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Prohibiting the Solicitation of Abortion—Viewpoint Discrimination and Other Free Speech Problems: Will Free Speech Guarantees Be a Casualty of the Moral Debate on Abortion?

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PROHIBITING THE SOLICITATION OF ABORTION—VIEWPOINT DISCRIMINATION AND OTHER FREE SPEECH PROBLEMS: WILL FREE SPEECH GUARANTEES BE A CASUALTY OF THE MORAL DEBATE ON ABORTION?

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I. INTRODUCTION

On March 19, 1990, the Governor of Guam signed into law Public Law 20-134.[1] Under threat of criminal sanctions, the statute prohibited abortion in all circumstances except when necessary to save a woman's life or to prevent grave impairment to her health.[2]

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1. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1423-25 (D. Guam 1990) (Guam I).
2. *Id.* at 1424. Public Law 20-134 was presented to the Governor for signature as Bill No. 848. The Bill, in its entirety, provided:

> AN ACT TO REPEAL AND REENACT § 31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§ 31.21 AND 31.22 THEREOF, TO ADD 31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON. BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:
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> *Section 1.* Legislative findings. The Legislature finds that for purposes of this Act life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.
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> *Section 2.* § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:
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> "§ 31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in

In addition to prohibiting elective abortions, the law declared it a

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(i) ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam."

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§ 31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action."

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§ 31.22. Soliciting and taking drug or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

"§ 31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum. (a) There shall be submitted to an island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro: "Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-134), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?"

In the event a majority of those voting vote "Yes", such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to

misdemeanor to solicit any woman to have an abortion. The law pronounced that:

> [e]very person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.[3]

During a 1990 speech before the Guam Press Club, Janet Benshoof, the director of the American Civil Liberties Union's Reproductive Freedom Project, acknowledged that Guam's law prohibited the solicitation of abortions, but she nonetheless apprised the audience that elective abortions remained legal in the State of Hawaii.[4] Also, she provided a telephone number with which to obtain additional information about the availability of abortion in Hawaii.[5] Ms. Benshoof was subsequently charged with violating the law's solicitation provision.[6]

In *Roe v. Wade*,[7] the United States Supreme Court found that the qualified right to obtain an abortion was a fundamental right.[8] Premised upon the right to privacy that is embraced within the Due Process Clause of the Fourteenth Amendment's concept of personal liberty, this fundamental right could be limited only by a compelling state interest.[9]

In the more recent decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[10] and previously in the plurality opinion of *Webster v. Reproductive Health Services*,[11] the Court has disavowed the fundamental right characterization, while describing the right as

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> the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

Id. at 1423-25. The scheduled referendum was not held because of the district court's ruling. *See* Appellant's Brief at 4, Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir.) (Guam II), *cert. denied*, 113 S. Ct. 633 (1992).

3. *See Guam II*, 962 F.2d at 1368 n.1.
4. *Guam I*, 776 F. Supp. at 1426; *see also* Tamar Lewin, *A.C.L.U. Lawyer Runs Afoul Of Guam's New Abortion Act*, N.Y. TIMES, Mar. 21, 1990, at A24.
5. *Id.*
6. *Guam I*, 776 F. Supp. at 1426. The charges were, however, subsequently dismissed without prejudice, apparently in response to the district court issuing a preliminary injunction in *Guam I*. *See* Plaintiffs' Brief at 71 n.73, *Guam I*, 776 F. Supp. 1422 (D. Guam 1990). It was assumed by the plaintiffs that the charges could be reinstated if the district court's injunction was ever lifted. *Id.*
7. 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).
8. *See id.* at 153-55.
9. *Id.*
10. 112 S. Ct. 2791 (1992).
11. 492 U.S. 490 (1989).

merely a liberty interest protected by the Due Process Clause.[12] The plurality opinion in *Webster* was especially significant because it "invited" states to impose more restrictions on the exercise of abortion rights.[13] Cognizant of the shifting composition of the Court and its implications for the future guarding of privacy interests,[14] particularly in the area of abortion rights,[15] the Government of Guam

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12. *Casey*, 112 S. Ct. at 2804-05 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *id.* at 2867 (Rehnquist, C.J., concurring and dissenting); *see Webster*, 492 U.S. at 520 (plurality opinion of Rehnquist, C.J.).
13. *Webster*, 492 U.S. at 556 (Blackmun, J., dissenting). Justice Blackmun's dissent in *Webster* noted:

> It is impossible to read the plurality opinion and especially its final paragraph, without recognizing its implicit invitation to every State to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception. All these laws will satisfy the plurality's nonscrutiny, until sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law.

Id. (footnote omitted).

14. *See, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277-80, 287-89 (1990) (opinions of Rehnquist, C.J., for the Court and O'Connor, J., concurring) (holding that right to withdraw treatment from an incompetent person was a liberty interest protected by the Due Process Clause, requiring a balancing of the liberty interests against relevant state interests); Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986) (holding that there was no fundamental liberty interest under the Due Process Clause to engage in consensual homosexual activity). *But see Cruzan*, 497 U.S. at 304-05, 339-46 (opinions of Brennan and Stevens, JJ., dissenting) (finding right to withdraw treatment of incompetent was a fundamental liberty interest that could be suspended only by a compelling state interest); *Bowers*, 478 U.S. at 202, 206, 208, 216 (opinions of Blackmun and Stevens, JJ., dissenting) (finding right to privacy grounded in the Due Process Clause of the Fourteenth Amendment encompassed an individual's right to control the nature of his intimate associations).
15. In *Casey*, Justices O'Connor, Souter, and Kennedy authored a joint opinion which stated that the Court was adhering to the essential holding of *Roe*. *Casey*, 112 S. Ct. at 2804, 2816-17. While so commenting, the joint opinion indicated that restrictions on abortion were to be evaluated according to an "undue burden" inquiry. *Id.* at 2819-20. An undue burden was defined as one which imposed "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2820. Until *Webster*, abortion restrictions were subject to the more rigorous strict scrutiny review which required the advancement of a compelling state interest. *Id.* at 2844-47 n.1 (Blackmun, J., concurring and dissenting); *id.* at 2855, 2860, 2867 (Rehnquist, C.J., concurring and dissenting).

    Although the joint opinion in *Casey* reaffirmed *Roe's* central holding, *see id.* at 2844 (Blackmun, J., concurring and dissenting), four other members of the Court would have voted to overrule *Roe*. *Id.* at 2855 (Rehnquist, C.J., concurring and dissenting). The willingness of four members of the Court to overturn *Roe* prompted Justice Blackmun to observe: "I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light." *Id.* at 2844 (Blackmun, J., concurring and dissenting). To that obser-

accepted *Webster's* "invitation" by enacting a law intended to provide the Court with the opportunity to explicitly overrule *Roe*.[16]

Guam's entire abortion-prohibition statute was found unconstitutional by the District Court of Guam, which noted in particular that the solicitation provision violated the First Amendment.[17] While the Government of Guam did not appeal the invalidation of the solicitation provision, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision as to those portions of the law that the government of Guam did appeal.[18]

This Article will confine its focus to the First Amendment free speech concerns presented by laws prohibiting the solicitation of abortion.[19] Prohibiting the solicitation of abortion strikes at the core values of the First Amendment because it discriminates on the basis of viewpoint. Such viewpoint-based discrimination prohibits anyone from furnishing women with information that is supportive or favorable to the exercise of the abortion option, but does not prohibit anyone from providing women with information that encourages or promotes carrying their pregnancies to term. The fact that efforts to prohibit the solicitation of abortion have not been confined to Guam evidences a climate in which the free speech guarantees of the First

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vation, Justice Blackmun concluded his opinion by adding:

> In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.
>
> I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Id. at 2854-55.

16. *See* Don J. DeBenedictis, *Two Abortion Laws Struck Down*, 76 A.B.A. J. 20, 20-21 (Nov. 1990).
17. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1428, 1429 n.9 (D. Guam 1990) (Guam I).
18. *See* Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1369 n.2 (9th Cir.) (Guam II), *cert. denied*, 113 S. Ct. 633 (1992).
19. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

    In 1968 Congress amended the Organic Act of Guam, 48 U.S.C. §§ 1421-1428, adding 48 U.S.C. § 1421 b(u), which extended particular provisions and amendments of the United States Constitution, including the First Amendment, to Guam. *Guam I*, 776 F. Supp. at 1426-28. Before invalidating the Guam law, both the district court and the United States Court of Appeals for the Ninth Circuit rejected the argument that Congress did not intend 48 U.S.C. § 1421 b(u) to mandate that the rights recognized in *Roe* also be extended to the people of Guam. *Id.*; *see also Guam II*, 962 F.2d at 1370.

Amendment have been targeted by abortion foes in their efforts to outlaw abortion.

Prohibiting speech of the sort employed by Ms. Benshoof would, however, run afoul of the First Amendment even if the Court were to abandon Roe.[20] This is so because the prohibited speech does not constitute incitement that would likely culminate in immediate lawless conduct.

