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Sidewalk Counseling: A First Amendment Right

Thomas Patrick Monaghan

SIDEWALK COUNSELING: A FIRST AMENDMENT RIGHT

THOMAS PATRICK MONAGHAN*

If all mankind minus one, were of one opinion, and only one person were of a contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

—John Stuart Mill[1]

In 1974, a group of Third Order Dominicans began praying the rosary in front of an abortion facility in Santa Rosa, California. While bearing this witness, they discovered that they were very often able to support women who actually did not want abortions and to persuade others not to have abortions. From this experience, they formed Catholics United For Life and developed the concept and term "sidewalk counseling," to describe this special type of communication designed to dissuade particular mothers from killing their unborn children. "Sidewalk counseling" is a more non-confrontational pro-life witness than some picketing or non-violent direct action sit-ins. The effectiveness of "sidewalk counseling" in saving lives, in the words of Catholics United for Life representative, Theo Stearns, a Dominican Third Order Prioress, is dependent upon speech and action with "charity, love, persistence and prayer." Catholics United for Life popularized "sidewalk counseling" through publications, workshops, and such vehicles as a presentation at the National Right to Life Conventions. As a result, "sidewalk counseling" is practiced by many groups who witness their faith and life at abortion centers across the country.

The First Amendment of the Constitution guarantees the right to freedom of speech. This guarantee would be of limited importance if it

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* Director of Legal Services, American Life League; Co-Chairman, Free Speech Advocates. Sarah Anne Biety, J.D., Creighton Law School, 1985, aided in the research and preparation of this Article.

[1] J.S. MILL, ON LIBERTY AND OTHER ESSAYS 20 (1926).

did not carry with it some assurance of the availability of means to reach a suitable audience. "Sidewalk counseling" is this kind of speech. The Supreme Court has sought to define what activities are protected under the First Amendment. This article will establish a framework, based on judicial determinations involving the freedom of speech, within which one may exercise this fundamental right in "sidewalk counseling."

THE POLITICAL DOCTRINE OF FREEDOM OF EXPRESSION

The First Amendment of the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2]

Justice Douglas, an absolutist in his interpretation of the First Amendment, continually emphasized the pivotal role freedom of speech has played in the development of American democracy. In *Dennis v. United States*,[3] Justice Douglas stated in dissent:

> Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions . . . . This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality . . . .[4]

A year later he wrote:

> The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights . . . . The Framers of the Constitution knew human nature as well as we do. They too . . . knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us . . . .[5]

Freedom of speech clearly includes the freedom to discuss all issues regardless of their popularity or support. "Freedom of discussion, if it would fulfill its historic function . . must embrace *all* issues about which

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[2] U.S. CONST. amend. I.

[3] 341 U.S. 494 (1951).

[4] *Id.* at 584-85 (Douglas, J., dissenting).

[5] Beauharnais v. Illinois, 343 U.S. 250, 285, 287 (1952) (Douglas, J., dissenting) (footnote omitted).

information is needed . . . to enable the members of society to cope with the exigencies of their period."[6] The constitutional safeguard of the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[7]

The Court has encouraged us to speak out about the wrong we see in our society so that it may be corrected. As the Court stated in *Thornhill v. Alabama*,[8] "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. *Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.*"[9]

ACTIVITIES ENCOMPASSED UNDER THE FIRST AMENDMENT

Freedom of speech includes not only the right to orally express views regarding an issue, it also includes the right to persuade,[10] picket,[11] publish and distribute literature,[12] and exhibit visual representations.[13] In

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[6] Rosenblatt v. Baer, 383 U.S. 75, 89-90 (1966) (Douglas, J., concurring) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)) (emphasis added).

[7] Roth v. United States, 354 U.S. 476, 484 (1957).

[8] 310 U.S. 88 (1940).

[9] *Id.* at 95 (emphasis added).

