Pace Law Review

Volume 16
Issue 2 *Winter 1996*
Tribute--Vincent L. Broderick

Article 11

January 1996

Madsen v. Women's Health Center, Inc.: Protection against Antiabortionist Terrorism

Joanne Neilson

Note

Madsen v. Women's Health Center, Inc.: Protection Against Antiabortionist Terrorism

Introduction

Freedom of speech, although one of the most formidable rights granted by the Constitution, is subject to restrictions when the exercise of one's freedom to speak interferes with the rights of another.[1] In *Madsen v. Women's Health Center, Inc.*,[2] a woman's right to reproductive choice was confronted by freedom of expression as exercised by a group of antiabortionists.[3] The United States Supreme Court upheld parts of a permanent injunction that restricted anti-abortion protesters to a speech-free buffer zone.[4] The Court promulgated a new standard for determining the constitutionality of a speech-limiting injunction: if the injunction is content-neutral[5] and "burden[s] no more speech than necessary to serve a significant government interest," it is not violative of the First Amendment.[6]

Part II of this casenote outlines the case history of speech-limiting injunctions,[7] addresses the violence inherent in the abortion debate.[8] Part III discusses the facts, procedural his-

1. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
2. 114 S. Ct. 2516 (1994).
3. *Id.* at 2523.
4. *Id.* at 2521. The injunction prohibited "pro-lifers" from obstructing access to the clinic and from demonstrating within 36 feet of the Aware Woman Center for Choice. *Id.* at 2522. *See infra* note 132.
5. A content-neutral injunction is one that is granted without reference to the subject of the communication. *Madsen*, 114 S. Ct. at 2523.
6. *Id.* at 2525.
7. *See infra* notes 18-28 and accompanying text.
8. *See infra* notes 97-123 and accompanying text.

tory, and holding of *Madsen*.[9] Part IV addresses the Supreme Court's newly-promulgated standard in light of the case history leading up to its birth, and the violence and unrest spawned by the abortion issue which surrounded it. This part further addresses the questionable necessity of the standard, and whether the Court properly applied this standard to the injunction at issue in *Madsen*. Part V concludes that although the Court failed to implement a tenable standard in *Madsen*, through its holding, it enabled courts to fend off violent antiabortionists with injunctions.

II. Background

A. *The First Amendment*

The United States Constitution guarantees an individual's right to speak freely and express themselves openly.[10] The purpose of the First Amendment is to promote the free exchange of ideas,[11] political discussion,[12] and even to invite dispute.[13] It maintains the ability of citizens to express their views although such espousal of ideas may offend or disturb others.[14]

---

9. *See infra* notes 124-227 and accompanying text.

10. U.S. CONST. AMEND. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

11. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 939-41 (1991) (there are various justifications for the right of free speech, including: preventing government suppression, enhancing self-fulfillment, nurturing self-government, and checking abuse of power by government officials).

12. *See* Cox v. Louisiana, 379 U.S. 536, 552 (1965).

13. *Id.* at 551-52.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)).

14. *See* Texas v. Johnson, 491 U.S. 397 (1989). The Court struck down a state statute forbidding the desecration of the national flag. *Id.* at 419-20. The Court held that a state may not prohibit free expression for fear that the offended audi-

This license, although it provides means through which political, social, and economic change may be achieved, is not an absolute right.[15] Indeed, the Court has found that freedom of speech is "narrower than an unlimited license to talk."[16] Therefore, speech designed to facilitate political discussion is guaranteed the utmost constitutional protection.[17] However, speech in the context of violence,[18] obscenity,[19] defamation,[20] and fighting words,[21] is of "such slight social value as a step to [the] truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[22] Consequently, speech of this type is afforded little, if any, constitutional protection.[23]

---

ence might disturb the peace. *Id.* at 418-20. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

15. NOWAK & ROTUNDA, *supra* note 11, at 942-44. However, it has been argued that the freedom should only be restricted if there is an imminent danger of placing the country in peril. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes expressed that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams*, 250 U.S. at 630.

16. Konigsberg v. State Bar of California, 366 U.S. 36, 50 (1961).

> On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Id. at 50-51 (footnote and citations omitted).

17. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980).

18. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).

19. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (citing Roth v. United States, 354 U.S. 476 (1957)).

20. *Id.* (citing Beauharnais v. Illinois, 343 U.S. 250 (1952)).

21. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

22. *Chaplinsky*, 315 U.S. at 572.

23. *Id.*

B. *Restrictions on Free Speech*

Although it is true that various forms of speech and expression are valued at different levels,[24] thereby affording degrees of protection to each,[25] even the most highly revered speech may be subjected to restraint.[26] Constitutionally protected speech, such as speech designed to facilitate political discussion, may interfere with other constitutional guarantees in the way the message is expressed; in those instances, regulations are sometimes promulgated to ensure that the expression of ideas does not infringe upon those rights.[27] Restrictions on free speech may be promulgated by the federal, state, or local governments and are subject to judicial scrutiny if constitutionally challenged.[28] There are several factors that the Court must employ in determining the validity of a speech-restricting enactment.[29]

1. *Content-Based / Content-Neutral Distinction*

a. *Content-Based Restrictions*

The primary inquiry the Court will make in determining an enactment's constitutionality is whether the law is content-based or content-neutral.[30] A content-based regulation prohibits speech based upon the content or subject matter of the speech.[31] Any enactment that is content-based is held to a standard of strict scrutiny — the regulation must be necessary to serve a compelling state interest and must be narrowly drawn

24. *See R.A.V.*, 505 U.S. at 382-83.

25. *Id.*

26. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

27. *Konigsberg*, 366 U.S. at 50. These regulations may be justified if speech subordinates valid governmental interests. *Id.* at 50-51.

28. *Id.*

29. *See* NOWAK & ROTUNDA, *supra* note 11, at § 16.45-16.48. The factors used in evaluating speech restrictions are: 1) whether the restriction is content-based or content-neutral; 2) where the speech is taking place; and 3) whether the restriction is a statute or injunction. NOWAK & ROTUNDA, *supra* note 11, at § 16.45-16.48.

30. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994); Turner Broadcasting Sys., Inc. v. F.C.C., 114 S. Ct. 2445 (1994); International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711 (1992); Rust v. Sullivan, 500 U.S. 173 (1991); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

31. *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992); International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2711 (1992); United States v. Kokinda, 497 U.S. 720 (1990); Ward v. Rock Against Racism, 419 U.S. 781 (1989); Boos v. Barry, 485 U.S. 312 (1988).

to achieve that end.[32] The First Amendment is adverse to proscribing speech or expressive conduct because of disapproval of the message communicated and, therefore, content-based regulations are presumptively invalid.[33]

In *Boos v. Barry*,[34] the United States Supreme Court held that a statute prohibiting the display of signs critical of a foreign government within five hundred feet of that government's embassy was unconstitutional.[35] Restrictions on public issue picketing must be strictly scrutinized because "the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open . . . .' "[36] The fact that the statute sought to restrict speech in a traditional public forum for assembly and expression — the public street — further lessened the likelihood of it being upheld.[37] The Court held that the government's power to restrict such protected speech was "very limited."[38]

In the event the government determines that an entire class of speech is impermissible, resulting in the prohibition of its expression, that prohibition is deemed to be content-based.[39] To determine if a content-based restriction on protected speech is constitutional, the Court applies the following test: if the state can show that the regulation is necessary to serve a compelling state interest, and the regulation is narrowly drawn to achieve that end, it will survive in accordance with the First

---

32. *See Perry*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

33. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). The Court found that there were limited areas in which speech regulations based on content were permissible, such as fighting words, defamation and obscenity. *Id.* at 382-83.

