47 *Id*. at 876.
48 505 U.S. 833, 871 (1992).
49 *Casey*, 505 U.S. at 877.

curtail the rights of people seeking abortions since the decision in 1992.

B. The Problems With Undue Burden

One of the many problems with the *Casey* decision is that the articulated standard is vaguer than the previous standard. Strict scrutiny is well defined, and it is also a relatively subjective standard. The undue burden standard invites the judicial system to speculate on what is, and what is not, a substantial burden on women who often have very different socioeconomic backgrounds and lifestyles than the judges and justices of the court. The Supreme Court has not issued a bright line rule for what an undue burden is, because there is no way to articulate a bright line rule. But until the Court acknowledges that a small subset of women bear a disproportionate amount of the burden in abortion regulation, they will never properly apply an undue burden analysis. And the way that undue burden is applied makes it easier for the Court to take a lax stance on abortion protections.

C. Changing Standards, Changing Attitudes towards Abortion

Casey signaled the beginning of a shift in how the Court protected abortion rights, and in more legislative restrictions on abortion rights. Since 1992, anti-abortion legislation has risen steadily,[50] with 950 bills proposed in 2010 alone.[51] Of those 950, 89 passed, more than double what was passed in 2008.[52] More anti-abortion legislation was passed in 2011-2013 than the entire decade previous.[53] As of now, 89% of U.S. counties have no abortion clinic,[54] and for women in those counties who must travel

[50] *Heather D. Boonstra & Elizabeth Nash, A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER POLICY REVIEW, (Winter 2014), at 10, *available at*: http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html#chart.

[51] *Id.*

[52] Guttmacher Inst., *Laws Affecting Reproductive Health and Rights: 2010 State Policy Review*, GUTTMACHER INST., (2010), *available at* http://www.guttmacher.org/statecenter/updates/2010/statetrends42010.html.

[53] Boonstra & Nash, *supra* note 50.

[54] *State Facts About Abortion: Texas* at 2, GUTTMACHER INST. (2014), *available at* http://www.guttmacher.org/pubs/sfaa/pdf/texas.pdf.

elsewhere to obtain their abortion, the distance can be almost unmanageably far. Texas is frequently in the news for its extreme anti-abortion measures, and as the second largest state in the nation at 268,820 square miles, it has just 8 abortion clinics as of 2014.[55] Even assuming that each clinic was spread equidistant from the next,[56] each clinic would need to serve an astonishing 33,602.5 square miles. For comparison, Massachusetts has 10,554 total square-miles and 12 abortion clinics as of 2013.[57] If each clinic were equidistant from the others,[58] each clinic would serve only 879.5 square-miles. For a resident of Massachusetts, a 24-hour waiting period may not be considered burdensome, given the relative proximity to a clinic.[59] For a resident of Texas, however, a 24-hour waiting period likely means that 48 hours in total are taken from work, school, or search for employment. It means finding childcare, borrowing a car, finding money for bus fare or gas, and significant amounts of travel during a phase of pregnancy can be characterized as weariness and morning sickness for many.[60] In Massachusetts, a consultation, even a procedure, may be close enough to achieve within a lunch break or a half-day. In Texas, only a few lucky women have that convenience.

For a young woman who is undergoing her abortion procedure due to rape, many restrictions can be cruel and even traumatic.

[55] *Texas Abortion Clinic Map*, FUND TEXAS CHOICE, http://fundtexaswomen.org/resources/texas-abortion-clinic-map/ (last visited Mar. 6, 2015).

[56] And this is not the case: the clinics are all located in or near a major city: Dallas (2), Fort Worth (1), Austin (1), San Antonio (2), or Houston (2). *See id.*

[57] *Abortion Providers in Massachusetts*, National Abortion Rights Action League Massachusetts (Jul. 2, 2013), *available at,* http://www.prochoicemass.org/assets/bin/pdfs/providerchart.pdf.

[58] *See id*. (In all fairness to Texas, this is not so in Massachusetts either. Many of the clinics are grouped around Boston, Adams, or Springfield and Worcester).

[59] This is not to say that it would not still be insulting to imply that people capable of bearing children needed a state enforced time out before they could make up their minds about a legal medical procedure. In fact, a waiting period may still violate fairness, equal protection (the state does not insist that people seeking vasectomies wait any amount of time before seeking the procedure, as an example), or other constitutional concerns.

[60] ERROL R. NORWITZ ET AL., OXFORD AMERICAN HANDBOOK OF OBSETRICS AND GYNECOLOGY 56-7 (2007).

Thirteen states[61] require ultrasounds to be performed,[62] and some have laws encouraging women to have ultrasounds or to view ultrasound images even though they are medically unnecessary.[63] In three states, women are required to view the ultrasound.[64] And in Texas, women seeking abortions in the first trimester (approximately 91% of all abortions)[65] will likely need a transvaginal ultrasound,[66] since a less invasive abdominal ultrasound will not capture an image of the fetus with the clarity required by law.[67] All of these laws may cause emotional, mental, or physical distress to a recent sexual assault victim, and may cause feelings of guilt, anger, depression, or a wide variety of other

61 *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. § 36-2156; Fla. Stat. Ann. §390.0111; Ind. Code §16-34-2-1.1; Kan. Stat. Ann. § 65-4a09; La. Rev. Stat. Ann. §1299.35.2; Miss. Code Ann. §41-41-135; N.C. Gen. Stat. Ann. §90-21.82; Ohio Rev. Code Ann. §2317.56; Okla. Stat. Ann. tit. 63 §1-738.2; Tex. Health and Safety Code Ann. §171.012; Va. Code Ann. §18.2-76; Wis. Stat. Ann. §253.10. All of these laws were passed in the last five years, most in the last three.

62 *Casey*, 505 U.S. at 837. All of these states should probably refresh their understanding of *Casey*'s undue burden holding, which specifically states that "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion." Also, The American College of Obstetricians and Gynecologists have spoken out against forced ultrasound laws as unnecessary and harmful to the physician-patient relationship. *See generally*: The Executive Bd. of the Am. Coll. of Obstetricians and Gynecologists and the Am. Cong. of Obstetricians and Gynecologists; *Statement of Policy: Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship* (May 2013), *available at* http://www.acog.org/-/media/Statements-of-Policy/Public/2013LegislativeInterference.pdf?dmc=1&ts=20150308T2208565881. Though they have not been so ruled yet, and may never be given the Court's recent attitude toward restricting abortion, unnecessary, forced ultrasounds certainly seem like exactly the sort of medical procedure *Casey* specifically ruled impermissible.