[10] Thomas v. Collins, 323 U.S. 516 (1945). In *Thomas*, a Texas statute required labor organizers to register with state officials before soliciting union membership. *Id.* at 519. Thomas, at the end of a speech, urged his listeners to join the union, and as a result he was sentenced to a fine and imprisonment. *Id.* at 522-23. The Supreme Court reversed the Texas court and found the registration requirement incompatible with the First Amendment. *Id.* at 536. The Court stated,

> "Free trade in ideas" means free trade in the opportunity to *persuade* to action, not merely to describe facts . . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

Id. at 537 (emphasis added).

[11] Thornhill v. Alabama, 310 U.S. 88 (1940). In *Thornhill*, the Court held that an Alabama statute which prohibited picketing intended to publicize facts concerning a labor dispute was invalid on its face because the prohibition was without regard to the number of persons involved, the peaceful character of their conduct, the nature of the dispute, or the accuracy of the language used. *Id.* at 99. A state, however, is not required to permit picketing at all times and in all places. Picketing is subject to reasonable time and place regulations in order to protect the public from violence, force, or coercion. *See* Bakery Drivers Local v. Wohl, 315 U.S. 769, 775 (1942).

[12] Jamison v. Texas, 318 U.S. 413 (1943). The Court in *Jamison* stated clearly that "one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communications of ideas by handbills and literature as well as by spoken word." *Id.* at 416 (citing Hague v. C.I.O., 307 U.S. 496 (1939)).

[13] Eisenstadt v. Baird, 405 U.S. 438, 460 (1972) (Douglas, J., concurring).

fact, the Court has recognized almost total discretion in deciding the form and content that a message may take. In *Erznoznik v. City of Jacksonville,*[14] the Court stated that:

> [T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances [where exposure is impossible to avoid], the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes" . . . . [T]he limited privacy interest of persons on the public streets cannot justify . . . censorship of otherwise protected speech on the basis of content.[15]

In a New York case[16] involving anti-abortion activists picketing an abortion clinic, the Appellate Division of the New York Supreme Court stated:

> The message that [the anti-abortionists] sought to communicate was an expression of their views about important public questions and policies, entitled to the greatest constitutional protection. Inherent in suppressing the use of particular words—even if provocative and controversial—is the grave risk of inhibiting the expression of ideas. Our proscription from inciting to riot is the constitutional limit of our control over the content of [the anti-abortion activist's] speech and will adequately protect the governmental interests therein.[17]

In its decision, the court granted an injunction which banned only that type of picketing which would incite rioting and disturb the needed quiet for the operation of a medical facility. It specifically allowed the anti-abortion activists to use the words "murder" and "kill" and similar words on placards. "[A]bove 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."[18]

It is well settled that the Court not only recognizes oral expression, but symbolic conduct as a permissible activity under the guarantee of the First Amendment.

> First Amendment rights are not limited to verbal expression. The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing involves physical activity as well as a display of a sign. A sit-in can be a quiet, dignified protest that has First Amend-

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[14] 422 U.S. 205 (1975).

[15] *Id.* at 210-12 (1975) (quoting in part Cohen v. California, 403 U.S. 15, 21 (1971)).

[16] O.B.G.Y.N. Ass'n v. Birthright of Brooklyn & Queens, Inc., 64 App. Div. 2d 894, 407 N.Y.S.2d 903 (2d Dep't 1978).

[17] *Id.* at 895-96, 407 N.Y.S.2d at 906.