> [T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id. at 383-84 (emphasis in original).

34. 485 U.S. 312 (1988).

35. *Id.* at 317-18.

36. *Id.* at 318 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

37. *Id.* at 318.

38. *Id.* (citing United States v. Grace, 461 U.S. 171, 177 (1983)).

39. Boos v. Barry, 485 U.S. 312, 319 (1988).

Amendment.[40] In applying this standard to the facts in *Boos*, the Court concluded that there was no compelling interest in preserving the dignity of foreign officials.[41] Thus, the Court held that the statute unconstitutional.[42]

b. *Content-Neutral Restrictions*

Content-neutral restrictions, conversely, are justified without reference to the message the expression conveys.[43] A content-neutral restriction will be considered valid if it is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information."[44] The most common type of content-neutral regulations are those reasonably restricting the time, place or manner of the expression.[45]

Time, place, and manner restrictions seek to limit when, where, and how expression takes place, but not the content of that expression.[46] In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[47] the United States Supreme Court defined the elements of a valid time, place, and manner restriction.[48] First, the regulation must be content-neutral, as discussed above.[49] Second, the regulation must be "narrowly tailored to serve a significant government interest."[50] Finally, the regulation must leave open ample alternatives for communication.[51] In promulgating these factors, the Court has held that even constitutionally protected speech may inflict unwanted intrusion into the general public's senses.[52]

---

40. *Id.* at 321 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

41. *Id.* at 322.

42. *Id.* at 321.

43. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

44. *Id.*

45. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 3.02[3] (1994).

46. *Id.*

47. 460 U.S. 37 (1983).

48. *Id.* at 45.

49. *Id.*

50. *Id.*

51. *Id.*

52. Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding that a guideline limiting the volume of music coming from a bandshell was constitutional). The main inquiry in determining a regulation's validity is its content-neutrality. If

2. *Location of Speech*

a. *The Public Forum*

Where the expressive conduct takes place is a determinative factor in assessing the constitutionality of a speech-limiting enactment.[53] While restricting speech on private property may be valid,[54] the same restriction on a public street may be invalid.[55] *Perry* defined the traditional public forum as "[a] place[ ] which by long tradition or by government fiat [has] been devoted to assembly and debate,"[56] and where "the rights of the State to limit expressive activity are sharply circumscribed."[57] The public street is such a forum.[58] Thus, to restrict a constitutionally protected form of speech on the public street, the content-neutral regulation must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[59]

b. *The Captive Audience*

People have a duty to "avert their eyes" if offended by a constitutionally protected form of speech.[60] However, a special problem is presented when the audience is captive.[61] When a person is confronted with a message she finds offensive in her own home, she has a right to proscribe it.[62] When the speech is technically taking place in a traditional public forum, such as the street and sidewalk in front of a residence, the question of

---

the regulation is not content-neutral, it is likely to be found unconstitutional on its face. *Id.* at 791-92.

53. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

54. *See* Frisby v. Schultz, 487 U.S. 474 (1988).

55. *Id.*

56. *Perry*, 460 U.S. at 45. The Court also described other types of public fora: 1) where the state opened an area "for use by the public as a place for expressive activity"; and 2) public property which is neither a traditional nor designated forum for expression. *Id.* at 45-46.

57. *Id.* at 45.

58. *Id.* The streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

59. *Perry*, 460 U.S. at 45 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981) (citations omitted)).

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

61. *See* SMOLLA, *supra* note 45, at § 3.05[2].

62. SMOLLA, *supra* note 45, at § 3.05[2].

how to maintain the freedom of speech while preserving the right to privacy becomes less clear.[63]

Offensive or coercive expression, directed at a person in the privacy of his or her own home, may be subject to limitation.[64] In *Frisby v. Schultz*,[65] the Court upheld an ordinance prohibiting targeted picketing of an individual's home.[66] Taking into account the fact that public streets are considered a traditional public fora,[67] and any restrictions on speech taking place in such surroundings must be judged against stringent standards (i.e., demonstrating that the regulation is narrowly drawn to serve a significant governmental interest), the Court determined that the ordinance was in harmony with the First Amendment.[68]

The Court relied upon the factors set forth in *Perry* to determine the constitutional feasibility of the ordinance. The Court examined the purpose of the restriction and held that the ordinance was content-neutral because it banned only picketing targeted at someone's home, not the message the expression conveyed.[69] Secondly, the Court analyzed whether the ordinance was narrowly tailored to serve a significant government interest.[70] In *Frisby* the compelling government interest was to protect residential privacy and tranquility.[71] The Court held that the government may protect this freedom[72] and "individuals are not required to welcome unwanted speech into their own homes."[73] The Court found the ordinance to be narrowly drawn because picketing and marching, in general, were not prohibited.[74] Finally, the Court addressed the concern of whether ample alternatives of communication were left open in the wake of the statute.[75] Because the prohibition of picketing aimed at

63. SMOLLA, *supra* note 45, at § 3.05[2].
64. Frisby v. Schultz, 487 U.S. 474 (1988).
65. *Id.*
66. *Id.* at 488.
67. *Id.* at 481.
68. *Id.* at 481, 488.
69. *Frisby*, 487 U.S. at 486-87.
70. *Id.* at 484.
71. *Id.* at 484-85.
72. *Id.* at 485.
73. *Id.*
74. *Frisby*, 489 U.S. at 486-88.
75. *Id.* at 488.

someone's home did not eliminate the possibility of groups or individuals expressing their views in residential neighborhoods altogether, ample alternatives existed.[76] In *Frisby*, the Court achieved a synergy between freedom of speech and the right to privacy, exemplifying the ideal that rights guaranteed by the Constitution can co-exist.

C. *Protests and Violence*

Just as obscene or threatening expression can be governmentally regulated, so can certain forms of protests. Protests, through such means as picketing, sit-ins, boycotts, and pamphleteering, have been fundamental in facilitating change. Instances of violence, however, may result in lowering the value of the message involved.[77] Consequently, certain time, place, and manner restrictions may be placed on the otherwise constitutionally sanctioned expression.[78] These instances, however, have been found to be "special [and] limited."[79]

In *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*,[80] a union dispute with a dairy company, over a distribution system, culminated in various interferences with the company's activities.[81] The union engaged in "peaceful picketing" in front of stores that carried the company's products, but also employed violent tactics.[82] The Court upheld an injunction that re-

---

76. *Id.* at 487.