Additionally, speech similar to that uttered by Ms. Benshoof cannot be forbidden under the First Amendment because the government may not punish a speaker for discussing prohibited sorts of behavior. Finally, Ms. Benshoof's speech could not be prohibited because the government cannot ban dissemination of information within one jurisdiction relating to an activity that is prohibited by that jurisdiction, but that is legal in another. The multiple problems posed by prohibiting the solicitation of abortion must be considered in light of the values underlying the First Amendment and the Court's precedent addressing viewpoint discrimination.

II. THE VALUES UNDERLYING THE FIRST AMENDMENT AND THE PROHIBITION AGAINST VIEWPOINT DISCRIMINATION

Three purposes commonly associated with the First Amendment are: (1) to permit informed choices by citizens in a self-governing democracy; (2) to further the search for truth; and (3) to allow each individual to develop and exercise his or her capacities, thereby promoting a sense of self-worth.[21] The preeminent exponent of the "self-government purpose" was Professor Alexander Meiklejohn, who observed that "[t]he freedom that the First Amendment protects is not . . . an absence of regulation. It is the presence of self-

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20. *See supra* note 15 and accompanying text. Justice Scalia, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, urged the Court to get out of the "abortion-umpiring business." *Casey*, 112 S. Ct. at 2882, 2885 (Scalia, J., concurring and dissenting). Justice Blackmun argued that even if the Court were to abdicate its constitutional responsibility as suggested by Justice Scalia, it would still be necessary for the Court to review abortion related issues, such as the extent to which government could, consistent with the First Amendment, limit speech dealing with abortion. *Id.* at 2854 n.12 (Blackmun, J., concurring and dissenting) (posing question of whether states that choose not to criminalize abortion could ban all advertising providing information about where and how to obtain abortions).

21. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23-26 (1975). Thoughtful writing on the values underlying the First Amendment abounds. *See, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 193 n.8 (1983) (citing numerous authorities).

government."[22] In Professor Meiklejohn's view, the First Amendment does not protect a "freedom to speak," but rather protects those activities of thought and communication by which we govern.[23] This view is premised on the fact that the people created a form of government whereby they granted only some powers to the state and federal governments, while reserving very significant powers of government to themselves.[24] Freedom of speech is essential to the vitality of our constitutional democracy because the people have chosen to govern themselves rather than to be governed.[25] In order for self-government to exist, however, "the voters must acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[26] For Professor Meiklejohn, freedom of expression is an absolute in the realm of public affairs.[27]

The "search for the truth" purpose was highlighted by Justice Holmes in his frequently quoted dissent in *Abrams v. United States*.[28] Justice Holmes stated that "the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[29] For society to advance in knowledge, it is believed

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22. *See* Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 252.
23. *Id.* at 255.
24. William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965).
25. *See* Meiklejohn, *supra* note 22, at 263; *see also* Brennan, *supra* note 24, at 11 (discussing Meiklejohn's First Amendment theory). James Madison shared Professor Meiklejohn's view of the First Amendment, observing "'that the censorial power is in the people over the Government and not in the Government over the people.'" *Id.* at 15 (quoting 4 ANNALS OF CONGRESS 934 (1794)).
26. *See* Meiklejohn, *supra* note 22, at 255.
27. *See* Brennan, *supra* note 24, at 12.
28. 250 U.S. 616 (1919) (involving prosecution under the Espionage Act of 1918 for statements critical of the Government made during World War I).
29. *Id.* at 630. John Stuart Mill similarly observed:

> Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.

See Karst, *supra* note 21, at 25 (quoting JOHN STUART MILL, *On Liberty* (1859), *in* THE PHILOSOPHY OF JOHN STUART MILL 207-08 (Marshall Cohen ed., 1961)). Professor Meiklejohn has disavowed any affinity for the "search for the truth" purpose of the First Amendment, his pessimism concerning the notion that truth will ultimately prevail is evident from the statement: "I have never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win." *See* Meiklejohn, *supra* note 22, at 262-63; *see also* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 284 n.314 (1989) (citing authorities critical of

that there must be unfettered competition between those views that predominate and those that depart from the mainstream.[30] The search for truth demands protection of all views, especially unpopular ones.[31]

While Justice Holmes' dissent in *Abrams* espoused the "search for the truth" purpose, Justice Brandeis' concurrence in *Whitney v. California*[32] focused on the goal of promoting individual self-worth. Justice Brandeis noted that "[t]hose who won our independence believed that *the final end* of the state was to make men free to develop their faculties. . . ."[33] Without freedom of speech, individuals are unable to realize their capacities.[34]

A law that substantially impairs the communication of a particular viewpoint violates the First Amendment because by removing a particular message from public debate it mutilates "the thinking process of the community," and therefore is incompatible with the values sought to be fostered by the First Amendment.[35] Viewpoint restrictions do not harmonize with the notion that there should be "equality of status in the field of ideas," so that all ideas dealing with a particular subject of public concern are accorded the same privileges.[36] Because viewpoint discrimination implicates core First Amendment values, the government, when contemplating establishing

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the assumption that the existence of an uninhibited marketplace of ideas necessarily results in truth prevailing). Professor Ingber also has argued that the existence of a free marketplace of ideas does not insure that the truth will predominate, but instead the marketplace "serves as a forum where cultural groups with differing needs, interests, and experiences battle to defend or establish their disparate senses of what is 'true' or 'best.'" Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 27.

30. *See* Karst, *supra* note 21, at 25.
31. *Id.*
32. 274 U.S. 357 (1927) (involving prosecution under the California Criminal Syndicalism Act for activities in the Communist party).
33. *Id.* at 375 (emphasis added).
34. *See* Karst, *supra* note 21, at 26.
35. *See* Stone, *supra* note 21, at 198 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960)).
36. *See* Paul B. Stephan, III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 233 n.136 (1982) (quoting and discussing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960)). John Stuart Mill made an insightful comment condemning efforts directed at suppressing disfavored viewpoints: "If all mankind minus one were of one opinion, and only one person were of the 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, ON LIBERTY 18 (David Spitz ed. 1975); *cf.* City Of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976) (stating that to permit one side of a debatable public question to have a monopoly in expressing its views is the antithesis of constitutional guarantees).

viewpoint-based regulation, must be sure to fashion a precisely drawn means of advancing a compelling governmental interest.[37]

The Supreme Court addressed the issue of viewpoint discrimination in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*[38] All of the plaintiffs in *Cornelius* were organizations that attempted to influence public policy through one or more of the following activities: political activity, advocacy, lobbying, and litigation on behalf of others.[39] At issue was an Executive Order that excluded "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves" from participating in the Combined Federal Campaign, a charity appeal directed at federal employees.[40] Justice O'Connor found that the Combined Federal Campaign was a non-public forum and that the restriction did not violate the First Amendment because it was viewpoint-neutral.[41] Although the Court upheld the restriction, the cause was remanded for further proceedings to determine whether the viewpoint-neutral restriction was in fact "a facade for viewpoint-based discrimination."[42]

Justice Blackmun, who was not persuaded by the government's contention that the restriction was viewpoint-neutral because it applied equally to all advocacy groups regardless of their political or philosophical predispositions,[43] dissented in *Cornelius* on the grounds that the restriction, on its face, discriminated on the basis of viewpoint.[44] Justice Blackmun viewed the relevant comparison not as between the individual organizations that composed the excluded group, but rather between the organizations allowed access to the campaign and those denied access.[45] The fact that government em-

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37. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 66 (1983) (Brennan, J., dissenting) (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980)).
38. 473 U.S. 788 (1985).
39. *Id.* at 793. The plaintiffs in *Cornelius* were: the NAACP Legal Defense and Education Fund, the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resource Center, the Lawyer's Committee for Civil Rights Under Law, and the Natural Resources Defense Council. *Id.*
40. *Id.* at 790, 795.
41. *Id.* at 810-11.
42. *Id.* at 811-13.
43. *Id.* at 832 (Blackmun, J., dissenting).
44. *Id.* at 814. Justice Blackmun emphasized that even in a non-public forum government cannot discriminate against speech on the basis of viewpoint. *Id.* at 819. Justice Stevens, in his *Cornelius* dissent, stated that he did not consider the precise characterization of the forum to be helpful in arriving at a result. *Id.* at 833 (Stevens, J., dissenting).
45. *Id.* at 832 (Blackmun, J., dissenting).

ployees could hear from only those charities of the opinion that charitable goals can best be achieved within the framework of existing social policy and the status quo was viewed as "blatantly" viewpoint based.[46]

On two recent occasions, the Court has addressed the constitutionality of flag desecration laws. In *Texas v. Johnson*,[47] Johnson was convicted of desecrating an American flag in violation of Texas law.[48] During the 1984 Republican National Convention in Dallas, Johnson participated in a political demonstration protesting Reagan administration policies.[49] The demonstration concluded with Johnson setting fire to an American flag.[50]