[18] *Id.* at 895, 407 N.Y.S.2d at 906 (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

ment protection even though no speech is involved. . . . [19]

In his book, *Freedom of Expression*, Archibald Cox promotes the use of picketing and other forms of symbolic conduct as inexpensive, effective means of communication:

> Social, political, or religious activists seeking changes that frighten or annoy all "right-minded" people have little access to conventional channels of effective expression. For them the best vehicles of expression are sit-ins, picketing, marches and mass demonstrations. The [Supreme Court] decisions of the 1960s and 1970s take pains to protect such use of the streets, coarse expletives, affronts to personal and public sensibilities and other unorthodox methods of expression.[20]

PICKETING IN A PUBLIC FORUM AS AN EFFECTIVE MEANS TO REACH A LARGE AUDIENCE

Justice Marshall, in his dissenting opinion in *Hudgens v. NLRB*,[21] stressed the forceful impact picketing has on its viewers compared to that of radio, television, billboards, and direct mail campaigns. The Justice stated:

> But none of those means is likely to be as effective as *on-location picketing*: the initial impact of communication by those means would likely be less dramatic, and the potential for dilution of impact significantly greater. As this court has observed: . . . "[T]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."[22]

The majority opinion in *Hudgens* cited several earlier opinions in which it was clearly established that picketing on public streets is subject to the protections of the First and Fourteenth Amendments.

THE RIGHT TO DISTRIBUTE LITERATURE AND OTHER VISUAL AIDS

The First Amendment not only guarantees verbal expression, it also guarantees the freedom of the press. Freedom of the press includes the right to publish and distribute literature with pictures, photographs, and facts about an issue. The Court, in an early decision, clarified the meaning of freedom of the press. "[L]iberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaf-

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[19] Eisenstadt v. Baird, 405 U.S. 438, 460 (1972) (Douglas, J., concurring).
[20] A. COX, FREEDOM OF EXPRESSION 49 (1980).
[21] 424 U.S. 507 (1976).
[22] *Id.* at 533 (Marshall, J., dissenting) (quoting Hughes v. Superior Court, 339 U.S. 460, 465 (1950)) (emphasis added).

lets . . . . 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' "[23]

The Court has also made reference to other forms of visual aid. "Handing an article under discussion to a member of the audience is a technique known to all . . . and is commonly used . . . . But passing one article to an audience is merely a projection of the visual aid and should be a permissible adjunct of free speech."[24]

APPROPRIATE FORUM FOR EXPRESSIONAL ACTIVITIES

The Court has ruled on the use of different public forums as suitable locations for expressional activities on numerous occasions. It is well settled that streets, parks, and sidewalks are appropriate places for carrying out speech activities. In *Hague v. C.I.O.*,[25] the Court established:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated for the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.[26]

In more recent decisions, the Supreme Court has extended the opportunity for speech activities to other places traditionally not designated as forums for public discussion. In *United States v. Grace*,[27] the Court summarized what recent court decisions have held, and articulated the test used to determine if a forum is an appropriate place for speech activities:

> Every citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place in question, whether that place is a school, a library, a private lunch counter, the grounds of a statehouse, the grounds of the United States Capitol, a bus terminal, an airport, or a welfare center. As we stated in *Grayned v. City of Rockford*, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity

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[23] Lovell v. Griffin, 303 U.S. 444, 452 (1938) (quoting in part *Ex parte* Jackson, 96 U.S. 727, 733 (1877)).

[24] Eisenstadt v. Baird, 405 U.S. 438, 460 (1972) (Douglas, J., concurring).

[25] 307 U.S. 496 (1939).

[26] *Id.* at 515-16.

[27] 461 U.S. 171 (1983).

> of a particular place at a particular time."[28] "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[29]

In *Wolin v. Port of New York Authority*,[30] the Court of Appeals for the Second Circuit held a bus terminal was an appropriate place for exercise of first amendment rights to communicate to the general public. The court held that the propriety of a place for use as a public forum turns on the relevance of the premises to the protest and the relevance of the audience found in the forum.[31]

When dealing with an indoor public forum the Supreme Court has identified a number of factors:

1. Whether the building is open to the public?
2. Whether the message is relevant to the selected building or audience inside?
3. Whether the method of communication interferes with the normal business routinely conducted upon the premises?
4. Whether there is an alternate forum which would be equally effective for conveying the message?[32]