63 Guttmacher Institute, *Requirements for Ultrasound*, https://www.guttmacher.org/state policy/explore/requirements-ultrasound (last visited Nov. 17, 2016). Georgia, Indiana, Kansas, Michigan, Nebraska, North Carolina, Oklahoma, South Carolina, Utah, Virginia, and Wisconsin all require women to be provided with information encouraging them to seek access to ultrasounds.

64 *See id.* These states are Kansas, Texas, and Wisconsin.

65 KAREN PAZOL ET AL., ABORTION SURVEILLENCE—UNITED STATES, CNT. FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT, 2009, *available at* http://www.cdc.gov/mmwr/pdf/ss/ss6108.pdf; *see* Jodi Jacobson, *Late Abortions: Facts, Stories, and Ways to Get Help*, RH REALITY CHECK (Jun. 2, 2009), *available at* http://rhrealitycheck.org/article/2009/06/02/lateterm-abortions-facts-stories-and-ways-help/.

66 *See* Transvaginal Ultrasound, MEDLINEPLUS, *available at* https://medlineplus.gov/article003779.htm. A transvaginal ultrasound is one where the ultrasonic device is inserted into the vagina for a clear picture of the reproductive organs and fetus.

67 DAVOR JURKOVIC ET AL., GYNAECOLOGICAL ULTRASOUND IN CLINICAL PRACTICE: ULTRASOUND IMAGING IN THE MANAGEMENT OF GYNAECOLOGICAL CONDITIONS 143 (2009).

reactions in any woman.[68] Proponents of these ultrasound laws often say that the instances of abortion caused by rape and incest are low.[69] They are right, with most statistics finding 1% to 2.5% of abortions are because of rape and incest.[70] Even if one were to argue that ultrasounds are no more than a slight inconvenience to women who are not the victims of rape or incest,[71] *Casey* reasoned that,

> [t]he analysis [of whether an abortion restriction constitutes an undue burden] does not end with the one percent of women[72] upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[73]

By this logic, it does not matter whether the ultrasound laws are harmful to 1% or 100% of women, if they are a burden on any, they must be evaluated for the effect they have on that group. Still, ultrasound laws persist. No challenge to the law has yet made it to the Supreme Court, but the number of such abortion restrictions continues to increase.

[68] For a description of one woman's distress, *see* Bonnie Rochman, *Requiring Ultrasounds Before Abortion: One Mother's Personal Tragedy*, TIME MAGAZINE (Mar. 23, 2012), *available at* http://healthland.time.com/2012/03/23/requring-ultrasounds-before-abortion-one-mothers-personal-tragedy/. Consider also other circumstances that may lead to distress upon being forced to view an ultrasound or hear it described, including circumstances not exempted by law. For example, women who want children but are in situations of domestic violence; women who cannot afford to go through a pregnancy without healthcare (or with healthcare that is not comprehensive enough to provide for them); or women who have mental or physical conditions that will make birth painful, or who cannot be pregnant if they wish to take daily medications.

[69] Laurence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, GUTTMACHER INST. (Sept. 3, 2005) at 113, *available at* http://www.guttmacher.org/pubs/journals/3711005.pdf; *see generally* MM Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, AM. JOURNAL OF OBSTETRICS AND GYNECOLOGY (Aug. 1996), *available at* http://www.ncbi.nlm.nih.gov/pubmed/8765248.

[70] *See* FINER, *supra* note 69.

[71] And there are any number of reasons why state sanctioned guilt and coercion may have a negative effect on women from all walks of life, sexual assault victims or not.

[72] This was in reference to the challenge to the spousal consent portion of the law in *Casey*. Challengers to the law said it would impose an undue burden on women in domestic abuse situations, while proponents of the law said this was not an undue burden since only approximately 1% of women seeking abortions were in situations of domestic abuse.

[73] *Casey*, 505 U.S. at 896.

Another example of the increasing hostility toward abortion is clinic violence. Only twelve years ago, the Court denied certiorari to *Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists*,[74] which involved anti-abortion protestors and activists who threatened abortion providers by printing "wanted" posters with their faces and personal information, and distributing them around the providers work and home areas. The posters included a "reward" and encouraged violence against the pro-choice doctors, nurses, and staff.[75] Stories of clinic violence are not uncommon,[76] and the Supreme Court must have been aware of this when deciding *McCullen*. Nationally, almost one in four clinics reports being the victim of "severe" violence, most commonly "bomb threats, death threats, stalking, and blockades[.]"[77] Clinic violence peaked in the late 1990's,[78] and as buffer zone laws began to pass in states and municipalities in the late 1990's and early 2000's,[79] clinic violence declined.[80]

74 539 U.S. 958 (2003) (*cert. denied*) (By denying certiorari, the Supreme Court allowed a judgment in favor of Planned Parenthood against aggressive and violent harassers to remain uncontested).

75 290 F.3d. 1058, 1062-63 (9th Cir. 2002).

76 *See generally* David Barstow, *An Abortion Battle, Fought to the Death*, N.Y. TIMES (Jul. 25, 2009), *available at* http://www.nytimes.com/2009/07/26/us/26tiller.html?pagewanted=all; *Anti-Choice Violence and Intimidation*, NATIONAL ABORTION RIGHTS ACTION LEAGUE (Jan. 1, 2015), *available at* http://www.prochoiceamerica.org/media/fact-sheets/abortion-anti-choice-violence.pdf; Ilyse Hogue, *Why the History of Anti-Abortion Violence Cannot Be Ignored*, MSNBC (Aug. 9, 2014), *available at* http://www.msnbc.com/msnbc/women-choice-abortion-violence; *5 Years After Dr. George Tiller's Murder, a Doctor Braves Threats to Continue Abortions in Witchita*, DEMOCRACY NOW!, http://www.democracynow.org/2014/6/4/5_years_after_dr_george_tiller (last visited Mar. 4, 2015); William Booth, *Doctor Killed During Abortion Protest*, WASHINGTON POST (SPECIAL REPORT) (Mar. 3, 1993), *available at* http://www.washingtonpost.com/wp-srv/national/longterm/abortviolence/stories/gunn.htm; and for stories specific to Massachusetts *see generally* Molly Redden, *12 Horror Stories Show Why Wednesday's Big Supreme Court Abortion Case Matters*, MOTHERJONES (Jan. 14, 2014), *available at* http://www.motherjones.com/politics/2014/01/abortion-horror-stories-supreme-court-massachusetts-mccullen-coakley (discussing 12 stories of clinic violence, all of which occurred in Massachusetts).