The Supreme Court held that the statute violated the First Amendment because a bedrock principle underlying the First Amendment is that government cannot prohibit the expression of ideas merely because society may find them offensive or disagreeable.[51] Likewise, government cannot prohibit expression because it disagrees with the message intended to be conveyed.[52] The statute conflicted with the notion that the best test of the truth is the ability of the thought to be accepted in the marketplace of ideas.[53]

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46. *Id.* at 833.
47. 491 U.S. 397 (1989).
48. *Id.* at 399.
49. *Id.*
50. *Id.*
51. *Id.* at 414; *see also* Forsyth County v. The Nationalist Movement, 112 S. Ct. 2395, 2404 (1992) (holding that speech cannot be financially burdened any more than it can be punished or banned simply because it may offend a hostile mob); FCC v. Pacifica Found., 438 U.S. 726, 745 (finding the fact that society may find speech offensive is not a sufficient reason to suppress, but rather reason to afford it constitutional protection), *reh'g denied*, 439 U.S. 883 (1978); Cox v. Louisiana, 379 U.S. 536, 551-52 (1965) (stating that the function of free speech is to invite dispute and it may best serve its high purpose when it induces unrest, creates dissatisfaction with conditions as they are, or stirs people to anger).
52. *Johnson*, 491 U.S. at 416; *see also Forsyth County*, 112 S. Ct. at 2403 (absence of standards for assessing permit fees allowed administrator to encourage some views and discourage others through arbitrary application of fees).
53. *See Johnson*, 491 U.S. at 418. In the context of discussing the search for the truth value, the Court commented that the First Amendment does not guarantee other concepts regarded as virtually sacred, such as the principle that race discrimination is odious and destructive, from being subjected to the test of the marketplace of ideas. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)). *Accord* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547-48 (1992) (prosecution for burning cross on African-American family's yard under Bias-Motivated Crime Ordinance was viewpoint based) (*see infra* notes 62-65 and accompanying text for further discussion); Levin v. Harleston, 966 F.2d 85, 87-90 (2d Cir. 1992) (creation of alternative class sections and threat of future discipline in response to professor's writings containing denigrating comments

One of the interests asserted by the State of Texas in defending Johnson's conviction was the preservation of the flag as a symbol of national unity.[54] The Court rejected the preservation argument, noting that Johnson was prosecuted for expressing dissatisfaction with his country's policies — expression situated at the core of First Amendment values.[55] The Court went on to add: "To conclude that the Government may permit designated symbols to be used to communicate only *a limited set of messages* would be to enter territory having no discernible or defensible boundaries."[56] The Court indicated that the way to preserve the flag's special significance is not to punish those who feel differently, but rather to persuade them that they are wrong.[57] While advocating persuasion, the Court quoted from Justice Brandeis' concurrence in *Whitney v. California*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[58]

In response to the Court's decision in *Johnson*, Congress passed the Flag Protection Act of 1989, which became the subject of the Court's opinion in *United States v. Eichman*.[59] As in *Johnson*, the

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regarding the intelligence and social characteristics of African-Americans violated the First Amendment); Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 773 F. Supp. 792, 793, 795 (E.D. Va. 1991) (discipline imposed on fraternity for skit containing offensive racial and sexual stereotypes violated First Amendment because the First Amendment does not recognize exceptions for bigotry, racism, religious intolerance, or matters some view as trivial, vulgar, or profane); UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1168-81 (E.D. Wis. 1991) (University's rule authorizing discipline for comments, epithets, or other expressive behavior or physical conduct that intentionally demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age violates the overbreadth doctrine).

54. *Johnson*, 491 U.S. at 400. The other interest was the prevention of breaches of the peace. *Id.*; *see infra* notes 155-57 and accompanying text.
55. *Johnson*, 491 U.S. at 411.
56. *Id.* at 417 (emphasis added). Professor Ely has written a definitive article on the First Amendment and flag desecration. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). Statutes aimed at protecting the flag's symbolism and that prohibit acts such as flag burning discriminate on the basis of viewpoint because they "proscribe only ideologically charged acts, and beyond that, only acts charged with a particular set of ideological outlooks." *Id.* at 1502-03.
57. *Johnson*, 491 U.S. at 419.
58. *Id.* (quoting *Whitney v. California*, 274 U.S. at 377 (Brandeis, J., concurring)).
59. 496 U.S. 310 (1990). The Flag Protection Act, in relevant part, provided:
    (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
    Id. at 314.

defendants in *Eichman* were prosecuted for setting American flags afire.[60] Relying extensively on its opinion in *Johnson*, the Court held that the Act, which it found to be insufficiently distinct from Texas' statute, violated the First Amendment.[61]

The Court's most recent pronouncement on viewpoint discrimination occurred in *R.A.V. v. City of St. Paul*.[62] In that case, the defendant was charged under the St. Paul Bias-Motivated Crime Ordinance, which prohibited placing on public or private property certain items likely to arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender.[63] It was alleged that the defendant had violated the Ordinance by burning a cross in the yard of an African-American family.[64] The Court held that the ordinance violated the First Amendment's prohibition against viewpoint discrimination because it applied only to speech which aroused intense emotions based upon race, color, creed, religion, or gender.[65] In light of the values underlying the First Amendment and the prohibition against viewpoint discrimination, the remaining question is whether prohibiting the solicitation of abortion violates the First Amendment.

III. PROHIBITING THE SOLICITATION OF ABORTION

A. Viewpoint Discrimination

Prohibiting the solicitation of abortion is viewpoint based discrimination that contravenes the purposes animating the First Amend-

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60. *Id.* at 312. The defendants in Appeal No. 89-1433 set fire to several flags on the steps of the Capitol while protesting various aspects of the Government's domestic and foreign policy. *Id.* The defendants in Appeal No. 89-1434 set fire to a flag while protesting the passage of the Flag Protection Act. *Id.*
61. *Id.* at 315-18. The Court declined to accept the Government's invitation to reconsider *Johnson* in light of what was contended to be Congress' recent recognition of a national consensus opposing flag burning. *Id.* at 318.
62. 112 S. Ct. 2538 (1992).
63. *Id.* at 2541. The Ordinance provided as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.
64. *Id.*
65. *Id.* at 2547-49. The Justices who concurred in the Court's unanimous decision opined that the ordinance was unconstitutional on overbreadth grounds. *Id.* at 2550, 2558-61 (opinions of White, Blackmun, and Stevens, JJ., concurring).

ment. Prior to enactment, the Guam statute's sponsor advocated passage on the grounds that Guam is a Christian community.[66] After the law was proposed, an "overwhelming majority" of those who testified at a hearing on the law supported it on the grounds of "religious belief or orientation."[67] The district court in *Guam Society of Obstetricians & Gynecologists v. Ada* recognized the solicitation provision discriminated on the basis of viewpoint when, without elaboration, it relied on *Texas v. Johnson* to conclude that the provision violated the First Amendment.[68]

The crime of "criminal solicitation" encompasses requests and encouragements to commit crimes.[69] The complaint filed against Ms. Benshoof by the Attorney General of Guam alleged that:

> On or about the 20th day of March, 1990, in the Territory of Guam, Janet Benshoof did knowingly solicit a person or persons to submit to an abortion in violation of 9 Guam Code Annotated section 31.23, as amended.[70]

The Affidavit of Probable Cause, which alleged that on March 20, 1990, Ms. Benshoof had addressed a gathering assembled at The Press Club of Guam to discuss the signing of the law, asserted:

> That during her presentation Ms. Benshoof indicated that she was aware that Guam's Anti-Abortion law prohibited the solicitation of pregnant women interested in getting abortions by advising them where they could obtain abortions.
>
> That in the presence of members of the Guam Press Club and others attending this meeting, Ms. Benshoof publicly encouraged women seeking abortions on Guam to have the abortion and travel to Honolulu, Hawaii. She mentioned

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66. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1425 (D. Guam 1990) (Guam I).
67. *Id.* (quoting Committee Report on Bill No. 848). A chart, appended to the Respondents' Ninth Circuit Brief in *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, summarized the oral legislative testimony on the law. The chart identified the names of those people who testified and whether they favored Bill 848, believed life begins at conception, and included religious references in their testimonies. A second chart summarizing the written legislative testimony, also appended to the Respondents' Ninth Circuit Brief, was structured in the same fashion as the chart summarizing oral testimony. The two charts reflect the Committee Report finding.
68. *Guam I*, 776 F. Supp. at 1428, 1429 n.9 (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).
69. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 110 (1989).
70. *See* Court File Criminal Case No. CM 0160-90 commenced in The Superior Court of Guam.

that there were places in Honolulu where women could obtain low cost abortions. Benshoof then gave a telephone number which women traveling to Honolulu to have abortions should call.[71]

A March 21, 1990, memorandum by the Attorney General of Guam stated that the solicitation provision prohibited "a medical professional or any other person from recommending to a woman that she seek an abortion in a location other than Guam by making such recommendations a crime."[72] Before turning to the constitutional problems posed by the solicitation provision, it should be noted that, in any case, prosecuting Ms. Benshoof was improper because her actions did not constitute "criminal solicitation." Ms. Benshoof did not engage in criminal solicitation because she did not request or encourage anyone to obtain an elective abortion *in Guam*, but rather advised women of where they could still go to obtain a *legal* elective abortion.[73]

The charge against Ms. Benshoof was unwarranted not only because her actions did not constitute criminal solicitation, but also because she could not have been convicted since the Guam law violated the First Amendment. The solicitation provision was viewpoint based because it sought to regulate speech favorable to the alternative of abortion. Speech dealing with abortion is of high value because it is an essential part of the exposition of ideas with substantial social value as a step towards realizing the truth about a highly controversial issue.[74] Particularly significant is the fact that by

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71. *Id.*

72. Plaintiffs' Brief at 79 (quoting Attorney General's Memorandum), Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam 1990).