In 1968, in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*,[33] the Court upheld the rights of picketers in a privately owned shopping center, based on the relevance of their message to the forum and the absence of another available, effective forum.[34] In 1976, in *Hudgens*,[35] the Court held that its decision in *Lloyd Corp. v. Tanner*[36] had, in effect, overruled the *Logan* decision.[37] Although in a dissenting opinion in *Hudgens*, Justice Marshall sought to preserve the distinction between *Logan* and *Lloyd*,[38] it is now apparent that the rights of parties to picket in private shopping centers will be determined by the National Labor Relations Board and is not protected by the First Amendment.[39]

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[28] 408 U.S. 104, 116 (1972).

[29] United States v. Grace, 461 U.S. 171, 184-85 (1983) (Marshall, J., concurring in part and dissenting in part) (footnotes omitted) (quoting in part Schneider v. State, 308 U.S. 147, 163 (1939)).

[30] 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

[31] *Id.* at 90.

[32] *See* Hudgens v. NLRB, 424 U.S. 507, 536 (1976) (Marshall, J., dissenting); Lloyd Corp. v. Tanner, 407 U.S. 551, 563 (1972); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308, 320-21 (1968).

[33] 391 U.S. 308 (1968).

[34] *Id.* at 319-20.

[35] *Hudgens*, 424 U.S. at 518.

[36] 407 U.S. 551 (1972).

[37] *See Hudgens*, 424 U.S. at 518.

[38] *See id.* at 534-35 (Marshall, J., dissenting).

[39] *See id.* at 523.

ACTIVITIES SUBJECT TO REGULATION

The time, place, and manner of expression of abortion views are subject to restrictions designed to insure the safety and convenience of all. In those places designated as public forums, the government's ability to restrict expressive conduct is extremely limited. "[T]he government may enforce reasonable time, place, and manner regulations as long as the restrictions are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[40]

In *Logan*, the Court stated: "That the manner in which handbilling, or picketing, is carried out may be regulated does *not* mean that either can be barred under all circumstances on publicly owned property simply by recourse to traditional concepts of property law concerning the incidents of ownership of real property."[41]

In a New York decision, *O.B.G.Y.N. Associations v. Birthright of Brooklyn & Queens, Inc.*,[42] the Appellate Division of the New York Supreme Court granted injunctive relief to an abortion clinic which would only *minimally* impinge on the picketer's right of freedom of expression.

The Court has continually recognized that freedom of expression cannot be denied merely because it offends the listener's sensibilities or invades one's privacy. It is well settled that when a person leaves the privacy of his home, he gives up his absolute right to privacy. Citizens cannot expect the same amount of legal protection for their mental tranquility when they venture on open streets and into public places. In *Erznoznik v. City of Jacksonville*,[43] the Court stated, "the limited privacy interest of persons on the public streets cannot justify . . . censorship of otherwise protected speech on the basis of its content."[44] In *Saia v. New York*,[45] the Court recognized that "[t]he native power of human speech can interfere little with the self-protection of those who do not wish to listen."[46]

Therefore, when a person leaves the privacy of his own home, he loses his right to be totally immune from the ideas and activities of others. This loss includes the loss of immunity from the ideas anti-abortionists seek to convey outside abortion clinics. The Court clarified its

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[40] United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[41] Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308, 316 (1968) (emphasis added).

[42] 64 App. Div. 2d 895, 407 N.Y.S.2d 903 (2d Dep't 1978).

[43] 422 U.S. 205 (1975).

[44] *Id.* at 212.

[45] 334 U.S. 558 (1948).

[46] *Id.* at 563.

sentiments in *Tinker v. Des Moines Independent Community School District*,[47] when it stated, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[48] and that particular activity should not be prohibited because of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[49]

FREEDOM OF EXPRESSION ON PRIVATE PROPERTY

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position.[50]

First Amendment principles as applied to private property are still evolving. However, early in its decisions, the Court established a foundation for the expansion of First Amendment rights to include activity on private property.