77 Art Winslow, *A Suspenseful Tale About Identity, Reality and Evil*, CHICAGO TRIBUNE (Mar. 13, 2005), *available at* http://articles.chicagotribune.com/2005-03-13/entertainment/0503110451_1_nuremberg-files-cloning-reproductive.

78 *Violence Statistics*, NATIONAL ABORTION FEDERATION (2012), http://prochoice.org/education-and-advocacy/violence/violence-statistics-and-history/ (last visited Mar. 7, 2015).

79 *See* COL. STAT. REV. ANN. §18-9-122; MASS. GEN. LAW ANN. CH. 266 §120E; MONT. CODE ANN. §45-8-110; N.H. REV. STAT §132:38.

80 *Violence Statistics*, *supra* note 78.

The holding in *McCullen* that the Massachusetts buffer zone was unconstitutional fits into a larger pattern of increased tolerance for abortion restrictions. The past two decades have seen an increase in abortion restrictions aimed at chipping away at the foundations of *Roe v. Wade*. Between 2001 and 2010, states enacted 189 abortion restrictions all together, but between 2011 and 2013 there have been 205 restrictions passed nationwide.[81] In 2000, Guttmacher Institute classified 13 states as hostile to abortion, for having at least four major restrictions on the procedure.[82] Now, the number has swelled to 27,[83] and women in more than half of the states in the United States live in a place where they will "likely struggle to terminate a pregnancy."[84] In not just the United States, but worldwide, more restrictions on abortion lead to more maternal deaths, birth-related complications, and infant deaths.[85] This increase in anti-abortion legislation is likely due to emboldened legislators, who notice the Court's less protective stance toward abortion rights. This increased passivity when deciding abortion cases also helps to explain how the Court decided *McCullen*; because the court values free speech above the right to privacy[86] and abortion, it is more willing to sacrifice the right to an abortion even when there is no cognizable violation of free speech. Here, it resulted not only in a

81 Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST. (2014), *available at* http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html.

82 *See id.* Most of the restrictions which flagged a state as hostile to abortion were later-term abortion bans, restrictions on abortion providers, limitations on the provision of medication abortion and restrictions on coverage of abortion in private health plans.

83 *Id*.

84 Tara Culp-Ressler, *In the Past Three Years, We've Enacted More Abortion Restrictions than During the Entire Previous Decade*, THINKPROGRESS (Jan. 2, 2014), *available at* http://thinkprogress.org/health/2014/01/02/3112081/abortion-restrictions-2011-2013/ (discussing: Ian Milhiser & Tara Culp-Ressler, *The Greatest Trick the Supreme Court Ever Pulled Was Convincing the World Roe v. Wade Still Exists*, THINKPROGRESS (Dec. 4, 2013), *available at* http://thinkprogress.org/justice/2013/12/04/2919111/supreme-court-roe-wade-exists/).

85 Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, REVIEWS IN OBSTETRICS AND GYNECOLOGY (vol. 2 Spring 2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/; Stephanie Castillo, *States With More Abortion Restrictions Hurt Women's Health, Increase Risk for Maternal Death*, MED. DAILY (Oct. 3, 2014), *available at* http://www.medicaldaily.com/states-more-abortion-restrictions-hurt-womens-health-increase-risk-maternal-death-306181.

86 The court does this even though both free speech and privacy are considered fundamental rights.

continuation of dangerous conditions for women, but a departure from free speech precedent by the Court.

III. McCullen Fits into a Larger Pattern of Increasing Abortion Restriction, But Not into Free Speech Precedent

McCullen is a departure from precedent in both other buffer zone cases and other free speech cases. *McCullen* represents another hostile precedent toward abortion, which could have major repercussions for abortion as a protected fundamental right.

A. History of Buffer Zones

The Supreme Court has analyzed the constitutionality of abortion clinic buffer zones on several occasions, and has generally protected such laws. Buffer zones create areas of restricted access to specified locations. They restrict some or all people from entering a certain area, require that people must leave a certain area after a certain time, or otherwise serve to filter who is in what place and when. A fixed buffer zone does not move and sets an outer limit around a location, which specified people cannot enter.[87] A floating buffer zone surrounds a moving point of interest, which specified people may not approach.[88] Buffer zones surround areas in everyday public life, from voting booths to schools.[89] Many go largely uncontested, and when they are, they are usually upheld and generally considered to be narrowly tailored, even when they are very wide. For example, in *Phillips v. Borough of Keyport*,[90] a 300-600 foot buffer zone around an adult entertainment store was upheld as constitutional. In fact, this rather large buffer zone was upheld in spite of the Court's

87 *E.g.*: Protestors must remain 25 feet from entranceways and driveways to reproductive healthcare facilities.

88 *E.g.*: Protestors may not approach within 6 feet of anyone entering or exiting a reproductive healthcare facility.

89 For a contemporary and interesting example, *see* Snyder v. Phelps, 131 S. Ct. 1207 (2011) (examining the adherence of a group of protesters affiliated with the Westboro Baptist Church to a buffer zone of 1,000 feet, which prevented protests around funeral homes and cemeteries); *see also* Mark Sherman, *Westboro Baptist Church Wins Supreme Court Appeal Over Funeral Protests*, HUFFINGTON POST (Mar. 2, 2011), http://www.huffingtonpost.com/2011/03/02/westboro-baptist-church-w_n_830209.html.