73. It should be noted that if a particular behavior is constitutionally protected then encouragement of that behavior would always or nearly always be protected as well. *See* GREENAWALT, *supra* note 69, at 280 n.34; *see also* Valley Family Planning v. North Dakota, 489 F. Supp. 238, 242 (D.N.D. 1980) (if government cannot interfere with or prohibit an activity, then it also cannot regulate discussion relating to that activity), *aff'd*, 661 F.2d 99 (8th Cir. 1981). From the noted principle, it necessarily follows that as long as *Roe* remains the law a jurisdiction cannot prohibit the solicitation of abortion within that jurisdiction even if that jurisdiction has declared abortion to be illegal. Even if the Court abandons *Roe*, however, speech such as that of Ms. Benshoof is protected both because of the prohibition against viewpoint discrimination and other First Amendment doctrines.

74. The protection afforded particular speech by the First Amendment is contingent upon whether that speech is of low or high First Amendment value. *See* Stone, *supra* note 21, at 194-96. Low value speech is entitled to only limited constitutional protection. *Id.* at 194. Limitations on high value speech, which are evaluated according to a more speech-protective analysis than restrictions on low value speech, approach absolute protection. *Id.* at 196.

The distinction between low and high value speech was first recognized in

discriminating on the basis of viewpoint, the Guam statute substantially impaired the communication of information relating to the option of abortion.[75]

The law discriminated on the basis of viewpoint because it sought to remove from public debate only the message that abortion is an alternative to childbirth. The Supreme Court has stated that "debate on public issues should be uninhibited, robust, and wide-open . . . ."[76] The solicitation provision precluded such debate on the alternative of abortion, mutilated "the thinking process of the community," and conflicted with the values sought to be advanced by the First Amendment.[77] There was no "equality of status in the field of ideas" because the only message that could be presented was that childbirth was preferable to abortion.[78]

The law's restriction on speech was contrary to the three purposes commonly associated with First Amendment jurisprudence.[79] First,

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the dicta of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where the Court noted: "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 194 (citing *Chaplinsky*, 315 U.S. at 571-72). Professor Stone has noted that the precise factors that cause particular classes of speech to fall within the realm of low value speech is somewhat obscure. *See* Stone, *supra* note 21, at 194. Certain categories of speech, however, are of low value because they are viewed as not furthering the underlying purposes of the First Amendment. *Id.* Classes of speech receiving only low value protection are words of incitement, false statements, obscenity, commercial speech, fighting words, and child pornography. *Id.* at 194-95.

Justice Scalia's majority opinion in *R.A.V. v. City of St. Paul* indicated that "a limited categorical approach has remained an important part of our First Amendment jurisprudence." R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992). Despite that observation, Justice White, in his concurring opinion, argued that the majority had "cast[] aside" any notion of a categorical approach to analyzing free speech questions. *Id.* at 2551-54 (White, J., concurring). The majority opinion also caused Justice Blackmun to conclude that if categorization is now forbidden, then protection of speech interests will be reduced "across the board." *Id.* at 2560 (Blackmun, J., concurring). For Justice Stevens, the majority had "revise[d]" a categorical approach which he regarded as "unsound." *Id.* at 2562, 2566 (Stevens, J., concurring). Justice Stevens' primary criticism was that the categorical approach failed to seriously account for the importance that context plays in evaluating free speech issues. *Id.* at 2566. Additionally, Justice Stevens opined that categorization seeks to superimpose straight and unwavering dividing lines when free speech matters do not lend themselves to such treatment. *Id.*

75. *See supra* notes 35-65 and accompanying text.
76. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (holding that actual malice must be shown before damages can be awarded in a libel action brought by a public official).
77. *See supra* notes 21-35 and accompanying text.
78. *See supra* note 36 and accompanying text.
79. *See supra* notes 21-34 and accompanying text.

the citizenry could not make informed choices when it was precluded from hearing speech offering abortion as an alternative to childbirth, thus stifling the self-governing purpose.[80] Second, the "search for the truth" about the option of abortion versus childbirth was undermined since there was an inhibited marketplace of ideas devoid of the competition envisioned by Justice Holmes.[81] Third, the restriction deprived individuals of the opportunity to promote their sense of self-worth by removing the abortion alternative from public discourse, thereby restraining people from exercising their rational capacities.[82]

Especially significant is the fact that the Court has stated that within the uninhibited marketplace of ideas secured by the First Amendment, the public is entitled "to receive suitable access to *social*, political, esthetic, *moral* and other ideas and experiences . . . ."[83] The subject of abortion is one of the most widely debated social and moral issues today, evoking strong sentiments from those on both sides of the issue.[84] Guam's law, as evidenced by the grounds for bringing the charges against Ms. Benshoof and by the Attorney General's memorandum, sought to advance the viewpoint that abortion is a social and moral evil, while prohibiting discussion of the opposing view.[85] The law was motivated by the fact that Guam is a Christian community, and the law's pronouncements were regarded as consistent with the "religious belief or orientation" of its population.[86] This justification is not the sort of compelling

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80. *See supra* notes 22-27 and accompanying text.
81. *See supra* notes 28-31 and accompanying text.
82. *See supra* notes 32-34 and accompanying text.
83. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added) (addressing constitutionality of the FCC fairness doctrine); *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 460 (1985) (noting that the communication of a fact or value judgment relating to a matter of public concern cannot be prohibited solely on the grounds that it erodes moral standards).
84. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 571 & n.16 (1989) (Stevens, J., dissenting) (noting that the intensely divisive character of much of the national debate on abortion reflects deeply held religious convictions yet religious organizations submitted amicus briefs on both sides of the abortion issue).
85. *See supra* notes 70-72 and accompanying text.
86. *See supra* notes 66-67 and accompanying text. The predominant religious affiliation in Guam is Catholic. Lewin, *supra* note 4. When the law was being debated, the Archbishop threatened to excommunicate any Catholic legislator who voted against it. *Id.* This sort of action by Catholic authorities is of particular significance when viewed in light of that portion of Justice Stevens' dissent in *Webster* which addressed Missouri's declaration that the life of all human beings commences at conception. Although other members of the Court who voted to uphold the Missouri law declined to reach the validity of that

governmental interest that should serve as the basis for viewpoint discrimination. Such discrimination should fall when subjected to strict scrutiny because the public is entitled to access to discourse concerning social and moral ideas and experiences.[87]

For example, despite the fact that racial discrimination is viewed as offensive by the vast majority of people, the Court has not sought to insulate that view from being tested in the marketplace of ideas.[88] The Court has gone so far as to find in *R.A.V. v. City of St. Paul* that although society has a compelling interest in eradicating forms of discrimination with a long history, including racial discrimination,

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declaration, *see Webster*, 492 U.S. at 507, 523, 532, Justice Stevens argued that such a pronouncement violated the Establishment Clause because there was no secular purpose and was an unequivocal endorsement of a religious tenet of some, but not all Christian faiths. *Id.* at 566 (Stevens, J., dissenting); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2839 (1992) (stating that for a state's interest in potential human life to be legitimate it must be secular and consistent with the First Amendment in not promoting a theological or sectarian interest) (Stevens, J., concurring and dissenting); *id.* at 2849 (Blackmun, J., concurring and dissenting) (the Establishment Clause precludes a state's interest in potential life from being theological or sectarian). *But cf.* Harris v. McRae, 448 U.S. 297, 318-20 (1980) (the fact that the Hyde Amendment's abortion funding restrictions coincide with Roman Catholic Church's religious tenets, without more, does not contravene the Establishment Clause).