77. *See generally* SMOLLA, *supra* note 45, at § 5.01[2][a][i].

78. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); Frisby v. Schultz, 487 U.S. 474 (1988); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Milk Wagon Drivers Union v. Meadowmoor Dairies Inc., 312 U.S. 287 (1941).

79. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968).

80. 312 U.S. 287 (1941).

81. *Id.* at 291.

82. *Milk Wagon Drivers*, 312 U.S. at 291-92.

> Besides peaceful picketing of the stores handling Meadowmoor's products, the master [judge] found that there had been violence on a considerable scale. Witnesses testified to more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and

strained all picketing activities, both violent and peaceful, because "[t]he picketing . . . was set in a background of violence."[83] The Court held that where picketing is set "in a background of violence" it could reasonably be concluded that although future picketing could be wholly peaceful, the fear of past violence will survive.[84] Emphasizing that a state may not enjoin peaceful picketing "merely because it may provoke violence in others,"[85] the Court limited the scope of the restriction, holding that where violence gave picketing a coercive effect "whereby it would operate destructively as force and intimidation," a state court may design an injunction prohibiting picketing only as long as it counteracts continuing intimidation.[86] The Court emphasized that in cases where restraint is warranted, any injunctive relief should be defined by clear and guarded language.[87]

In *N.A.A.C.P. v. Claiborne Hardware Co.*,[88] the black citizens of Claiborne County, Mississippi, boycotted white merchants in response to unheard demands for racial equality.[89] The merchants brought an action for injunctive relief and damages against the N.A.A.C.P.[90] The Court held that "offensive" and "coercive" speech is protected by the First Amendment.[91] It further noted that "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means."[92] The act of peaceful pamphleteering, in an effort to inform the public, is communication protected by the First Amendment.[93] "The

---

severely beaten about the head while being told "to join the union"; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and driver.

Id.

83. *Id.* at 294.

84. *Milk Wagon Drivers*, 312 U.S. at 294. "In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." *Id.*

85. *Id.* at 296.

86. *Id.* at 298.

87. *Id.*

88. 458 U.S. 886 (1982).

89. *Id.* at 888.

90. *Id.* at 889-90.

91. *Id.* at 911.

92. *Id.* at 933.

93. *Claiborne Hardware*, 458 U.S. at 910-11 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment."[94] However, the Court recognized that there may be "narrowly defined instances" justifying the government's regulation of protected speech.[95]

As the above cases illustrate, the Court has traditionally taken a strict position in making speech restrictions as narrow and precise as possible to preserve fundamental First Amendment protection. Therefore, even where other rights guaranteed by the Constitution are infringed upon, the Court is reluctant to restrain the reach of the First Amendment. However, where the Court finds lives endangered, it is willing to uphold regulations designed to protect this country's citizens.[96]

D. *Abortion Battles*

Violent opposition to the legalization of abortion, from harassment of patients to murdering of doctors,[97] has resulted in

---

94. *Id.* at 911 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

95. *Id.* at 912. "A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." *Id.* (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (citations omitted)).

96. *Claiborne Hardware*, 458 U.S. at 916-17.

97. The violence at abortion clinics and reproductive health care centers has ranged from arson to murder. Laurie Goldstein & Pierre Thomas, *Clinic Killings Follow Years of Antiabortion Violence*, THE WASH. POST, Jan. 17, 1995, at A1. According to the records compiled by the Bureau of Alcohol, Tobacco & Firearms (ATF) and clinics, "the tally of violence over the past twelve years includes 123 cases of arson, 37 bombings in 33 states, and more than 1500 cases of stalking, assault, sabotage and burglary." *Id.* In 1994 alone, one doctor, his security escort, and two clinic receptionists were shot to death. *Id.* As a result of this violence, abortion doctors have been forced to wear bullet-proof vests; some have been compelled to carry weapons. *Slaying Has Abortion Providers Up in Arms — Literally,* N.Y. TIMES, March 12, 1993, at A16. The slaying referred to in the title is that of Dr. David Gunn, who was slain outside the clinic at which he performed abortions. *Id.* The next year, Dr. John Britton and his security escort, Air Force Lt. Col. James Barrett were shot and killed outside of the same clinic. Kathy Sawyer, *Turning From "Weapon of the Spirit" to the Shotgun*, THE WASH. POST, Aug. 7, 1994, at A1. On July 29, 1994, Dr. John Britton, an abortion provider, was shot and killed in front of the clinic where he worked. Convicted of the 1994 murders in Pensacola, Florida is ex-minister Paul Hill, a known opponent to abortion rights, who frequently protested at this clinic. Finally, in Brookline, Massachusetts, two

various organizations, abortion providers, and woman's rights supporters choosing to fight back in the courtroom.[98] The judicial remedies used to alleviate these occurrences have ranged from fines and injunctive relief to criminal prosecution.[99] Although the courts have striven to maintain peace in the area of the abortion clinics, they have continuously struggled to achieve a balance between the right of abortion doctors, staff and patients to a safe environment, and the right of abortion protesters to express their views.[100]

1. *The Courts*

In *Frisby v. Schultz*,[101] picketing targeted at the home of a local doctor who performed abortions resulted in an ordinance prohibiting such tactics.[102] Although the activities engaged in by the protesters were generally peaceful, they had spent over an hour picketing in front of the doctor's residence, on at least six occasions, in groups ranging from eleven to over forty people.[103] The antiabortionists brought suit to enjoin the enforcement of the ordinance.[104] However, the Court found that such exclusive attention directed at one person in his home rendered him captive to the message being expressed, thereby warranting the ordinance.[105]

---

abortion clinic receptionists were shot to death in December 1994. Goldstein & Thomas, at A1.

98. *See* Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992) (the plaintiff attempted to use a civil rights conspiracy statute against abortion protesters); Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991) (discussing an action for trespass and interference with contract); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) (the court granted permanent injunctive relief against blockade of abortion clinics).

99. *See, e.g., Lucero*, 954 F.2d 624; Roe v. Operation Rescue, 919 F.2d 857.

100. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993); and National Organization for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994).

101. 487 U.S. 474 (1988).

102. *Id.* at 476. The ordinance, implemented in 1985, made it unlawful for any person to engage in picketing before or about the residence of any individual. *Id.* at 477.

103. *Id.* at 476.

104. *Id.* at 477.

105. *Frisby*, 487 U.S. at 486-88.