90 107 F.3d 164, 172 (1997).

acknowledgement that the speech restriction was not content neutral,[91] and that the lack of content neutrality put even more of a burden on the state to tailor the restriction to impose the least possible burden.[92] The wide buffer zone was deemed necessary to public interest and welfare, providing a compelling enough state interest that it was seen as reasonably the "least possible" burden.[93]

Buffer zones that span hundreds of feet are found in other areas of public life as well. For example, in Massachusetts, the buffer zone around polling locations is 150 feet.[94] In Louisiana, it is 600 feet.[95] The buffer zones around polling places are generally justified to avoid the distribution of material "intended to influence"[96] the voters on their way into the ballot box. Only one case about polling location buffer zones has gone to the Supreme Court,[97] and only a handful of challenges have been brought to court at all.[98] In 1992, the Supreme Court heard *Burson v. Freeman*,[99] where a Tennessee political party worker sought to enjoin statutes prohibiting the distribution of campaign materials and solicitation of votes within 100 feet of the polling place.[100] The Court applied strict scrutiny, and determined the buffer zone was valid because it served a compelling state interest to protect a voter's right to cast a vote "in an environment which is free from intimidation, harassment, confusion, obstruction, and undue influence."[101]

91 *Id*. at 172. The town was specifically targeting the adult entertainment store because of the products they sold, but argued a compelling state interest in protecting children and public welfare with a 300-foot buffer because it "afforded a constitutionally sufficient opportunity for adult expression."

92 *Id*. at 173.

93 *Id*. at 172.

94 MASS. GEN. LAWS ANN. 54 § 65; *See* Linda Killan, *Supreme Court Hypocrisy on Buffer Zones?*, WALL ST. J. (Jun. 27, 2014), http://blogs.wsj.com/washwire/2014/06/27/supreme-hypocrisy-on-buffer-zones/ (accusing the Court of hypocrisy for stripping a 35 foot buffer zone from Massachusetts clinics when the Court is protected by a wide buffer zone across the Supreme Court plaza).

95 LA. REV. STAT. ANN. 18:1462.

96 MASS. GEN. LAWS ANN. 54 § 65.

97 *See* Burson v. Freeman, 504 U.S. 191, 211 (1992).

98 *See* Russell v. Lundergan-Grimes, 769 F.3d. 919 (2014); Anderson v. Spear, 356 F.3d. 651 (2004); PG Publ'g Co. v. Aichele, 902 F. Supp. 2d. 724 (2012).

99 504 U.S.191 (1992).

100 *Id*. at 193-94.

101 *Id*. at 194-95.

It is such harassment, undue influence, and intimidation that buffer zones around abortion clinics are meant to prevent, in addition to clinic violence. The Court had a long history of upholding buffer zones around abortion clinics, especially fixed buffer zones. For example, in *Madsen v. Women's Health Center, Inc.*,[102] the Supreme Court specifically ruled that a 36 foot buffer zone around clinic driveways and entrances was constitutional.[103] This fixed buffer zone was found to burden "no more speech than necessary to accomplish the governmental interests in protecting access to the clinic and facilitating an orderly traffic flow on the street."[104] Following *Madsen* the Court decided *Schenck v. Pro-Choice Network of Western New York*,[105] which also involved a court issued injunction rather than a statute.[106] In the opinion, the Supreme Court stressed the importance of deference to the district court's finding of a "proper distance to ensure access."[107] The Court reasoned that the district court is in a better position to determine what kind of buffer zone will properly protect the interests of all parties involved.[108] The Court in *Schenck* upheld a 15 foot fixed buffer zone around the clinic, while striking down the floating buffer zones[109] of 15 feet around any person entering or exiting the clinic.[110] These floating buffer zones were said to burden speech more than necessary by enacting a broad prohibition against leafleting and other forms of public area speech, and were considered too vague for proper enforcement.[111] The Court in *Schenck* also cited safety concerns as justifying the buffer zone,

102 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

103 *Id.* at 770 (protestors blocked access to a Florida clinic, so a court enjoined them from interfering with public access to the clinic. The injunction was broadened to a 36-foot buffer zone around the entrances and driveways of the clinic, as well as other provisions. However, the Supreme Court did reject some aspects of this injunction, such as the prohibition of signs and buffer zones for clinic doctors' private homes).

104 *Id.*

105 Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357 (1997).

106 *Id.* at 366-67. Protestors routinely blockaded this abortion clinic, so an injunction was issued with a 15-foot fixed buffer zone, as well as a 15-foot floating buffer zone.

107 *Id.* at 381.

108 *Id.* Protecting such interests means balancing the protestors' First Amendment rights with the government interest of ensuring public safety and order.

109 *See id.* at 377-78 (describing floating buffer zones as the protestor's boundaries shifting as the object the boundaries protect moves).

110 *Schenck*, 519 U.S. at 379.

111 *Id.* at 377.

holding that preventing threats of violence[112] was a sufficient governmental interest. The Court also ruled that keeping protestors out of close proximity to cars and patients was not too broad an interest or aim. [113]

A few years later the court decided a similar case, *Hill v. Colorado*.[114] The law being challenged in *Hill* created a fixed zone of 100 feet, inside of which existed a floating buffer zone of 8 feet.[115] Protestors could not enter this floating buffer zone without the consent of the patient or staff member entering or exiting the clinic.[116] In *Hill*, the Court expressly acknowledged a state interest in protecting "those who enter a health care facility from" unwilling listeners from speech or conduct that really represented "harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach[.]"[117] In short, the Court acknowledged the need to protect people from harassment being disguised as freedom of speech, and allowed states to distinguish between the two. *Hill* also urged deference to the legislature's judgment about the best way to balance all the competing interests of the protestors' right to free speech with the clinic patients and workers' right to privacy and safety.[118] Again, the Court believed that the body creating the buffer zone had the best information and insight to determine what will work best for the clinics involved. In all three of these cases, the Court protected the states' right to shield clinic patients and staff from harassment and violence, deferred to decisions about how to implement buffer zones, and upheld buffer zones in varying sizes.

B. Background on McCullen

In deciding *McCullen*, the Court declined to follow this buffer zone precedent. In *McCullen*, a private citizen sued the Massachusetts Attorney General to challenge the Massachusetts

112 *Id*. at 375-76 (mentioning that the threats of violence did at times escalate into actual fighting).

113 *Schenck*, 519 U.S. at 376.

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

115 *Id*.

116 *Hill*, 503 U.S. at 703.

117 *Id*. at 724.

118 *Id*. at 704.