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.[51]

In *Marsh v. Alabama*,[52] the Court stated, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[53]

The Supreme Court has held in definite terms that the states have the power to surpass the protection of the federal Constitution in guaranteeing the freedom of expression on private property. In *Pruneyard Shopping Center v. Robins*,[54] the Supreme Court held that California's constitutional provisions, as construed to permit individuals to reasonably exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, did not violate the shopping center owner's property rights under the Fifth and Fourteenth

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[47] 393 U.S. 503 (1969).
[48] *Id.* at 508.
[49] *Id.* at 509.
[50] Marsh v. Alabama, 326 U.S. 501, 509 (1946) (footnote omitted).
[51] Munn v. Illinois, 94 U.S. 113, 126 (1877).
[52] 326 U.S. 501 (1946).
[53] *Id.* at 506.
[54] 447 U.S. 74 (1980).

Amendments nor his freedom of speech rights under the First and Fourteenth Amendments.[55]

In reaching its decision in *Pruneyard*,[56] the California Supreme Court stated, "To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights."[57] On review, the Supreme Court held that there was nothing to suggest that preventing owners from prohibiting speech activities would impair the value or use of their property if limited to common areas. "[N]either property rights nor contracts rights are absolute . . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . ."[58] The Court's decision in *Pruneyard* opens the way for states to protect expression from interference by owners of private property, interference not reached by the federal Constitution.[59]

The Supreme Court of New Jersey has reached a similar conclusion in *State v. Schmid*.[60] The court held that the New Jersey constitutional guarantees of freedom of speech and assembly apply to the distribution of political material on the campus of a private university. The court concluded that the state constitution furnished to the individual the freedom of speech and assembly and protected the reasonable exercise of these rights. It protected these rights against unreasonably restrictive conduct on the part of private entities that have assumed a constitutional obligation not to bar exercise of such freedoms because of the public use of the property. It was also ruled immaterial that another forum, equally effective, was available to the petitioners.[61]

In a California case, *In re Lane*,[62] the court held that when a business "invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the side-

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[55] *Id.* at 88.

[56] Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

[57] *Id.* at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859. A number of states have reached similar conclusions as to shopping centers. *See* Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963); Moreland Corp. v. Retail Store Employees Union Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962).

[58] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980) (quoting Nebbia v. New York, 291 U.S. 502, 523 (1934)).

[59] *Pruneyard Shopping Center*, 447 U.S. at 85.

[60] 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100 (1982) (per curiam).

[61] *Id.* at 560, 423 A.2d at 628.

[62] 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

walk at or near the place of entry," as long as ingress and egress from the building is not obstructed.[63]

In *In re Hoffman*,[64] it was held that First Amendment activities of handing out leaflets in a privately owned railroad station could not be prohibited solely because it was not maintained as a public building, if the speech activities did not interfere with the conduct of business.[65]

These recent decisions support the rights and activities of anti-abortion activists when they seek to express their views on the sidewalks outside an abortion clinic and even in the common corridors of a building which houses an abortion clinic.

WHAT THE FIRST AMENDMENT MEANS TO ANTI-ABORTION ACTIVISTS

Abortion is a fundamental decision concerning life and death. As Justice O'Connor stated in her dissent in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[66] "[t]he decision also has grave consequences for the fetus, whose life the State has a compelling interest to protect and preserve."[67] Even in *Harris v. McRae*,[68] which utilized the Court's newspeak oxymoron about "potential life," the Court observed, "no other procedure involves the purposeful termination of . . . life."[69]

Picketing, distribution of literature, and the visual demonstration of the development of the unborn are constitutionally permissible means to "open the eyes" of the public. The constitutionally protected right to express facts about abortion includes the right to address others on public streets, sidewalks, parks, and in public buildings. The Supreme Court's recent decision in *Pruneyard* has paved the way for states to expand free speech protection to clearly include those activities which take place on publicly used "private" property.