In *Bray v. Alexandria Women's Health Clinic*,[106] abortion clinics attempted to invoke the Ku Klux Klan Act[107] to prevent anti-abortion demonstrations from being conducted in the Washington, D.C. metropolitan area.[108] Operation Rescue had repeatedly performed " 'rescue' operations that violate[d] local law and harm[ed] innocent women."[109] The militant group had engaged in such "malicious conduct" as "defacing clinic signs, damaging clinic property, and strewing nails in clinic parking lots and on nearby public streets."[110] The theory of the abortion rights supporters in this action was that by conducting such demonstrations, the abortion protesters were conspiring to deprive women of their right to interstate commerce.[111] The Supreme Court found, however, that the Ku Klux Klan Act did not provide a federal claim against persons blocking clinic access.[112]

In *National Organization for Women, Inc. v. Scheidler*,[113] women's rights organizations and abortion clinics successfully argued that the Racketeer Influenced and Corrupt Organizations Act (hereinafter R.I.C.O.)[114] could be applied to certain an-

---

106. 113 S. Ct. 753 (1993).

107. 42 U.S.C. § 1985(3) (West 1996).

108. *Bray*, 113 S. Ct. at 758. 42 U.S.C. § 1985(3) (West 1996) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against one or more of the conspirators.

Id. at 758 n.1.

109. *Id.* at 780 (Stevens, J., dissenting).

110. *Id.* at 781.

111. *Id.*

112. *Bray*, 113 S. Ct. at 758. For further discussion of *Bray*, see Lisa J. Banks, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449 (1994); Randolph M. Scott-McLaughlin, *Operation Rescue Versus a Woman's Right to Choose: A Conflict Without a Federal Remedy?*, 32 DUQ. L. REV. 709 (1994).

113. 114 S. Ct. 798 (1994).

114. 18 U.S.C.A. § 1962 (West 1984). R.I.C.O. states as follows:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a prin-

tiabortion groups.[115] The complaint alleged that the defendants were "members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity"[116] and that they conspired to use force, violence, or fear to induce clinic workers to give up their jobs, doctors to give up their right to practice medicine, and patients to forego medical services at the clinic.[117] The Court held that if the plaintiffs could prove the defendants "conducted the enterprise through a pattern of racketeering activity," they could maintain the action.[118]

2. *The Legislature*

Although the battle lines of the abortion debate have been drawn primarily in the courtrooms,[119] the common law has not effectively deterred the violence occurring at the clinics.[120] In

---

cipal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds if such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through the collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Id.

115. *Scheidler*, 114 S. Ct. at 802-03.

116. *Id.* at 801.

117. *Id.* at 801-02.

118. *Id.* at 806.

119. *See supra* note 98 and accompanying text.

120. According to the House Report released with the passing of the Freedom of Access to Clinic Entrances Act of 1994, "[t]he laws currently in place at the Federal, state, and local level have proven inadequate to prevent the violent conduct . . ." at the clinics. H.R. REP. No. 306, 103d Cong., 1st Sess. 10 (1994).

> State and local law enforcement authorities have failed to address effectively the systematic and nationwide assault that is being waged against health care providers and patients. Enforcement of local laws such as trespass, vandalism and assault have proven inadequate. In some localities, local authorities have refused to act. In others, they have been unable to do so effectively, which is due partially to the inherent inability of state law to

response to the continued violence at reproductive health centers and clinics, Congress passed the Freedom of Access to Clinic Entrances Act of 1994 (hereinafter F.A.C.E.).[121] The Act established penalties for interference, use of threats, or other antagonistic activities directed at clinics.[122] The F.A.C.E. Act also allows injunctive relief as a civil penalty.[123] Thus, court-issued injunctions have become the most effective means to stop the violence and ensure the right of women to choose abortions.

---

deal with interstate law enforcement issues. In addition, state and local criminal law is often unable to provide effective deterrence.

Id.

121. 18 U.S.C.A. § 248 (West 1994). The legislative history outlines the following statistical information regarding the unrest at abortion clinics from 1977 to 1993: 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, 327 clinic "invasions," and 1 murder. H.R. REP. No. 306, *supra* note 120, at 6-7.

122. *See* H.R. REP. No. 306, *supra* note 120, at 6-7. The F.A.C.E Act provides:

> (a) Prohibited activities. —Whoever—
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.
>
> (b) Penalties. —Whoever violates this section shall—
>
> (1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and
>
> (2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than [three] years, or both . . . .

18 U.S.C.A. § 248 (West 1994).

123. 18 U.S.C.A. § 248(c)(1)(B) (West 1994). *See supra* notes 101-02. 18 U.S.C.A. § 248 (c)(1)(B) (West 1994) provides for civil penalties:

> In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

Id.

III. *Madsen v. Women's Health Center, Inc.*

A. *Facts*

The petitioners in *Madsen v. Women's Health Center, Inc.*[124] were members of Operation Rescue America (hereinafter Operation Rescue), a group whose goal is to close down abortion clinics throughout the country.[125] The Aware Woman Center for Choice, operated by the Women's Health Center, Inc., a women's health care clinic, provided abortions and counseling to its clients.[126] Members of Operation Rescue engaged in picketing and demonstrations in front of and around the clinic, essentially blocking the entrance to the clinic.[127]

The members of Operation Rescue were extremely open about their intent to have the clinics incapacitated.[128] They stated to the press that they intended to shut down a clinic.[129] The literature of the organization stated that "their members should ignore the law of the State and the police officers who remove them from their blockading positions."[130] Women's Health Center, Inc., brought an action for injunctive relief prohibiting Operation Rescue members from engaging in these activities.[131]

B. *Procedural History*

In September 1992, a Florida trial court issued a permanent injunction that imposed several general restrictions on Operation Rescue, including those that would prevent the group from blocking the clinic entrance and physically abusing people trying to gain access to clinics located in Brevard and Seminole County, Florida.[132] However, six months later the hazardous

124. 114 S. Ct. 2516 (1994).

125. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 666 n.2 (Fla. 1993), *aff'd in part sub nom.*, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994).

126. *Operation Rescue*, 626 So. 2d at 666.

127. *Id.* at 667.

128. *Id.* at 666-67 n.3.

129. *Id.*

130. *Id.*

131. *Operation Rescue*, at 666.

132. *Id.* at 666-67. The injunction contained the following restrictions:

A. Respondents, OPERATION RESCUE . . . are hereby enjoined from:

conditions at the clinic continued.[133] The trial court found that the injunction did not prevent Operation Rescue from impeding access to the Aware Woman Center for Choice; groups ranging from "a handful to a crowd of four hundred"[134] would picket at the entrance to the clinic's driveway, causing congestion and hindering patients' access to the clinic.[135] The group would also sing and chant, occasionally using bullhorns.[136]

The harassment was not limited to the clinic grounds.[137] The trial court also found that members of Operation Rescue would approach the "private residences or temporary lodging places of clinic employees," tormenting the employees, as well as their children.[138] They would ring the doorbell of an employee's neighbor, providing literature calling the employee a "baby killer."[139] Group members would stalk patients and staff members as they left the clinic and would also trace the license plate numbers of patients to gain their home addresses and subsequently contact them.[140] Most significantly, the anti-abortion group had threatened violence "against Clinic patients, employees, and staff."[141]

---

1. trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;

2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,

3. attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

B. Nothing in this Court's Order should be construed to limit [Operation Rescue's] exercise of [its] legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate [paragraphs] 1, 2, and 3 above . . . .