Guam's solicitation provision ran afoul of not only the Free Speech Clause, but also the Establishment Clause because it lacked a secular purpose and endorsed Catholic religious tenets. This is true, despite the Court's recent emphasis upon evaluating Establishment Clause claims according to a coercion test. *See* Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992). Justices Blackmun, Stevens, O'Connor, and Souter adhere to the view that proof of government coercion is not a necessary prerequisite for demonstrating an Establishment Clause violation and endorsement is an appropriate criterion for assessing claims advanced under that clause. *Id.* at 2664, 2671-72, 2676-77 (opinions of Blackmun and Souter, JJ.). Although Justice Kennedy has emphasized the role of coercion, *see id.* at 2655, and has disapproved of employing endorsement as a barometer for evaluating Establishment Clause challenges, *see* County of Allegheny v. ACLU, 492 U.S. 573, 668-74 (1989) (Kennedy, J., concurring and dissenting), he has also indicated his belief that government cannot engage in efforts to proselytize on behalf of religion, *see id.* at 664. The effort to prohibit speech that conflicts with Catholic tenets, in order to advance those tenets, should be viewed as a form of proselytization.

87. *See supra* note 83 and accompanying text.

88. *See* Texas v. Johnson, 491 U.S. 397, 418 (1989) (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)); *see also supra* note 53 and cases cited therein; *cf.* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 256-65 (1986) (rejecting the notion that the Federal Election Commission had a compelling interest to force compliance with federal statute prohibiting use of corporate funds in connection with federal elections by Massachusetts Citizens for Life when the speech that opposed abortion was core political speech).

that such an interest must be achieved through means other than laws that discriminate on the basis of viewpoint.[89]

Simply because abortion is morally offensive to certain segments of the population does not constitute a compelling interest so as to exempt its discussion from the scrutiny of the marketplace of ideas.[90] Even if, sometime in the future, preventing abortions is found to be a compelling interest, adequate alternatives to viewpoint discriminatory laws such as education could further such an interest.[91] Guam's

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89. 112 S. Ct. at 2549-50. The St. Paul Ordinance was not reasonably necessary to accomplish the asserted compelling interests because the only interest served by the viewpoint restriction was to display the city council's special hostility towards certain forms of biases. *Id.*

90. Although the Guam law did not employ the phraseology "compelling interest" in its Legislative Findings, *see supra* note 2, recent efforts aimed at restricting abortion in other states have included use of such language as a portion of their findings or purpose. *See, e.g.*, LA. REV. STAT. ANN. § 14:87 (West Supp. 1992) (declared unconstitutional in Sojourner T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom.* Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992)); UTAH CODE ANN. § 76-7-301.1 (Supp. 1992). Guam argued before the Ninth Circuit that its law sought to advance a "compelling interest." Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1372-74 (9th Cir.) (Guam II), *cert. denied*, 113 S. Ct. 633 (1992). In rejecting Guam's assertion, the Ninth Circuit, in part, commented that "a view of the state's interest in potential life as 'compelling' throughout pregnancy does not necessarily mean that it sweeps all other interests out of the way. There is a countervailing right in issue here, although we find little reflection of it in Guam's briefs." *Id.* at 1373 (footnote omitted).

In the Guam case, the Ninth Circuit also observed that there must be limits to the ability of a state's interest in potential life, whether or not that interest is compelling, to override all conflicting interests. *Id.* at 1373 n.9. That observation is particularly appropriate in the context of prohibiting the solicitation of abortion, as the public is entitled to reasonable access to social and moral ideas and experiences, therefore, any claim of a compelling interest should fail. Also, government has a compelling interest not to violate the Establishment Clause. *See, e.g.*, Doe v. Small, 934 F.2d 743, 770 (7th Cir. 1991) (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981) to support finding that display of sixteen pictures depicting Christ's life in city park violated Establishment Clause), *rev'd*, 964 F.2d 611, 621-22 (7th Cir. 1992) (en banc) (reversing granting of injunction on the grounds that it was overbroad in prohibiting display of pictures by any group) (Cudahy, J., concurring, relying on *Widmar*, while observing that compliance with the Establishment Clause is a compelling state interest, *id.* at 625); Kaplan v. City of Burlington, 891 F.2d 1024, 1030 (2d Cir.) (display of menorah in City Hall Park violated Establishment Clause), *cert. denied*, 496 U.S. 926 (1989). As previously discussed, *see supra* note 86, prohibiting the solicitation of abortion also violates the Establishment Clause, and therefore, even a statement asserting that fetal protection is a compelling interest does not validate prohibiting the solicitation of abortion.

91. *Cf.* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2549-50 (1992) (finding that there were sufficient means, other than an ordinance which discriminated on the basis of viewpoint, available to advance compelling interest of eradicating discrimination).

restriction on the discussion of the abortion option represented a clear case of censorship that jeopardized the vitality of free speech and that was "blatantly" viewpoint based.[92]

Since the Guam solicitation prohibition was viewpoint based, the district court's reliance on *Texas v. Johnson* was well founded.[93] The law conflicted with the First Amendment since the Guam legislature attempted to silence speech favorable to the abortion option because it disagreed with those espousing that view.[94] Just as those who would prohibit flag burning were urged to redirect their efforts to persuasion, so too should adherents of the view that abortion is morally wrong channel their energies towards persuasion, which at the same time respects the rights of others to disagree with their view.[95] Such a view is in keeping with Justice Brandeis' admonition that what should be fostered is more speech and not enforced silence.[96]

Efforts directed at prohibiting the solicitation of abortion are neither novel nor confined to the Territory of Guam. The State of Montana, for example, prohibits physicians, other persons, or facilities from engaging in solicitation or other forms of communication the purpose of which is to invite, induce, or attract anyone to have an abortion.[97] Montana's Code declares that the proscribed conduct constitutes a misdemeanor.[98]

Similarly, the State of Vermont has criminalized the furnishing to the public, whether by print, writing, words or language, any information or advice meant to cause or to facilitate the procurement of an abortion.[99] The Vermont provision authorizes a maximum prison term of ten years, while mandating a sentence of not less

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92. *Cf. supra* notes 43-46 and accompanying text.
93. *See supra* note 68 and accompanying text.
94. *Cf.* Texas v. Johnson, 491 U.S. 397 (1989); *supra* note 51 and accompanying text.
95. *Cf.* Texas v. Johnson, 491 U.S. 397 (1989); *supra* note 57 and accompanying text; New York Times Co. v. Sullivan, 376 U.S. at 269 (citing Roth v. United States, 354 U.S. 476, 484 (1957) in holding that the role of the First Amendment is to assure the unfettered exchange of ideas for bringing about political and social change).
96. *See supra* note 58 and accompanying text.
97. The "[c]ontrol of [the] practice of abortion" is codified in MONT. CODE ANN. § 50-20-109 (1991). In particular, § 50-20-109(4) provides that: "No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients."
98. *Id.* § 50-20-109(5).
99. The "[a]dvertising or dealing in anything to cause miscarriage" is governed by VT. STAT. ANN. tit. 13, § 104 (Supp. 1991).

than three years.[100] Likewise, the State of Louisiana prohibits the placing or carrying of any advertisement relating to abortion services through the publication of the availability of those services.[101] The United States Virgin Islands forbids the creation of any public or private organization or society for the purpose of soliciting candidates for abortion.[102]

The Guam solicitation provision is not the first to be declared unconstitutional. In the 1980 case *Leigh v. Olson*,[103] the United States District Court for the District of North Dakota considered a challenge to a North Dakota solicitation statute that prohibited physicians, hospitals, or any other person from advertising or participating in any form of communication whose purpose was to invite, induce, or attract a woman to obtain an abortion.[104] The plaintiffs in *Olson* were Dr. Richard Leigh, a gynecologist who performed abortions,

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100. The text of VT. STAT. ANN. tit. 13, § 104 (Supp. 1991), in its entirety, provides that:

> A person who knowingly causes to be made public by print, writing, words or language that give any information where anything, or any advice or information, may be obtained for the purpose of causing or procuring the miscarriage of a pregnant woman, shall be imprisoned not more than ten years nor less than three years. A person who sells or gives away anything for the purpose of producing such miscarriage shall be imprisoned not more than three years nor less than one year and fined not more than $500.00 nor less than $200.00, or both.

101. The Louisiana prohibition against "[a]bortion advertising," found in LA. REV. STAT. ANN. § 14:87.4 (West 1986), provides that:

> Abortion advertising is the placing or carrying of any advertisement of abortion services by the publicizing of the availability of abortion services.
>
> Whoever commits the crime of abortion advertising shall be imprisoned, with or without hard labor, for not more than one year or fined not more than five thousand dollars, or both.

By proscribing the publicizing of the availability of abortion services through the placing of any advertisement, the Louisiana statute appears to preclude such actions as those of Ms. Benshoof in which she advised women of where abortion remained legal.

102. The Virgin Islands statute, V.I. CODE ANN. tit. 14, § 153 (Supp. 1992), is captioned "[s]oliciting abortion prohibited." That section provides that: "No public or private organization or society shall be created for the purpose of soliciting candidates for abortion; however, this provision shall in no way be construed to restrict the legitimate activities of the Family Planning Clinic conducted by the Department of Health."