Based on the analysis established by the Court and Justice Marshall's separate opinion in *Pruneyard*, legitimacy can be given to anti-abortion activities in public areas, including corridors, outside an abortion clinic. Justification can be given for "sidewalk counseling" of prospective clients because the anti-abortion message is specifically addressed to them. Not only does the anti-abortionists' message not interfere with clinic's activities, it promotes the woman's freedom of choice by presenting her with facts and perspectives about abortion enabling her to make

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[63] *Id.* at 878, 457 P.2d at 565, 79 Cal. Rptr. at 733.
[64] 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).
[65] *Id.* at 854, 434 P.2d at 356, 64 Cal. Rptr. at 100.
[66] 462 U.S. 416 (1983).
[67] *Id.* at 474 (O'Connor, J., dissenting).
[68] 448 U.S. 297 (1980).
[69] *Id.* at 325.

an informed decision.[70]

This is a needed corrective to the assembly line mentality of abortion providers. Gitlow's article, *A Methodology for Determining the Optimal Design of a Free Standing Abortion Clinic*, notes ways in which "balkers are weeded out of the daily scheduling rosters," so that profits may be maximized.[71] In *Akron*, Justice O'Connor cited a Sixth Circuit dissenting opinion of Judge Kennedy regarding her observations of the alleged "physician-patient relationship" for abortionists and stated "that the record in this case shows that the relationship is nonexistent."[72] The evidence in that case established that the women did not even know the name of the abortionist. One clinic employee testified: "They know that the physician is a real doctor, because all patients ask if we have *real doctors*, but they don't know the name of the doctor."[73]

Inherent in the anti-abortionists' freedom of expression is their freedom to use particular words to convey their message. The Supreme Court has clearly recognized that the anti-abortionists' message cannot be suppressed because of its provocative content. As Judge Allen Sharp states:

> One of the basic ideas of Western thought has been the sacredness of human life at all stages . . . . The right to life is the most fundamental human right . . . . It is therefore the right and obligation of all members of this constitutional society to concern themselves with the wisdom of decisions affecting the basics of life itself.[74]

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[70] The facts about abortion that anti-abortionists seek to convey to women entering abortion clinics have become even more important to the making of a well-informed decision since the informed consent provision in *Akron* was struck down by the Supreme Court. The Court in *Akron* found that the information which the physician was required to provide was designed to influence the woman's choice. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444-45 (1983). *See also* Collopy, *Informed Consent, Common Sense*, SISTERLIFE 3-4 (Apr. 1983).

[71] Gitlow, *A Methodology for Determining the Optimal Design of a Free Standing Abortion Clinic*, 22 MANAGEMENT SCIENCE No. 12 (Aug. 1976).

[72] *Akron*, 462 U.S. at 473 (O'Connor, J., dissenting). Judge Kennedy's dissenting opinion below stated:

> The evidence presented at trial showed that the decision to terminate a pregnancy was made not by the woman in conjunction with her physician, but by the woman and lay employees of the abortion clinic, the income of which is dependent upon the woman's choosing to have an abortion. The testimony disclosed that the doctors at Akron Center's clinic did little, if any, counseling before seeing the patient in the procedure room. Akron's ordinance simply takes into account these realities of the "physician-patient" relationship at an abortion clinic.

Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1217 (6th Cir. 1981) (Kennedy, J., dissenting).

[73] Trial Transcript VI, at 113, *Akron Center for Reproductive Health, Inc. v. City of Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979) (emphasis added).

[74] Gary-Northwest Indiana Women's Serv., Inc. v. Brown, 421 F. Supp. 734, 737-38 (N.D. Ind. 1976) (Sharp, J., concurring), *aff'd*, 429 U.S. 1067 (1977).