Id. at 667 n.4.

133. *Id.* at 667.

134. *Id.*

135. *Id.*

136. *Operation Rescue*, 626 So.2d at 667.

137. *Id.* at 668.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Operation Rescue*, 626 So. 2d at 668. The trial court documented these incidents: "On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, 'I pray that God strikes you dead now!' " *Id.*

The trial court found that as a result of these activities, patients would experience greater hypertension and anxiety, causing them to require more sedation, increasing the risks already attendant to an abortion procedure.[142] The trial court also had evidence that the noise outside the clinic would cause more stress in the patients during surgery and while they recuperated.[143] Furthermore, patients who were intimidated by the antiabortionists would postpone the procedure until a later date, also aggravating any existing risk associated with an abortion.[144] Thus, the trial court amended the general restrictions to prohibit specific acts engaged in by Operation Rescue.[145]

> On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

Id.

142. *Id.*

143. *Id.*

144. *Operation Rescue*, 626 So.2d at 668-69.

145. *Id.* at 669. The amended injunction prohibited Operation Rescue from engaging in the following acts:

> (1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice . . .
> (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.
> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six [sic] (36) feet of the property line of the Clinic . . . . An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east . . . . The respondents must remain at least five [sic] (5) feet from the Clinic's east line . . . .
> (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.
> (5) At all times on all days, in an area within three hundred [sic] (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [members of Operation Rescue] . . . .
> (6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three hundred [sic] (300) feet of the residence of any of the [Clinic's] employees staff, owners or agents, or blocking or attempting to

Operation Rescue brought suit in the Florida Supreme Court,[146] challenging the constitutionality of the injunction, and alleging that it violated the First Amendment. In *Operation Rescue*, the Florida Supreme Court, finding that the injunction met the "reasonableness test" for technical validity,[147] and that the injunction was content-neutral,[148] upheld the injunction.[149] However, in *Cheffer v. McGregor*,[150] a case challenging the same injunction, the United States Court of Appeals for the Eleventh Circuit struck it down.[151] The United States Supreme Court granted certiorari to settle the apparent dispute between the Florida Supreme Court and the Court of Appeals over the injunction's constitutionality.[152]

C. *The Opinions*

1. *The Majority Opinion*

The United States Supreme Court[153] began its analysis by finding that the Florida Supreme Court injunction was not content- or viewpoint-based, even though it applied only to the ex-

---

block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [Clinic's] employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the streets on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the . . . Clinic or trying to gain access to, or leave, any of the homes of owners, staff, or patients of the Clinic.

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the . . . Clinic.

Id.

146. *Id.* at 666.

147. *Id.* at 670.

148. *Operation Rescue*, 626 So.2d at 671.

149. *Id.* at 676.

150. 6 F.3d 705 (11th Cir. 1993).

151. *Id.* at 712.

152. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523 (1994).

153. Chief Justice Rehnquist wrote the majority opinion joined by Justices Blackmun, O'Connor, Souter and Ginsberg. *Id.* at 2520.

pression of abortion protesters.[154] The Court stated that: 1) injunctions apply only to particular groups or individuals and regulate activities or speech of groups; 2) injunctions are a result of the group's past actions as a result of a dispute; and 3) parties seeking an injunction assert a violation of their rights. The court hearing the action is charged with fashioning a remedy for a specific deprivation, not with drafting a statute aimed at the general public.[155] Injunctions "by [their] very nature, appl[y] only to a particular group (or individuals) and regulate[ ] the activities, and perhaps the speech, of that group."[156] Injunctions have this function "because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights . . . ."[157]

The Court found the injunction to be content-neutral because it was not aimed at the message, but the conduct of the petitioners.[158] The Court analyzed the injunction by determining whether the speech regulation was adopted "without reference to the content of the regulated speech."[159] The purpose of the injunction was then examined.[160] The fact that the petitioners shared the same viewpoint regarding abortion did not demonstrate that the issuance of the order was motivated by some invidious content- or viewpoint-based purpose.[161] "In short, the fact that the injunction covered people with a particular viewpoint [did] not itself render the injunction content- or viewpoint-based."[162]

The Court went on to address the differences between an injunction and a statute.[163] A statute is a legislative choice regarding promotion of particular societal interests.[164] Thus, the

154. *Id.* at 2524 (noting Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)).
155. *Id.* at 2523.
156. *Id.*
157. *Madsen*, 114 S. Ct. at 2523.
158. *Id.* at 2523-24.
159. *Id.* at 2523 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
160. *Id.* at 2523-24.
161. *Id.* at 2524.
162. *Madsen*, 114 S. Ct. at 2524 (citing Boos v. Barry, 485 U.S. 312 (1988)).
163. *Id.*
164. *Id.*

standard for determining its constitutionality would be whether the time, place, and manner regulation was "narrowly tailored to serve a significant governmental interest."[165] By contrast, injunctions "are remedies imposed for violations (or threatened violations) of a legislative or judicial decree."[166] The Court stated that "[i]njunctions also carry greater risks of censorship and discriminatory application than do general ordinances."[167] There is a distinct advantage to injunctions: "they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred."[168]

The Court's evaluation of the inherent contrast between statutes and injunctions resulted in the Court requiring a somewhat more stringent application of general First Amendment principles in this context.[169] Usually, in evaluating speech-restricting injunctions, the Court has relied upon "such general principles while also seeking to ensure that the injunction was no broader than necessary to achieve its desired goals."[170]

> Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, 'that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs.'[171]

Thus, the Court required the injunction to meet the following standard: the injunction must not burden more speech than necessary to serve a significant government interest.[172]

Chief Justice Rehnquist discussed each contested provision of the injunction to see if it burdened more speech than neces-

---

165. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

166. *Id.* (citing United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953)).

167. *Madsen*, 114 S. Ct. at 2524. " '[T]here is no more effective practical guaranty [sic] against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.' " *Id.* (quoting Railway Express Agency, Inc. v. N.Y., 336 U.S. 106, 112-13 (1949)).

168. *Id.* (citing United States v. Paradise, 480 U.S. 149 (1987)).

169. *Id.* at 2525.

170. *Id.* (citing Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968)).