103. 497 F. Supp. 1340 (D.N.D. 1980).

104. *Id.* at 1342-43, 1350. Under N.D. CENT. CODE § 14-02.1-06 (1991), "[s]oliciting abortions" was prohibited. That statute declared that: "No licensed physician or licensed hospital, or any person employed by the licensed physician or licensed hospital, nor any other person may advertise or participate in any form of communication having as its purpose the inviting, inducing, or attracting of a pregnant woman to undergo an abortion."

and Jane Bovard, a counselor who desired to furnish advice regarding abortion to women in North Dakota.[105]

Initially, the district court found Dr. Leigh's providing of abortion services, his discussion about those services with patients, and Ms. Bovard's counseling services, to constitute behavior prohibited by the solicitation statute.[106] The court then indicated that the potential application of the statute was so broad that a person of ordinary intelligence might not be able to determine whether particular conduct or utterances were proscribed.[107] Because of these deficiencies, the district court concluded the statute was so vague that it violated the Fourteenth Amendment's Due Process Clause.[108] Although, the district court stated that it was unnecessary to address whether the statute violated the First Amendment, it noted "that the threat of criminal sanctions for communications having as their purpose inviting, inducing or attracting a pregnant woman to undergo an abortion would effectively deter the exercise of free speech."[109]

In 1991, the Utah Legislature enacted laws limiting a woman's right to obtain an abortion.[110] These laws permitted abortion only when a woman's life was threatened, when she would sustain grave damage to her health, when the pregnancy was the result of rape or incest, or when the child would be born with grave birth defects.[111] Although the Utah laws did not contain a solicitation provision similar to that employed in the Guam law, the possibility of someone being charged in a situation similar to that of Ms. Benshoof has surfaced as an issue. News media reports have included accounts that the American Civil Liberties Union has expressed concerns that individuals could be charged with solicitation if the new laws were read in conjunction with Utah's general solicitation statute.[112] Those

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105. *Olson*, 497 F. Supp. at 1343. While neither plaintiff had engaged in advertising, the district court noted if they had wished to have done so the State could not have precluded such activity. *Id.* at 1350 (citing Bigelow v. Virginia, 421 U.S. 809 (1975)) (*see infra* notes 164-67 and accompanying text for a discussion of *Bigelow*).

106. *Olson*, 497 F. Supp. at 1350.

107. *Id.*

108. *Id.*

109. *Id.* (citing Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967)).

110. *See* UTAH CODE ANN. §§ 76-7-301.1(4) & 76-7-302 (Supp. 1992).

111. *Id.*

112. *Legislature's Rush to Judgment Created Flawed Abortion Law*, THE SALT LAKE TRIBUNE, Mar. 26, 1991, at A12 (editorial) [hereinafter LEGISLATURE'S RUSH]; *Legislature Keeps Utah Fighting in Unnecessary Abortion Battle*, THE SALT LAKE TRIBUNE, Apr. 21, 1991, at A16 (editorial). Criminal solicitation in Utah is governed by UTAH CODE ANN. §§ 76-4-203 to 76-4-204 (Supp. 1992).

In a recent Utah case, which did not present the problem of someone who was charged with solicitation, the district court rejected a free speech challenge to Utah's abortion laws. The district court found that Utah's abortion laws

concerns included the possibility of prosecutions for discussing abortion when the discussions focused on the possibility of accessing legal abortion services in neighboring states.[113]

The fact that solicitation prohibitions and the controversy surrounding them have not been unique to Guam suggests that not only *Roe* has been targeted by those who want government to reflect their morality on the subject of abortion, but the First Amendment as well, to the extent that it requires unfettered discussion on controversial subjects. Because some elected officials have been willing to champion the view that their governments, as well as the entire United States, can and should endorse laws that treat the availability of abortion as a moral evil,[114] the challenge to a woman's right to choice under *Roe* has been expanded to include a challenge to the First Amendment's free speech guarantees.

The promulgation of the regulations at issue in *Rust v. Sullivan* is indicative of the generalized threat facing the free speech guarantees of the First Amendment as a result of the moral debate surrounding abortion.[115] In *Rust*, the United States Department of Health and Human Services promulgated regulations restricting the activities of Title X fund recipients as they related to the abortion alternative.[116] The regulations prohibited recipients from counseling or providing referrals for abortion as a method of family planning.[117] Also,

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did not expose physicians, clergy, and counselors to accessorial liability for engaging in abortion counseling. Jane L. v. Bangerter, 794 F. Supp. 1537, 1547-48 (C.D. Utah 1992). In *Bangerter*, the court reasoned that under UTAH CODE ANN. § 76-2-202 (1990), accessorial liability was premised on aiding, encouraging, or soliciting someone who is engaged in conduct that constituted an offense, and physicians, clergy, and counselors were not engaged in conduct declared to be illegal. *Id.*

113. *Legislature's Rush, supra* note 112, at A12.

114. *See, e.g.*, DeBenedictis, *supra* note 16, at 20-21 (discussing federal district courts' rulings on Guam and Pennsylvania abortion restrictions aimed at directly challenging *Roe*); LA. REV. STAT. ANN. § 14:87 (West 1986 & Cum. Supp. 1992) (limiting permissibility of abortion to circumstances in which the woman's life or fetus is endangered and when pregnancy is product of rape or incest) (declared unconstitutional in Sojourner T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom.* Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992)); UTAH CODE ANN. §§ 76-7-301.1, 76-7-302 (Supp. 1992) (limiting availability of abortion to when the woman's life is threatened or when she will sustain grave damage to her health, or the pregnancy results from rape or incest, or a child would be born with grave birth defects).

115. Rust v. Sullivan, 111 S. Ct. 1759 (1991).

116. *Id.* at 1764-66.

117. *Id.* at 1765. The issue of government prohibition of abortion counseling when its resources are in some manner connected to health care providers has been the subject of multiple journal articles. *See* Alexandra A.E. Shapiro, Note, *Title X, the Abortion Debate, and the First Amendment*, 90 COLUM. L. REV. 1737, 1737 (1990) (Title X regulations impose an unconstitutional condition on

recipients were precluded from engaging in activities that encouraged, promoted, or advocated abortion as a form of family planning.[118]

The grantees in *Rust* challenged the regulations on the grounds that they discriminated on the basis of viewpoint by prohibiting discussion about abortion as a lawful option, while compelling the provision of information that encouraged continuing a pregnancy to term.[119] The Court rejected the viewpoint discrimination challenge on the grounds that government may choose to fund an activity it believes to be in the public interest to the exclusion of other activities, and that it is not required to subsidize the exercise of a right.[120] In so holding, the Court noted that a basic difference exists between direct state interference with a protected activity and state encouragement of an alternative activity that is consistent with legislative policy.[121]

The *Rust* decision, however, does not constitute authority favorable to upholding solicitation provisions such as Guam's law. Prohibiting the solicitation of abortion is not linked in any manner to government funding. Conversely, *Rust* does provide support for the view that solicitation prohibitions violate the First Amendment,

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grantees' First Amendment rights to engage in political advocacy of abortion rights and to give medical advice about abortion); Carole I. Chervin, Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights*, 41 STAN. L. REV. 401, 410, 417 (1989) (Title X prohibition on abortion counseling is content-based and viewpoint discriminatory); C. Andrew McCarthy, Comment, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics*, 77 CAL. L. REV. 1181, 1205-06 (1989) (Title X prohibition on abortion counseling constitutes content restriction and viewpoint discrimination); Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916, 1922, 1932 (1988) (prohibition on abortion counseling to grantees under Adolescent Family Life Act constitutes impermissible viewpoint discrimination); Theodore C. Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895, 1900, 1909, 1914 (1988) (government can choose childbirth as preferred social policy and is not required to subsidize abortion counseling under Adolescent Family Life Act); *see also* Reproductive Health Serv. v. Webster, 851 F.2d 1071, 1077 (8th Cir. 1988) (addressing Missouri prohibition on use of public funds, public employees, and public facilities to encourage or counsel a woman to have an abortion), *rev'd*, 492 U.S. 490 (1989).

118. *Rust*, 111 S. Ct. at 1765.

119. *Id.* at 1771-72.

120. *Id.* at 1772.

121. *Id.* Justice Blackmun dissented in *Rust* and expressed his view that the regulations discriminated on the basis of viewpoint. *Id.* at 1779-82 (Blackmun, J., dissenting). In Justice Blackmun's opinion, discrimination against a particular ideological viewpoint is a repugnant ground for denying the granting of funds. *Id.* at 1781-82. In *Rust*, Justice Blackmun found that the regulations were viewpoint based because the Government was seeking to deny funding to family-planning projects that advocated abortion, because they advocated abortion. *Id.* at 1781.

for such prohibitions *do* constitute direct state interference with protected First Amendment speech dealing with abortion. Although the *Rust* decision is not authority that favors upholding solicitation prohibitions, it serves as evidence that free speech is at great risk in the moral debate surrounding abortion. The *Rust* regulations reflect certain elected officials' views that it is proper for government to impede the exercise of the abortion option, because segments of the population consider abortion morally reprehensible, even at the expense of the First Amendment.[122] Besides constituting unlawful viewpoint discrimination, the Guam solicitation law, and other efforts like it, violate the First Amendment because they conflict with other recognized First Amendment doctrines.