Reproductive Healthcare Facilities Act (MRHFA). The MRHFA was originally passed in 2000. In 2007 it was amended to include a 35-foot wide buffer zone around the entrances and driveways to all reproductive healthcare facilities.[119] This was done in response[120] to a wave of anti-choice violence[121] around the country which had led to11 murders, 17 attempted murders, 550 incidents of stalking, plus harassment and other violations of individual privacy of pro-choice doctors, patients, staff, and advocates.[122] In Massachusetts alone, there had been two murders, as well as five people injured during an attempted murder.[123] The original version of the law contained a 15 foot buffer zone with a 6 foot "no approach" zone,[124] meaning that once inside the 15 foot buffer zone, no protestor could approach within 6 feet of a patient or provider without permission.[125] The revised version expanded the buffer zone to disallow protestors entirely, while removing the no approach zone.[126]

Eleanor McCullen and the other plaintiffs[127] were protestors, who styled themselves as "sidewalk counselors" and engaged in regular attempts to speak to, help, and "counsel" young women using the Massachusetts clinics these protestors frequented.[128] The crux of their claim was that because they sought to engage in

119 MASS. GEN. LAWS ANN. 266 §120E1/2.

120 *See generally*: Respondents' Brief on the Merits at 1-12, McCullen v. Coakley, 134 S. Ct. 2518 (2014) (No. 12-1168); S. JOURNAL, 185th Cong., at 3 (Mass. Nov. 8, 2007).

121 Nationwide, "1 in 5 clinics report experiencing severe violence." *See* Susie Gillian et al., *2014 National Clinic Violence Survey*, FEMINIST MAJORITY FOUNDATION (2014), *available at* http://www. http://feminist.org/rrights/pdf/2014ncapsurvey.pdf

122 *Violence and Disruption Statistics*, NATIONAL ABORTION FEDERATION (2014), https://prochoice.org/wp-content/uploads/Stats_Table_2014.pdf (last visited Jan. 8, 2016). These figures represent the most recent compiled statistics but do not take into account clinic violence that occurred in abortion clinics in 2015. In late November of 2015, three people were murdered in a Planned Parenthood in Colorado Springs, the first murders directly linked to anti-abortion violence since 2009. *See* Julie Turkewitz and Jack Healy, *3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center*, N.Y. TIMES (Nov. 27, 2015).

123 Christopher B. Daly, *Gunman Kills 2, Wounds 5 in Attack on Abortion Clinics*, WASHINGTON POST (Dec. 31, 1994), available at http://www.washingtonpost.com/wp-srv/national/longterm/abortviolence/stories/salvi.htm

124 Though differently phrased, the "no approach" zone was essentially a floating buffer zone.

125 MASS GEN. LAWS ANN. 266 §2 (2000) (repealed).

126 MASS. GEN. LAWS ANN. 266 §120E1/2.

127 The other plaintiffs were Jean Blackburn Zarella, Gregory A. Smith, Eric Cadin, and Carmel Ferrell. McCullen v. Coakley, 759 F. Supp. 2d 133, 135 (D. Mass. 2010).

128 *Id*. at 208.

conversation with the clinic patients, rather than protest, the buffer zone was a violation of their free speech rights.[129] The court declared that the law, as amended, was a violation of Eleanor McCullen's (and other protestors) constitutional rights, as it was not narrowly tailored to be a reasonable restriction on free speech.[130] The Court reasoned that for a law to be narrowly tailored, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests[.]"[131]

The protestors who brought the suit acknowledged that approximately 5% of passersby stopped to engage them, that they were not restricted from standing in other areas on the public sidewalk which left them visible to the clinic patients and workers, and that they were both seen and heard from the clinic while outside the buffer zone.[132] There was no claim that they need to enter the buffer zone in order to be adequately heard, but rather that their rights were violated despite their visibility.

C. Understanding Buffer Zones as a Restriction on Free Speech and McCullen as Inconsistent with Buffer Zone and Free Speech Precedent

To understand why *McCullen* should have conformed to pre-existing precedent, it is important to understand free speech and analyze the case against free speech precedent while comparing it to other buffer zone cases.

The First Amendment provides that the government shall make no law "abridging the freedom of speech,"[133] meaning that people in the United States have wide latitude to express their opinions without fear of governmental reprisal. It has been extended over time to include not just speech, but expression generally.[134]

129 *See generally id.*

130 *McCullen*, 134 S. Ct. at 2521.

131 *Id.* at 2524.

132 *McCullen*, 844 F. Supp. 2d at 223.

133 U.S. CONST. AMEND. I.

134 This means essays, dance, silence, music, protest signs, and other forms of expression are as protected as traditional speech is. *Rock Against Racism*, 491 U.S. at 790 (holding that music, although speech, was subject to restriction); *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984) (holding that protests were subject to restriction even though they were a protected form of speech).

Freedom of speech is one of the most important rights granted to United States citizens, as evidenced by its inclusion in the very First Amendment in the Bill of Rights.[135]

Contrary to what many laypeople believe, freedom of speech is not an unrestricted right in the United States. Although perhaps one of our most lauded and protected fundamental rights, there is a history almost as old as the country itself of restricting speech that is violent or which in some ways runs afoul of public policy considerations. Perhaps the oldest case to recognize that the Bill of Rights is not without restrictions is *Robertson v. Baldwin*.[136] The 1897 case involved a man arrested for refusing to complete a seaman's contract.[137] Although the Court held that the Thirteenth Amendment, which abolished slavery and servitude, was not meant to invalidate laws against desertion, it provided that the Bill of Rights, generally, was simply meant to embody certain guarantees and immunities "which had, from time immemorial, been subject to certain well-recognized exceptions[.]"[138] The Court simply found that anti-desertion laws were not such an exception. Later, two 1919 cases relied on that language when looking specifically at restrictions on free speech, citing the case when discussing exceptions to First Amendment freedoms. *Frohwerk v. United States*[139] ruled that the First Amendment as written "cannot have been, and obviously was not, intended to give immunity for every possible use of language."[140] Seven days previously, *Schenck v. United States*[141] had stated that when

135 U.S. CONST. AMEND. I.

136 165 U.S. 275 (1897).

137 *Id.* Robertson contracted to be a seaman aboard a ship bound for Valparaiso, Chile. He became dissatisfied with his employment and disembarked while the ship was in Astoria, Oregon, and refused to continue the voyage. He was then arrested and held before being returned to the ship against his will. When he continued to refuse to complete his work, he was charged. The man argued that the statute allowing him to be charged with desertion constituted a violation of his Thirteenth Amendment rights. The Thirteenth Amendment abolished slavery and involuntary servitude.

138 *Id.* at 281.