171. *Madsen*, 114 S. Ct. at 2525 (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

172. *Id.*

sary to accomplish its goal.[173] The Court first addressed the thirty-six foot buffer zone, which prohibited the petitioners from "congregating, picketing, patrolling, demonstrating or entering any portion of the public right-of-way or private property within [thirty-six] feet of the property line of the clinic . . . ."[174] The speech-free buffer zone required the petitioners to move to the other side of the street across from the clinic, and away from its driveway,[175] since the petitioners "repeatedly had interfered with the free access of patients and staff."[176] However, the buffer zone also included private property to the north and west of the clinic.[177]

The Court distinguished between the buffer zone's application to the clinic property and the public property.[178] The Court emphasized the difference between "focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation."[179] In this case, the picketing was aimed directly at clinic patients and staff; the purpose of the injunction was to protect their ability to gain access to the clinic.[180] In light of the interests involved, the Court held that the thirty-six foot buffer zone burdened no more speech than necessary to accomplish the governmental interest.[181]

In respect to the buffer zone around the private property, the Court took a different stance, characterizing it as extreme.[182] The Court stated that there was no evidence to prove petitioners, standing on private property, had obstructed access

173. *Id.* at 2526-30.
174. *Id.* at 2526.
175. *Id.*
176. *Madsen*, 114 S. Ct. at 2526.
177. *Id.* at 2527.
178. *Id.*
179. *Id.* at 2527 (citing Frisby v. Schultz, 487 U.S. 474, 486 (1988)).
180. *Id.* The Court stressed the fact that "Dixie Way [was] only 21 feet wide in the area of the clinic." *Madsen*, 114 S. Ct. at 2527. In light of the failure of the first injunction, it was unrealistic to allow the petitioners to stand on the sidewalk and driveway of the clinic. *Id.* It had also been established at the evidentiary hearing at the trial level that the buffer zone was narrow enough to place the petitioners only 10 to 12 feet from the cars approaching and leaving the clinic. *Id.* Protesters could still be seen and heard from the clinic parking lot. *Id.*
181. *Madsen*, 114 S. Ct. at 2527.
182. *Id.* at 2528.

to the clinic.[183] Thus, it was held that this provision "burden[ed] more speech than necessary to protect access to the clinic."[184]

The Court next addressed the "noise restriction" and "images observable" provision of the injunction.[185] The Court considered the place to which the restriction applied and expressed the importance of noise control around "hospitals and medical facilities during surgery and recovery periods . . . ."[186] Hospitals are places where the ailing are treated and where " 'pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.' "[187] Thus, the Court held that the limited noise restriction burdened no more speech than necessary "to ensure the health and well-being of the patients at the clinic."[188] However, the Court held the "images observable" provision of the injunction to be unconstitutional.[189] Although threats to patients were clearly proscribable under the First Amendment, a blanket ban on all displays was too broad to achieve its purpose of limiting the patients' anxieties.[190] Stating that it "is much easier for the clinic to pull its curtains than for a patient to stop up her ears . . . ," the Court invalidated the "images observable" provision.[191]

Similarly, the Court invalidated a provision that prevented the petitioners from approaching any person seeking the clinic's services within 300 feet of the clinic, unless that person indicated a desire to communicate.[192] Although the state had a le-

183. *Id.*

184. *Id.*

185. *Id.* This provision of the injunction restrained the petitioners from "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic" from 7:30 a.m. through noon, between Monday and Saturday. *Id.*, 114 S. Ct. at 2528.

186. *Madsen*, 114 S. Ct. at 2528.

187. *Id.* (quoting NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783-84, n.12 (1979) (citation omitted)).

188. *Id.* "The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Id.*

189. *Id.* at 2528-29.

190. *Madsen*, 114 S. Ct. at 2529.

191. *Id.*

192. *Id.*

gitimate interest in protecting clinic patients and staff from being stalked, a prohibition on all uninvited approaches could not be justified.[193] The Court stated that without evidence that the petitioners' speech was independently proscribable, or was "so infused with violence as to be indistinguishable from a threat of physical harm. This provision [could not] stand."[194] The provision, therefore, burdened more speech than necessary to serve a governmental interest in preventing intimidation and ensuring access to the clinic.[195]

The Court finally addressed the regulation relating "to a prohibition against picketing, demonstrating, or using sound amplification equipment within [300] feet of the residences of the clinic staff."[196] The Court, while upholding the validity of the noise restriction, invalidated the picketing aspect of the injunction.[197] The Court found the 300 foot zone to be too broad.[198] Had the restriction been limited to targeted picketing, it would have been sufficient to accomplish the desired result.[199]

2. *Justice Stevens, Concurring in Part and Dissenting in Part*

Justice Stevens joined the Court's view in upholding the thirty-six foot buffer zone around the clinic and the Court's treatment of the noise and images observable provision.[200] However, he disagreed with the Court's treatment of the 300 foot buffer zone around the clinic and residential properties.[201] Justice Stevens believed that injunctive relief should have been judged by a less stringent standard than legislation.[202] Legisla-

193. *Id.*

194. *Id.* (citing Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292-93 (1941)).

195. *Madsen*, 114 S. Ct. at 2529. The Court also stated, "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

196. *Id.*

197. *Id.* at 2530.

198. *Id.*

199. *Madsen*, 114 S. Ct. at 2530.

200. *Id.*

201. *Id.*

202. *Id.* at 2531.

tion, he reasoned, applies to the entire community, "regardless of individual culpability," while "injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty — the normal consequence of illegal activity."[203] Thus, while a statute prohibiting demonstrations within thirty-six feet of the clinic would probably violate the First Amendment, an injunction "directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional."[204]

Justice Stevens addressed "two obvious dimensions" of the standard governing injunctions: 1) it should be no more burdensome that necessary to provide complete relief;[205] and 2) "the remedy must include appropriate restraints on 'future activities both to avoid a recurrence of the violation and to eliminate its consequences.' "[206] Justice Stevens observed that the petitioners had repeatedly and tortiously violated an earlier injunction. Thus, the injunction is "twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts."[207]

Justice Stevens then addressed paragraph five of the trial court's injunction, which prohibited members of Operation Rescue from approaching individuals seeking the Clinic's services.[208] Justice Stevens disagreed with the Court finding this clause to be constitutionally impermissible, stating that it did not prohibit speech but a "species of conduct,"[209] that being the approach of the petitioners toward the patients, without their

---

203. *Id.*

204. *Madsen*, 114 S. Ct. at 2531.

205. *Id.* (citing Califano v. Yamanski, 442 U.S. 682 (1979)). "In a First Amendment context . . . the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence. For this reason, standards fashioned to determine the constitutionality of statutes should not be used to evaluate injunctions." *Id.*

206. *Id.* (quoting Nat'l Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697-98 (1978)).

207. *Id.* at 2532.

208. *Madsen*, 114 S. Ct. at 2532.