B. Other Free Speech Problems Besides Viewpoint Discrimination

Beyond the viewpoint discrimination area, had Guam appealed the invalidation of the solicitation provision, and had the Supreme Court granted review and forsaken *Roe*, the solicitation provision should still have been found to violate the First Amendment because it conflicted with other well established First Amendment principles. In *Kingsley International Pictures Corp. v. Regents of the University of New York*,[123] the Court considered a New York motion picture licensing law that provided that a license shall be issued unless a movie was obscene, indecent, immoral, inhuman, sacrilegious, or was of such character that its exhibition would tend to corrupt morals or incite crime. The status of being immoral or of such character that exhibition would tend to corrupt morals was defined as films whose dominant purpose or effect was erotic or pornographic, which portrayed acts of sexual immorality, perversion, or lewdness, or

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122. Professor Blasi has authored a thesis that posits the existence of pathological periods for First Amendment core values. Blasi, *supra* note 83. The thesis proposes that at all times courts should "equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically." *Id.* at 449-50. The feature which characterizes a period in time as being pathological is a shift in basic attitudes among certain influential individuals, if not the public at large, regarding the desirability of the central norms of the First Amendment. *Id.* at 467. The recent intolerance displayed towards flag burning and restrictions imposed on speech dealing with abortion suggest we are now in a pathological period. *But see* Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1006-07 (1986) (criticizing the pathological period analysis because substantial costs are imposed on courts by demanding application of the restrictive doctrine when it is unnecessary and because it erroneously assumes that the courts are sufficiently insulated from political processes so as not to succumb to the accompanying political pressures).

123. 360 U.S. 684, 685 (1959).

which expressly or impliedly presented such acts as desirable, acceptable or proper patterns of behavior.[124]

Kingsley was denied a license to distribute *Lady Chatterley's Lover* because the theme of the picture was immoral, presenting adultery as a desirable, acceptable, and proper pattern of behavior.[125] The denial of the license was defended on the grounds that the picture attractively portrayed a relationship that was contrary to the moral standards, religious precepts, and legal code of New York's citizens.[126] The Court found that the denial of the license struck at the heart of the First Amendment which is the freedom to advocate ideas.[127] The fact that the picture advocated conduct proscribed by law was not constitutional grounds for denying a license because advocacy of proscribed conduct is not "a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."[128] The Court also noted that the deterrents employed to prevent crime are education and punishment for violations of the law, not the abridgment of free speech.[129]

The distinction between advocacy and incitement likely to result in immediate lawless action was also the subject of the Court's decision in *Brandenburg v. Ohio*.[130] There the defendant was convicted of violating the Ohio Criminal Syndicalism Statute for his speech activities during a Ku Klux Klan rally.[131] The conviction was reversed because the Ohio law prohibited mere advocacy that was not also accompanied by incitement likely to culminate in imminent lawless action.[132]

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124. *Id.* at 685.
125. *Id.*
126. *Id.* at 688.
127. *Id.*
128. *Id.* at 689 (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).
129. *Kingsley*, 360 U.S. at 689 (citing Whitney v. California, 274 U.S. at 378 (Brandeis, J., concurring)). In *Kingsley*, the Court also drew from Thomas Jefferson noting that he wrote: "But we have nothing to fear from the demoralizing reasonings of some if others are left free to demonstrate their errors." *Kingsley*, 360 U.S. at 689 n.11 (quoting letter of Thomas Jefferson to Elijah Boardman (July 3, 1801), JEFFERSON PAPERS, Library of Congress, Vol. 115, folio 19761).
130. 395 U.S. 444 (1969).
131. *Id.* at 444-47. The conviction in *Brandenburg* was premised on the defendant "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444-45 (quoting OHIO REV. CODE ANN. § 2923.13) (alterations in original).
132. *Brandenburg*, 395 U.S. at 448-49.

In the situation involving Ms. Benshoof, in which there was nothing to suggest that the speech would have caused immediate lawlessness, Guam, like New York in *Kingsley* and Ohio in *Brandenburg*, certainly attempted to prohibit advocacy relating to proscribed conduct that fell short of incitement. This is true because all that Ms. Benshoof did was to inform women that abortion remained legal in Hawaii, and to furnish a telephone number to be called regarding abortion services there. Additionally, it is arguable whether Ms. Benshoof's speech even constituted "advocacy" because she did not facilitate illegal abortions *in Guam*.[133]

The decision in *Brandenburg v. Ohio* is instructive also when considered in the context of Professor Kent Greenawalt's analytical approach to issues of criminal solicitation. Professor Greenawalt has urged that when crimes of criminal solicitation are at issue, the degree of protection afforded by the First Amendment should vary according to whether the solicitation is private or public, and whether the solicitation is ideological or nonideological.[134] Public and private speech are distinguished from one another by the fact that public speech involves the message being communicated in a manner in

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133. Professor Barnes has indicated that when an underlying activity is prohibited, government should be allowed to regulate speech likely to foster that unlawful activity. Richard L. Barnes, *Regulations of Speech Intended to Affect Behavior*, 63 DENV. U. L. REV. 37, 39 (1985). Even if the Court were to adopt Professor Barnes' view of the First Amendment, while abandoning *Roe*, government should not be able to prohibit speech such as that of Ms. Benshoof, as she did not furnish women with information pertaining to how to obtain an abortion in Guam, but rather she merely informed them where they could go to obtain legal abortions. *See infra* notes 164-69 and accompanying text. The Commonwealth of Virginia's regulation of "[e]ncouraging or promoting abortion" appears to have been drafted in a manner consistent with Professor Barnes' views. That statute provides that:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the performing of an abortion or the inducing of a miscarriage *in this Commonwealth* which is prohibited under this article, he shall be guilty of a Class 3 misdemeanor.

VA. CODE ANN. § 18.2-76.1 (Michie 1988) (emphasis added). It should be noted that § 18.2-76.1 only bans the encouragement or promotion of an abortion *in Virginia* and only then when that abortion would violate other limitations imposed under Article 9, which governs abortion. Those other limitations include: 1) requiring second trimester abortions be performed in a licensed hospital; 2) requiring third trimester abortions be performed in a licensed hospital and only allowing abortions to preserve the life and health of women while also furnishing life support measures to be used if there is evidence of viability; and 3) requiring written consent before performing an abortion. VA. CODE ANN. §§ 18.2-73, 18.2-74, 18.2-76 (Michie 1988).

134. *See* GREENAWALT, *supra* note 69, at 260-72.

which its content can become known to a wide audience.[135] The feature that characterizes nonideological solicitation is telling someone that a particular act will benefit him or her.[136] In contrast, ideological solicitation is identified with telling someone that something is "his duty or his right, or will be of broad benefit, or is warranted within some overall philosophical understanding of human life and social change."[137]

The constitutional protection afforded the different types of solicitation lie along a continuum. At one end, where entitlement to the greatest protection is located, lies public ideological solicitation, and at the other end, where the least protection is afforded, is found private nonideological solicitation.[138] Somewhere along the continuum are private ideological solicitation and public nonideological solicitation.[139]

Public ideological solicitation has substantial expressive value, demanding stringent requirements akin to those in *Brandenburg v. Ohio* be satisfied before speech can be limited.[140] Punishment for public ideological speech should only be allowed if it seriously threatens the public interest.[141] The public interest is only seriously threatened if a speaker steadfastly encourages the commission of a specific crime, it is reasonably likely that the speech will contribute to the commission of the crime, and that the crime will occur within the very near future.[142] Occurrence of the crime within the very near future is a requirement for punishing public ideological solicitation because the opportunity exists for countervailing speech and for the authorities to intercede to prevent the crime.[143]

Less protection is afforded private ideological solicitation because of the possibilities of overbearing influence and manipulation, the small audience, and the unavailability of countervailing perspectives.[144] Private ideological solicitation should not be punishable, however, unless it presents a significant danger to persons or property.[145] Public nonideological solicitation is also entitled to less protection because it is customarily associated with commercial speech.[146] Unlike public ideological solicitation, private nonideological solici-

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135. *Id.* at 271.
136. *Id.*
137. *Id.* at 271-72.
138. *Id.* at 269.
139. *Id.* at 269-71.
140. *Id.* at 266, 268.
141. *Id.* at 268.
142. *Id.* at 266.
143. *Id.* at 268.
144. *Id.* at 269.
145. *Id.* at 270.
146. *Id.* at 270-71.

tation has slight expressive value when compared to its potential dangers and therefore punishing such speech does not impinge upon free speech liberties.[147]

Although Ms. Benshoof's speech did not constitute criminal solicitation because she did not urge women to obtain abortions in Guam,[148] even if her speech were scrutinized employing Professor Greenawalt's descriptive categories, it would be considered to constitute protected public ideological solicitation. Clearly, her comments constituted public speech because they were presented to a gathering of the Guam Press Club and therefore were intended to be made known to a substantial audience. Her comments were ideological because they were designed to inform residents of Guam that although Guam had limited the right to an abortion, another state, Hawaii, still afforded women the right to choose to have an abortion. Also, those comments were consistent with a philosophical perspective that is integrated with the social ideology that women are entitled to control their reproductive capacities.