139 249 U.S. 204, 206 (1919). In this case, Jason Frohwerk was charged with conspiracy to violate the Espionage Act. He was charged with preparing to circulate a paper encouraging people to disloyalty and mutiny among military and naval forces. Frohwerk contended that the law prohibiting such circulation was a violation of his right to free speech.

140 *Id.*

141 Schenck v. United States, 249 U.S. 47, 48–49, 52 (1919). This case is also one where the defendants were originally charged with violations of the Espionage Act. They were also

determining when states could restrict a person's free speech, the Court considers "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[142] This was the first articulation of a rule that the Supreme Court would refine over the course of the 20th century to determine if a restriction on free speech was constitutional.

This rule for free speech restrictions is best summarized in *Ward v. Rock Against Racism*, which reasoned that,

> even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[143]

In 1989, *Ward v. Rock Against Racism* evaluated a noise buffer, which required a concert to keep its volume within certain limits so that the general community would not hear it.[144] In the decision, the Court held that when free speech was being regulated according to time, place, or manner, the restriction "need not be the least restrictive or least intrusive means" of regulating that speech, although it could not be substantially burdensome.[145] This important decision ruled that if a law is content neutral and based on a compelling state interest, and the restriction is not "substantially broader than necessary to achieve the government's interest,"[146] it cannot be defeated simply because a less restrictive option is available.

said to have circulated printed material, which caused and intended to cause mutiny in military and naval forces.

142 *Id*.

143 *Ward v. Rock Against Racism*, 491 U.S.,781, 791 (quoting Clark v. Comm. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). For other cases with regulation test language, *see* Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); U.S. v. Grace, 461 U.S. 171, 177 (1983).

144 *Rock Against Racism*, 491 U.S. at 781.

145 *Id*. at 798.

146 *Id*. at 799.

The Court agreed that the law being contested in *McCullen* was content neutral, as it does not "draw content-based distinctions on its face."[147] The Court ruled that "a facially neutral law does not become content based simply because it may disproportionately effect speech on certain topics,"[148] and that incidental effect is not enough if the regulation serves a purpose unrelated to the content of the expression involved.[149] Though the law is concededly content neutral, the Court holds that the law is not narrowly tailored enough.[150] However, this runs contrary to the Court's previous precedent on what narrow tailoring means. An examination of the meaning of narrow tailoring and a comparison to other buffer zone cases highlights the inconsistency of this decision to other Supreme Court precedent.

In order for a speech restriction to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests."[151] Although it need not be the least restrictive of all possible options, the regulation must not "regulate speech in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[152]

The regulation in *McCullen* seems to have been developed with *Madsen*[153] in mind, using similar distances to measure the buffer zone and measuring the zones specifically around the entrances and driveways. It also avoided the problematic aspects of the regulation in *Madsen*, such as sign restrictions and buffer zones for surrounding property. The choice of a 35-foot buffer zone around driveways and entrances was not very likely an accident, and was probably the result of an effort to conform to the Supreme Court precedent in *Madsen* and other cases. The District Court in *McCullen* found that the 35-foot buffer zone was adequate to ensure the patients and prospective patients had access to the

147 *McCullen* 134 S. Ct., at 2531.

148 *Id.*

149 *Ward*, 491 U.S. at 791.

150 *McCullen*, 134 S. Ct at 2523.

151 *Ward*, 491 U.S. at 799.

152 *Id.* at 798-99 ("Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" (quoting United States v. Albertini, 472 U.S. 675, 689 (1985))).

153 512 U.S. 753 (1994). *Madsen* ruled that a similarly sized fixed buffer zone (of 36-feet) was constitutional.

clinic, while leaving open "adequate alternative means of communication" for the protestors.[154] Although the first iteration of the Massachusetts Reproductive Healthcare Facilities Act may have been constitutional under *Hill*, floating buffer zones are a delicate and more controversial subject. Their replacement in 2007 with the 35-foot fixed buffer zone should have made the MRHFA less controversial as fixed buffer zones are more often upheld. It also allows protestors greater freedom of expression than the original Act. For many years, courts have determined that buffer zones similar to the one in the MRHFA are narrowly tailored to achieve a long-conceded governmental interest in protecting patient privacy and clinic safety,[155] and the decision in *McCullen* flies in the face of years of precedent about what narrow tailoring of abortion specific speech should look like. It also disregards a precedent of deference to the Legislature and to the District Courts when deciding what is an appropriate amount of space to balance the interests of the protestors, patients, and government.

In addition to narrow tailoring, another important consideration of free speech restriction is whether the restriction "leave[s] open ample alternative channels of communication."[156] If speech is restricted but a person has other channels and means to disseminate expression, the restriction is considered more narrowly tailored and less burdensome.[157] The restriction challenged in *McCullen* leaves more than ample channels for the protestors to communicate their feelings about abortion. From 35-feet away, signs would be clearly visible. Any patients[158] walking to the clinic could be approached from more than 35-feet away, and any patients driving by would see signs clearly. There were no noise restrictions in the statute, and handing out leaflets outside the buffer zone perimeter was permitted. As the District Court noted in its opinion, "it is apparent that Plaintiffs are able to

154 *McCullen*, 844 F. Supp. 2d 206, 224 (2012).

155 As evidenced by *Madsen*, *Schenck*, and *Hill*. The rulings in these cases all discussed this important interest and found buffer zones to be narrowly tailored, even ones larger than the one challenged in *McCullen*. *Madsen*, 512 U.S. at 753; Schenck v. Pro Choice Network of W. N.Y., 519 U.S. 357, 357 (1997); Hill v. Colorado, 530 U.S. 703, 703 (2000).

156 *Perry Educ. Ass'n*, 460 U.S. at 45; *see Clark*, 468 U.S. at 293.

157 *Ward*, 491 U.S. 802; *Clark*, 468 U.S. 293.

158 Or any passerby at all, in fact.

convey their pro-life message to people entering the clinic and people passing by."[159] The court further noted that any patients interested in the message being broadcast by the plaintiffs were free and able to approach them, and that at one location approximately 5% of the patients and passersby did engage with the plaintiff.[160] Being restricted from standing directly next to the clinic's two driveways "does not mean that adequate alternative means of communication do not exist," and as the District Court noted, "Plaintiffs may engage in any form of communicative activity they desire anywhere else on the public sidewalk."[161] The narrow tailoring of the MRHFA is even more clearly demonstrated by the ease with which the plaintiffs were able to continue spreading their message, being visible and audible at all times.