209. *Id.*

consent and in an intimidating manner.[210] While he acknowledged the idea that "sidewalk counseling" is protected by the First Amendment, Justice Stevens argued that it "does not encompass attempts to abuse an unreceptive or captive audience, at least under the circumstances of this case."[211]

Justice Stevens argued that the "physically approaching" prohibition was "no broader than the protection necessary to provide relief for the violations . . . ."[212] He noted that this portion of the injunction was drafted to protect the clinic patients and staff from being stalked.[213] Justice Stevens concluded that the prohibition against physically approaching anyone seeking the services of the clinic was constitutionally permissible and, therefore, should have been upheld.[214]

3. *Justice Scalia, Concurring in the Judgment in Part and Dissenting in Part*

Justice Scalia,[215] in direct contrast to Justice Stevens' opinion, maintained that the injunction in *Madsen v. Women's Health Center Inc.* was content-based.[216] Justice Scalia challenged the "brand-new for this abortion-related case" standard promulgated by the Court, calling it "intermediate-intermedi-

---

210. *Id.* Justice Stevens again quoted the injunction, which forbade Operation Rescue to "encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." *Id.*

211. *Id.* at 2533. "One may register a public protest by placing a vulgar message on his jacket and, in so doing, expose unwilling viewers . . . . Nevertheless, that does not mean that he has an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services." *Id.* (citation omitted).

212. *Madsen*, 114 S. Ct. at 2533.

213. *Id.*

214. *Id.*

215. Justice Scalia was joined in his dissent by Justices Thomas and Kennedy. *Id.* at 2539.

216. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). "Because I believe that the judicial creation of a 36-foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with our First Amendment precedents and traditions, I dissent." *Id.* at 2535.

ate" scrutiny.[217] He argued that regardless of the "content" of an injunction, it should be subjected to strict scrutiny.[218]

Justice Scalia enumerated three policy reasons for this conclusion.[219] First, he asserted that injunctions may be aimed to suppress ideas rather than to achieve a permissible governmental goal, regardless of whether it attacks content.[220] Second, speech-restricting injunctions should be subjected to strict scrutiny, because they are "the product of individual judges rather than legislatures — and often of judges who have been chagrined by prior disobedience of their orders."[221] Third, "the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards."[222] Justice Scalia asserted that anyone subjected to such an injunction may not be able to file an immediate appeal, resulting in the silence of the party subjected to the injunction, ultimately depriving the party of a First Amendment defense.[223]

Justice Scalia proceeded to discuss "reasons of precedent" to subject injunctions to strict scrutiny.[224] He began by likening the injunction to a "prior restraint," "the prototype of the greatest threat to First Amendment values."[225] Since a prior restraint is afforded a " 'heavy presumption' against its

217. *Madsen*, 114 S. Ct. at 2538.

218. *Id.* Justice Scalia argued that the real issue in *Madsen* was not "whether intermediate scrutiny, which the Court assumes to be some kind of default standard, should be supplemented because of the distinctive characteristics of injunctions; but rather whether those distinctive characteristics are not, for reasons of both policy and precedent, fully as good a reason as 'content-basis' for demanding strict scrutiny." *Id.* "And the central element of the answer is that a restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is *at least* as deserving of strict scrutiny as a statutory, content-based restriction." *Id.* (emphasis in original).

219. *Id.* at 2538-39.

220. *Madsen*, 114 S. Ct. at 2538. Justice Scalia relies on the following example: "When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he *knows* he is enjoining) the expression of pro-union views." *Id.* (emphasis in original).

221. *Id.* at 2539.

222. *Id.*

223. *Id.*

224. *Madsen*, 114 S. Ct. at 2541.

225. *Id.* (citing Alexander v. United States, 113 S. Ct. 2766 (1993)).

constitutional validity," a speech restricting injunction should be required to attain the same standard.[226]

IV. Analysis

In *Madsen v. Women's Health Center, Inc.*, the Court incorporated the desire to regulate the conduct accompanying speech[227] with the ultimate goal of preserving political discussion.[228] The Court established the standard that speech-limiting injunctions burden no more speech than necessary to achieve a significant government interest with the intention that it be applied to injunctive relief, thus protecting the public from the unfettered discretion of the trial court judge.[229] The Court's holding in *Madsen* sought to establish a uniform standard for interpreting the constitutionality of injunctions restricting free speech.[230] Thus, the requirement that a speech restriction be "no more burdensome than necessary" was intended to recognize the subtle distinctions between injunctions and statutes.[231]

The injunction at issue in *Madsen* was a content-neutral time, place and manner restriction on the speech and conduct associated with Operation Rescue.[232] As such, it should have been measured against a standard of intermediate scrutiny.[233] The injunction was not issued because of the content of the message being conveyed by the group, but because of the conduct accompanying the message.[234] The protesters were trespassing on clinic grounds, blocking clinic entrances, and physically intimidating patients, despite a court order to the contrary.[235]

The Court, attempting to promulgate a standard to be applied to content-neutral injunctions, distinct from the one ap-

226. *Id.* (citing Organization for a Better Austin v. O'Keefe, 402 U.S. 415 (1971)).

227. *Id.* at 2527. *See supra* notes 180-181 and accompanying text.

228. *See supra* text accompanying note 170.

229. *Madsen*, 114 S. Ct. at 2525; *see supra* text accompanying notes 159-69.

230. *See supra* text accompanying note 170.

231. *See supra* notes 163-69 and accompanying text.

232. *See supra* notes 45-52, 160 and accompanying text.

233. *See supra* notes 43-44, 47 and accompanying text.

234. *See supra* text accompanying note 160.

235. *See supra* part III.B.

plied to statutes, merely rephrased the intermediate standard of scrutiny into a nebulous, indistinguishable standard. The distinction between a "narrowly tailored" restriction and one that "burdens no more speech than necessary" is imperceptible.[236] Both speak of the extent to which an individual can be restrained from engaging in her constitutionally protected actions to preserve the rights of other individuals.[237] The Court did not establish a new standard of scrutiny to be applied to injunctions; it merely defined what "narrowly tailored" means in terms of injunctive relief.[238]

The distinction between statutes and permanent injunctions warrants a distinct standard to apply when testing the constitutionality of a free speech restriction. While an ordinance restricting First Amendment rights would apply to the entire public, an injunction only focuses on an individual or group that has unjustly curbed the rights of others.[239] Thus, the Court should have adopted the approach Justice Stevens enunciated in his dissent.[240] Justice Stevens argued that a speech-limiting injunction is constitutionally valid if (1) it burdens no more speech than necessary to provide complete relief and (2) includes appropriate restraints on future activity to eliminate its consequence.[241] This approach represents the idea that injunctions are designed to remedy a specific wrong precipitated by a specific group.[242] This position directly refutes Justice Scalia's argument that an injunction is the functional equivalent of a content-based statute.[243] To ensure that the court issuing the injunction does not abuse its discretion, the injunction should include a time-limiting provision, so the injunction remains effective for only as long it is "counteracting continuing intimidation."[244]

---

236. *Madsen*, 114 S. Ct. at 2525.

237. *See supra* text accompanying notes 43-52, 170-72.

238. *Madsen*, 114 S. Ct. at 2524-25.

239. *Id.* at 2531 (Stevens, J., dissenting).

240. *See supra* note 206 and accompanying text.

241. *See supra* notes 206-08 and accompanying text.