The public interest was not seriously threatened but rather was advanced because the public had a right to receive information pertaining to social and moral issues.[149] Since no crime was encouraged, Ms. Benshoof's speech could not have reasonably contributed to the commission of a specific crime, which would occur in the very near future, through serious encouragement. Moreover, those who disagree with Ms. Benshoof undoubtedly had the opportunity to present their countervailing views. Even if Ms. Benshoof's comments had been made in private, to one person, so as to constitute private ideological solicitation, they would not have been punishable as there would have been no danger, significant or otherwise, to persons or property.[150]

This situation can be analogized to the events in *Texas v. Johnson*.[151] Prior to the flag burning that occurred in *Johnson*, demonstration participants marched through Dallas streets chanting political slogans, stopped at corporations to stage "die-ins" to dram-

147. *Id.* at 264.

148. *See supra* note 73 and accompanying text.

149. *See supra* notes 83 & 87 and accompanying text.

150. Danger to persons is, and should be, limited to persons who already have been born. This Article will not venture into the moral debate, which fuels the abortion controversy, whether a fetus is a person because it is irrelevant to the First Amendment issues presented by prohibiting the solicitation of abortion. *Cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2806 (1992) (although some members of the Court find abortion morally offensive, that sentiment cannot control the Court's decision because its obligation is to define the liberty of all and not to mandate a particular moral code) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

151. 491 U.S. 397 (1989); *see supra* notes 47-58 and accompanying text.

atize the consequences of nuclear war, defaced the walls of buildings, and overturned potted plants.[152] At the conclusion of those activities, Johnson ignited a flag that had been stolen from a flagpole outside one of the targeted buildings.[153] Although no one was physically injured or threatened with injury, several witnesses testified that they had been seriously offended by the flag burning.[154]

The State of Texas not only defended the statute on the grounds that it sought to preserve the flag as a symbol of national unity, it also asserted an interest in preventing breaches of the peace.[155] The Court found that prevention of breaches of the peace was not implicated by the facts in *Johnson*.[156] Also, the Court rejected the State's invitation to assume that every expression of a provocative idea will incite a riot, and concluded that the events surrounding the flag burning did not constitute incitement likely to produce imminent lawless action.[157] Certainly, if the actions of Johnson and the other demonstrators were not likely to result in a riot, and thereby did not constitute incitement likely to result in imminent lawlessness, then Ms. Benshoof's speech, wherein she merely apprised women of where elective abortions remained legal, cannot be prohibited.

Although government can prohibit certain conduct, it cannot punish speech dealing with that conduct. For example, in *Bowers v. Hardwick*[158] the Supreme Court upheld Georgia's sodomy statute, concluding that there was no fundamental liberty interest to engage in consensual homosexual activity. The decision in *Bowers* should be contrasted with the decision of the Tenth Circuit in *National Gay Task Force v. Board of Education of Oklahoma City*,[159] which held that public school teachers cannot be terminated for advocating repeal of the State's sodomy law.[160] The Eighth Circuit's decision in *Gay & Lesbian Students Ass'n v. Gohn*[161] reflects a similar commitment by holding that the Gay and Lesbian Students Association at the University of Arkansas at Fayetteville could not be refused funding

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152. *Johnson*, 491 U.S. at 399. The defendant, Johnson, however, did not participate in the noted activities. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 400.
156. *Id.* at 407-09.
157. *Id.* at 409 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).
158. 478 U.S. 186, 194-95 (1986).
159. 729 F.2d 1270, 1274-75 (10th Cir. 1984), *aff'd per curiam*, 470 U.S. 903 (1985). While finding the proscription against advocating, encouraging, or promoting homosexual activity was overbroad, the court noted that statements "which are aimed at legal and social change, are at the core of First Amendment protections." *Id.* at 1274.
160. *Id.* at 1274-75.
161. 850 F.2d 361 (8th Cir. 1988).

by the Student Senate because of views it espoused regarding homosexuality.[162] By applying the reasoning that government can proscribe particular conduct, but not speech involving that conduct, it follows that the charges brought against Ms. Benshoof violated the First Amendment.[163]

No matter the fate of *Roe*, speech such as that engaged in by Ms. Benshoof cannot be prohibited under *Bigelow v. Virginia*.[164] Bigelow was a director and editor of a weekly Virginia newspaper that published an advertisement from a New York organization that informed readers that abortion remained legal in New York.[165] Criminal charges were brought against Bigelow for violating a Virginia statute that prohibited encouraging or promoting the procurement of an abortion through publication, lecture, advertisement or by the sale or circulation of any publication.[166] The Court concluded that the statute violated the First Amendment, holding that a state cannot prohibit an individual from disseminating information about an activity declared as illegal there, but which is legal in another state.[167] Like Bigelow, Ms. Benshoof merely informed others about where elective abortions continued to be legal. Such speech is therefore protected by the First Amendment.[168] In addition, speech such as

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162. *Id.* at 367-68. In granting the Gay and Lesbian Students Association relief under 42 U.S.C. § 1983, Judge Arnold noted that:

> [S]odomy is illegal in Arkansas. However, the GLSA does not advocate sodomy, and even if it did, its speech about an illegal activity would still be protected by the First Amendment. People may extol the virtues of arson or even cannibalism. They simply may not commit the acts. Thus, we reverse the District Court on the First Amendment issue. Conduct may be prohibited or regulated, within broad limits. But government may not discriminate against people because it dislikes their ideas, not even when the ideas include advocating that certain conduct now criminal be legalized.

Id. at 368.

163. Additional support for the position discussed can be found in Musser v. Utah, 333 U.S. 95 (1948). There, the defendants were convicted of conspiring to commit acts injurious to public morals through their counseling or advising on polygamy. *Id.* at 96 (citing UTAH CODE ANN. § 103-11-1 (1943)). The Court did not address the constitutionality of the statute, but vacated the judgment and remanded the case to the state court to interpret the statute that gave rise to the prosecutions. *Id.* at 95-98. Justice Rutledge, in dissent, would have reversed the convictions and observed that the "extreme position, that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment." *Id.* at 102.

164. 421 U.S. 809 (1975).

165. *Id.* at 811-12.

166. *Id.* at 812-13 (citing VA. CODE ANN. § 18.1-63 (1960)).

167. *Id.* at 824-25.

168. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 507-08, 529 n.3 (1965) (While the

that of Ms. Benshoof is entitled to even greater protection than that in *Bigelow* because her speech was not commercial in nature.[169]

IV. CONCLUSION

The Guam solicitation provision discriminated on the basis of viewpoint because speech that favored the exercise of the option of abortion was prohibited while speech opposing that alternative was not barred. Such discrimination manifested itself in the charges brought against Ms. Benshoof. Besides the fatal viewpoint discrimination, the prosecution of Ms. Benshoof violated the First Amendment, no matter the fate of *Roe*, because: (1) her speech did not constitute incitement likely to result in immediate lawlessness, (2) government cannot punish speech dealing with prohibited conduct, and (3) the First Amendment precludes a jurisdiction from prohibiting the furnishing of information regarding an activity declared as illegal there, but which is legal in another jurisdiction.

Any assertion that the government has a compelling interest in perpetuating the view that abortion is morally wrong should be rejected because the values underlying the First Amendment mandate that the public have suitable access to all information relating to social and moral questions. Because efforts to limit the solicitation of abortion have not been confined to Guam, it is evident that the free speech guarantees of the First Amendment are at substantial risk. To the extent that governments and their leaders may be willing to champion the prohibition of the solicitation of abortion, the First Amendment is in jeopardy of becoming a casualty of the moral debate surrounding abortion. Courts should remain mindful of Justice Kennedy's observation in *Lee v. Weisman* that "[t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry."[170] Hopefully, the values animating the First Amendment will prevail in any future controversies that may arise involving abortion solicitation prohibitions.

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statutes prohibiting the use of contraceptives and the aiding of their use should have been held constitutional, speech or advocacy dealing with contraception, without affirmative conduct directed at violating the statutes, were protected by the First Amendment.) (Black and Stewart, JJ., dissenting).

169. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) (holding that the Constitution accords less protection to commercial speech than other constitutionally safeguarded forms of expression).

170. 112 S. Ct. 2649, 2657 (1992).