D. McCullen as an Endorsement of Harassment as a Valid Exercise of Speech

The Supreme Court is not balancing the interests of the government and protestors; it is sacrificing the safety, health, and privacy of people seeking abortions to an overextension of freedom of speech. One of the most important elements of a free and democratic government is that it protects the fundamental rights of its people from those who wish to infringe upon them. Though the protestors and "sidewalk counselors" at abortion clinics claim to only want to provide information to the willing listener, evidence (anecdotes[162] as well as statistics on violence and

159 *McCullen*, 844 F. Supp. 2d at 224.

160 *Id*. at 223.

161 *Id*. at 224.

162 For such anecdotes, *see* REDDEN, *supra* note 76, (this article was written in response to McCullen v. Coakley, to highlight violence clinics often face). *See also* Aaron Gouveia, *My Wife's Abortion v. Your Free Speech*, TIME MAGAZINE (Jun. 26, 2014), *available at* http://time.com/2928275/supreme-court-abortion-free-speech/ (a piece written in response to *McCullen*, by a man whose YouTube video of himself confronting protestors harassing his wife went viral.); *Abortion Doctor: AL Protestors "More Harassing"*, WSFA12 NEWS (May 22, 2014), *available at* http://www.wsfa.com/story/25590440/abortion-doctor-al-protesters-more-harassing (a news piece profiling a doctor's perspective on clinic harassment); Samantha Lachman, *Undercover Audio Reveals How Anti-Abortion Activists Pursue Patients, Providers*, HUFFINGTON POST (Aug. 12, 2014), *available at* http://www.huffingtonpost.com/2014/08/12/abortion-protesters-_n_5672077.html (an article about an anti-abortion protest "training video" in which protestors were encouraged to track patient license plates, "line" sidewalks to maximize intimidation, and look up district records to follow abortion providers throughout the state).

harassment)[163] proves otherwise. To quote an article on the *McCullen* decision: "if there's only one participant, is it even a conversation?"[164] The goal of these sidewalk counselors is not to merely converse, not to merely express themselves. It is to shame and harass women who have made a choice the protestors disagree with. If the goal were open-ended, civil conversation with consenting individuals, the protestors would have no need to avail themselves of the limited buffer zone area, since from 35-feet away they can still be seen and heard. If consensual conversation were their goal, willing participants would come to them, as one plaintiff in *McCullen* admitted happened about 5% of the time.[165] The protestors were free to make themselves known and available to patients,[166] though without the ability to approach them. Protestors also had to remain a respectful distance if the patients were not interested in their dialogue.[167]

The Supreme Court has sanctioned harassment in free speech clothing, and by all accounts the state of Massachusetts introduced evidence enough to make the Court aware of this. The opinion failed to acknowledge that opposition to abortion has led to 8 murders, 17 attempted murders, 550 incidents of stalking, plus harassment and other violations of individual privacy of pro-choice doctors, patients, staff, and advocates.[168] Indeed, the Court makes

163 *See generally*: *Violence Statistics supra* note 77; GILLIAN, *supra* note 121.

164 Emily Jane Goodman, *Supreme Court Decision on Abortion Clinic Buffer Zones Opens the Door to Further Challenges*, THE NATION (Jul. 1, 2014), *available at* http://www.thenation.com/article/180474/supreme-court-decision-abortion-clinic-buffer-zones-opens-door-further-challenges.

165 *McCullen*, 844 F.2d at 223.

166 At no time in *McCullen* did any of the plaintiffs contest the fact that they could be easily seen, heard, and noticed from outside the buffer zone at any of the clinics they frequented.

167 Indeed, for a group styling themselves as counselors, they certainly are not following traditional counseling methods. It is a rare occasion indeed that a psychologist takes to the streets, demanding to diagnose passersby. If they truly were interested in counseling women who wanted more information about abortion alternatives, they should be more content to make themselves known and allow such women to come speak to them.

168 The Court failed to acknowledge this even though it was the focus of the respondent's argument in favor of the law. *See generally* Brief for the U.S. as Amicus Curiae Supporting Respondents at 12, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168), 2013 WL 6157111, *12; Brief of Amici Curiae, Am. Coll. of Obstetrics and Gynecology, Am. Med. Ass'n, and Mass. Med. Soc'y for Respondents at 11-2, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168), 2013 WL 6213247, *12-13; Brief of Amici Curiae, Civil Rights Orgs. For Respondents at *26, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 11-1268), 2013 WL 6228466, *1; Brief of Amici Curiae, Law Professors in Support of Respondent at 1, *McCullen v. Coakley*, 134 U.S. 2518 (2014)(No. 11-1268), 2013 WL 6235567, *1; Brief of

only two mentions of the violence faced by abortion clinics,[169] despite its paramount importance to the case. The Court also made little to no mention of the evidence that buffer zones do decrease violence in, and increase access to, reproductive healthcare clinics, keeping protestors at a safe distance to stop the escalation of already tense interactions.[170]

Clinics in Massachusetts fear the decision has already pressured people to stay home. In the week following the decision, a Planned Parenthood in the state reported more no-shows than usual.[171] Protestors were observed following patients down the street and to the doors of the clinic, even as most patients showed a desire to be left alone by ignoring them. One young woman entering the clinic said she "felt uncomfortable," and described the protestors' behavior as making her "feel harassed[.]"[172] Coakley, the Massachusetts Attorney General who unsuccessfully defended the buffer zone regulation, stated that since the buffer zone was struck down, many women "have had their access denied as a practical matter"[173] because they have been afraid to access the clinic.

Given the rise of anti-abortion violence that occurred during the 1990's, a law like the MRHFA provided vital protection to individuals who wished to avail themselves of abortion services.[174]

Amici Curiae, Nat'l Abortion Fed'n & 31 Other Orgs. at 5-21, *McCullen v. Coakley*, 134 U.S. 2518 (11-1268), 2013 WL 6504289, *1; *see also Violence Statistics supra* note 78.

169 *McCullen v. Coakley*, 134 U.S. 2518, 2523, 2532 (2014).