242. *See supra* part III.C.2.

243. *See supra* part III.C.3.

244. *See* Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941); *and see supra* text accompanying note 86.

This approach is most similar to the Court's approach in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*,[245] the facts of which are similar to the issues prevalent in the war over abortion rights. In the same way violent antiabortionists have been documented bombing clinics, and shooting clinic doctors and workers, the union in *Milk Wagon Drivers* bombed dairy plants, smashed windows, and assaulted workers, which resulted in serious injuries.[246] The Court recognized that, although the picketing at this particular dairy plant had been peaceful, the undercurrent of violence was enough to justify enjoining picketing completely.[247]

While prohibiting protests in the area of the clinic would have been extreme, as would completely banning all images observable, the lower court had valid reasons for "burdening" as much speech as it did by prohibiting protesters from entering within 300 feet of the clinic and the residences of its employees.[248] The lower court had sought to prevent the clinic from being overrun by groups vehemently against its mission, while maintaining the right of those groups to express themselves.[249] However, the protesters ignored the original injunction.[250]

In *Madsen*, the events occurred in a volatile setting. There were allegations of clinic doctors and employees being stalked; hostile and aggressive antiabortionists subjected patients to their rhetoric, both verbally and forcibly, thus endangering the patients' health.[251] Furthermore, at the time certiorari was granted, one abortion doctor had been murdered in a nearby county, and several clinics nationwide had been subjected to bombings and fires.[252] With this terror being visited upon the reproductive health care centers, doctors and employees alike had been resigning from their health care facilities in fear for their lives.[253] In light of these facts, it is obvious that the pro-

245. *See supra* notes 80-87 and accompanying text.

246. *See supra* note 82 and accompanying text.

247. *See supra* note 82 and accompanying text.

248. Operation Rescue v. Women's Health Ctr. Inc., 626 So.2d 664, 669 (Fla. 1993).

249. *Id.* at 668.

250. *Id.* at 669.

251. *See* Brief for Respondent at 7, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) (No. 93-880).

252. *See supra* note 97 and accompanying text.

253. *See supra* text accompanying note 141.

tests were "operat[ing] destructively as force and intimidation."[254] Thus, the lower court judge was justified in issuing an injunction setting a 300 foot buffer zone around the clinic and around the residences of clinic employees.[255] The injunction burdened no more speech than necessary to give complete relief to the clinic patients and staff, and included adequate restraint on future activity to prevent any tragic consequences.

Throughout the history of this country, many and varied groups have raised the public's awareness as to their situations and political dilemmas through protests.[256] The Court has repeatedly recognized the right of these groups to express themselves through protests.[257] However, when the protests turn violent, the Court has exercised its power to restrain them.[258] Additionally, the Court has upheld injunctions in which the protests themselves were peaceful, but the undercurrent of violence was so great that the lower court judge completely enjoined the protests until the violence stopped.[259]

In the context of the war over abortion rights, however, the holding in *Madsen* has different meanings. In one sense, the Court has given a license to the lower courts to impose a speech-free buffer zone around clinics faced with violent protesters.[260] Alternatively, the Court may be construed as failing to give credence to the fact that antiabortionists are claiming as their victims abortion doctors, their escorts, and even their employees.[261] However, it has been illustrated that the Court has traditionally taken a strict position in making restrictions as narrow and precise as possible to preserve fundamental First Amendment protection.[262] Where the Court finds lives endangered, however, as in *Milk Wagon Drivers*, it is willing to uphold restrictions designed to protect those lives.[263] The Court

254. *Milk Wagon Drivers*, 312 U.S. at 298.

255. *Operation Rescue*, 626 So. 2d at 669.

256. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); Boos v. Barry, 485 U.S. 312 (1988); N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982); Carey v. Brown, 447 U.S. 445 (1980).

257. *Id.*

258. *See supra* note 11 and accompanying text.

259. *Milk Wagon Drivers*, 312 U.S. at 298-99.

260. *See supra* text accompanying notes 175-77.

261. *See supra* note 97 and accompanying text.

262. *See supra* notes 30-33, 47-51 and accompanying text.

263. *See supra* text accompanying notes 80-87.

demonstrated this even in *Madsen*, by upholding the thirty-six foot buffer zone and the noise limitation provisions of the injunction.[264] By allowing these provisions to stand, the Court enabled antiabortionists to express themselves in a somewhat less intimidating, but no less communicative manner.

Although the Court has addressed the violence occurring at abortion clinics in earlier cases, *Madsen* is the first to provide a solid basis upon which a clinic may bring suit. Previously, the decisions were based on creatively-used statutes, such as R.I.C.O. or the Ku Klux Klan Act.[265] Although success under R.I.C.O. would result in criminal prosecution of violent protesters, the burden of proving conspiracy among protesters, in many instances, would be too tenuous.[266] Alternatively, the use of injunctive relief allows a narrow tailoring to the situation at hand.[267] Thus, if a single person is posing a threat, an injunction may be designed blocking his or her access to a clinic.

Recently, Congress passed a statute that would severely penalize anyone seeking to prevent an individual's access to a reproductive health clinic.[268] The Freedom of Access to Clinic Entrances Act provides for criminal as well as civil penalties.[269] As one of the civil penalties, the statute provides for injunctive relief.[270] In light of the Court's holding in *Madsen*, it is likely that any constitutional challenges to the F.A.C.E. Act will fail, further ensuring the protection of reproductive choice.

V. Conclusion

The right to free speech is arguably the predominant First Amendment right. Without that right, the battles that have been fought, and won, in the area of the right to privacy, including a woman's right to choose, never would have come to pass. However, when the right to speak freely is used to veil practices

264. *Madsen*, 114 S. Ct. at 2528.

265. *See supra* notes 106-18 and accompanying text.

266. National Organization for Women, Inc. v. Scheidler, 114 S. Ct. 798, 803 (1994).

267. *See supra* text accompanying note 169.

268. *See supra* note 121 and accompanying text.

269. *See supra* note 122 and accompanying text.

270. *See* 18 U.S.C.A. § 248(c)(1)(b) (West 1994).

of violent intimidation and coercion, it must be restricted so that other rights can be maintained.

In *Madsen*, the right of women to have a legal and safe abortion was being threatened by groups fighting vehemently to revoke that right. Although the Court promulgated an untenable standard in the realm of speech-restricting injunctions, it demonstrated through its holding that the right to reproductive choice can be protected through court-issued injunctions. In light of the violence visited upon abortion providers, however, the Court failed to protect those who make the option of an abortion possible. By invalidating the provision of the injunction that prohibited the members of Operation Rescue from approaching patients and staff within 300 feet of the Aware Woman Center for choice, the Court preserved an outlet for destruction.

*Joanne Neilson**

* Special thanks to Marc Gootman, Joan Ruggierd, and the rest of my family and friends for their love and support throughout law school. This article is dedicated in memory of my grandmother, Josephine Bell.