170 Most acts of violence against clinics happen within feet of clinic doors, and many are the result of the escalation of protestors. Many protestors were known for protesting and harassing clinics in their area well before they committed acts of violence. *See generally* Brief of Nat'l Abortion Fed'n & 31 Other Orgs. as Amici Curiae Supporting Respondents, McCullen v. Coakley, 134 S.Ct. 2518 (2014) (No. 12-1168), 2013 WL 6504289, *18.

171 Laura Bassett, *Abortion Clinic Buffer Zones Crumble Around the Country*, HUFFINGTON POST (Jul. 9, 2014), *available at* http://www.huffingtonpost.com/2014/07/09/abortion-clinic-buffer-zo_n_5571516.html; Alana Semuels, *Abortion Buffer Zone Laws Begin Falling Apart After Supreme Court Ruling*, L.A. TIMES (Jul. 7, 2014), *available at* http://www.latimes.com/nation/nationnow/la-na-nn-buffer-zone-laws-struck-down-20140707-story.html.

172 Alana Semuels, *Abortion Buffer Zone Laws Begin Falling Apart After Supreme Court Ruling*, L.A. TIMES (Jul. 7, 2014), *available at* http://www.latimes.com/nation/nationnow/la-na-nn-buffer-zone-laws-struck-down-20140707-story.html.

173 *Id.*

174 It also protects those who provide abortion services and the countless other individuals of varying genders and ages who rely on clinics like Planned Parenthood for

Not only did abortion clinic violence decrease in the years when buffer zones began to be introduced, but buffer zones help to establish who has legitimate business inside clinics, and helps to separate those individuals from ones who may wish to harass or possibly harm them. The consequences of not protecting these people from threats of violence are clear: protestors are emboldened to harass and in extreme cases attack; patients become uncomfortable and frightened; and for many, access to abortion becomes difficult or unthinkable as a practical matter.

In the larger context of abortion hostility, this ruling can only make things worse and continue to embolden protestors to use extreme methods and harassment. It continues to signal the Court's reluctance to properly and vigorously defend the fundamental right to abortion, which emboldens legislators to infringe further on the already weakening right. Not only does this strip women in Massachusetts (and possibly other states with similar laws) of protections against intimidation, harassment, and violence, but it adds to Supreme Court cases that chip away at the foundations protecting abortion rights. This case throws other similar buffer zones in other states into question, and allows legislators to more easily reject or remove buffer zone protections on the federal and state level. This changing attitude toward buffer zones, previously so solidly protected by the Court, may also contribute to increased harassment and violence against protestors, as was seen in the 1990's before such buffer zones began to pass.

IV. Conclusion

Every day, people from all backgrounds and lifestyles find out that they or a loved one are pregnant. For many this is a time of celebration and joy, but for many others it is terrifying. Whether they are in situations of abuse, or in poverty, or have a mental health condition making it impossible to care for a child, or were raped, or simply never want to be parents, the idea of birthing and raising a child is personal, and some circumstances make it the wrong choice for many Americans. In a post-*Roe* world, most

other services, such as STD testing, cancer screenings and mammography, birth control, family and interpersonal violence resources, and prenatal care.

Americans rest easy with the thought that abortion is a legal and protected right. Many do not see the regulations and attitudes that creep slowly toward criminalizing abortion once more.[175]

These changes to the abortion jurisprudence are allowed under many guises. From freedom of speech, to the "right to life" of the fetus, to the many unnecessary regulations passed and allowed because they are said to serve the state interest in protecting the health of the mother,[176] there is no shortage of interests states have come up with to oppose and restrict abortion. But the one interest that seems to be consistently forgotten is the interests of the pregnant person. The fundamental right of a person to seek an abortion is rarely discussed anymore, and though it seems to be taken for granted, a close look at the state of abortion regulation in America shows it is anything but secure.

[175] Although abortion is still legal, women across the country have found themselves jailed for abortions or even miscarriages based on draconian abortion regulation laws. *See* Emily Bazelon, *A Mother In Jail for Helping Her Daughter Have an Abortion*, N.Y. TIMES (Sept. 22, 2014), *available at* http://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-her-daughter-have-an-abortion.html (a woman secured abortion pills for her daughter without realizing it was against Pennsylvania state law, and is now in jail); Kate Sheppard, *Mississippi Could Soon Jail Women for Stillbirths, Miscarriages*, MOTHERJONES (May 23, 2013), *available at* http://www.motherjones.com/politics/2013/05/buckhalter-mississippi-stillbirth-manslaughter (a woman jailed under suspicion that she ingested methamphetamines, killing her unborn fetus); Lynn M. Paltrow & Jeanne Flavin, *Pregnant, and No Civil Rights*, N.Y. TIMES OP-ED (Nov. 7, 2014), *available at* http://www.nytimes.com/2014/11/08/opinion/pregnant-and-no-civil-rights.html (various instances of women jailed for abortions and miscarriages); Jason Foster, *Woman Faces Charges of Killing Unborn Child During August Suicide Attempt*, THE HERALD (Feb. 21, 2009), *available at* http://www.heraldonline.com/2009/02/21/1152282/woman-faces-charge-of-killing.html (a South Carolina woman jailed after a suicide attempt caused the death of her unborn fetus); JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA, NYU PRESS 84 (2009), *available at* http://www.jstor.org/stable/j.ctt9qffnc.7 (referring to a Louisiana woman who went to jail on second degree murder charges for over a year before an autopsy proved she had had a miscarriage).

[176] Ultrasounds are an excellent example of this, as are requirements that abortion providers have admitting privileges at local hospitals. Even though abortion is a thoroughly safe procedure with a low risk of complications and both restrictions are considered unnecessary by the American College of Obstetricians and Gynecologists, many states have passed or considered such restrictions. Some states even regulate things like corridor width in an attempt to covertly shut down clinics. *See generally State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Mar. 1, 2015), *available at* http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf; Jim Forsyth, *Anti-Abortion Group to Move into Shuttered Texas Clinic*, REUTERS (Nov. 10, 2014), *available at* http://www.reuters.com/article/2014/11/10/us-usa-texas-abortion-idUSKCN0IU2C920141110.

The Supreme Court will have to revisit its decision in *McCullen v. Coakley*, and unless it wishes to take this country in a new and unprecedented direction,[177] it will have to overturn the decision. Free speech does not trounce other personal and fundamental rights, and *McCullen* has continued a dangerous trend that has put one such fundamental right gravely at risk.

177 Or rather, unless they want to drag us kicking and screaming back in the direction we came from.