
NOTE

OPERATION RESCUE V. PLANNED PARENTHOOD, INC.: A JUDICIAL SHOWDOWN OVER SIDEWALK COUNSELORS AND FIRST AMENDMENT RIGHTS*

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*“The baby killing center (abortion clinic) is a storefront on Main Street. All those who are entering the clinic have no hope. They have given up on all that is good and are about to murder their own child. . . . Will you please go tell them”*¹

I. INTRODUCTION

The scene evolves on a narrow walkway that marks the entrance into an abortion clinic in Houston, Texas.² Abortion protesters chant, sing, and shout.³ Some protesters act as “sidewalk counselors,”⁴ offering pro-life literature to people entering the clinic.⁵ Although these interchanges are often peaceful, angry confrontations sometimes erupt when the sidewalk counselors “get in the faces” of patients and yell anti-abortion slogans.⁶ It is against this backdrop that the Texas

1. Operation Rescue West, *Do Something* (visited Mar. 16, 2000) <<http://www.operationrescue.org/dosomething/>>.

2. See Operation Rescue v. Planned Parenthood, Inc., 975 S.W.2d 546, 549-50 (Tex. 1998) (describing protest actions at a number of abortion clinics).

3. See *id.* at 550.

4. See *id.* This Note uses the term “sidewalk counselor” to refer to anti-abortion protesters who approach clinic patients individually in an attempt to initiate one-on-one anti-abortion counseling.

5. See *id.* (“These encounters were often peaceful efforts to convey information in a helpful, persuasive way . . .”).

6. See *id.*

Supreme Court rendered its decision in *Operation Rescue v. Planned Parenthood, Inc.*⁷

Few issues in the history of United States jurisprudence have divided the courts, the political system, and indeed the nation more starkly than that of a woman's right to a legal abortion.⁸ Although over twenty-five years have elapsed since the Supreme Court determined that a woman's constitutional right to privacy included the decision to have an abortion,⁹ bitter altercations frequently erupt between pro-choice advocates and pro-life activists.¹⁰ In Texas, as in many states across the nation, the long-standing feud continues today.¹¹ At the heart of the current debate is whether the First Amendment guarantee of free speech allows abortion protesters to approach women seeking abortion services.¹²

This Note contends that the Texas Supreme Court, under the guise of adherence to the First Amendment principles articulated by the United States Supreme Court in *Madsen v. Women's Health Center, Inc.*¹³ and *Schenck v. Pro-Choice*

7. 975 S.W.2d 546 (Tex. 1998).

8. See, e.g., KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 1-2 (1984) (noting that the abortion issue incites political turmoil because "the two sides share almost no common premises and very little common language").

9. See *Roe v. Wade*, 410 U.S. 113, 164-66 (1973) (striking down as unconstitutionally broad a Texas statute that restricted elective abortions).

10. See generally Carolyn Thompson, *Slain Abortion Doctor Had Voiced Concerns He Might Die Violently*, HOUS. CHRON., Oct. 26, 1998, at 2A (reporting that slain physician Barnett Slepian had frequently been the target of aggressive anti-abortion protesters prior to his murder). See also CYNTHIA GORNEY, ARTICLES OF FAITH (1998) (detailing continuing conflicts between pro- and anti-abortion activists in Missouri after *Roe v. Wade*); NAT HENTOFF, LIVING THE BILL OF RIGHTS (1998) (describing the Supreme Court's *Webster v. Reproductive Health Services* decision, which expanded state power to broaden restrictions on abortion, as one of the "term's most controversial"); GARY E. MCCUEN, ABORTION VIOLENCE AND EXTREMISM (1997) (presenting diametrically opposed commentary on *Roe v. Wade* from across the political spectrum).

11. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down a state statute that required spousal notice of a planned abortion as unconstitutional); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 62 F.3d 280 (9th Cir. 1995); *Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995) (using the Racketeer Influenced and Corrupt Organizations Act to assert claims against anti-abortion groups); *Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352 (6th Cir. 1984) (challenging a state regulatory scheme, which applied to freestanding abortion-providing clinics, on both federal equal protection and due process grounds); *Operation Rescue*, 975 S.W.2d 546 (narrowing the scope of an injunction, which created buffer zones at abortion clinics and physicians' residences, on free speech grounds).

12. See *Operation Rescue*, 975 S.W.2d at 554. The petitioners claimed that the injunction violated their First Amendment right to free expression.

13. 512 U.S. 753 (1994).

Network,¹⁴ unjustifiably mandated that sidewalk counselors be allowed within fixed buffer zones around abortion clinics. Moreover, this Note argues that a complete buffer zone is warranted when previous injunctive relief has failed to safeguard a woman's access to abortion services. This Note maintains further that an injunction prohibiting sidewalk counseling does not offend the First Amendment.

Part II of this Note discusses the Texas Supreme Court's *Operation Rescue v. Planned Parenthood, Inc.* decision, in which the court fashioned permanent injunctive relief restricting pro-life activists from protesting within a buffer zone around abortion clinics, but allowed a maximum of two sidewalk counselors inside the buffer zone.¹⁵ Part III charts a brief history of content-neutral restrictions on free speech in traditional public forums under the First Amendment and analyzes the arguments supporting the admission of sidewalk counselors inside buffer zones. Part III also argues that legal precedent supports a ban on sidewalk counseling and examines the implications of the court's holding in *Operation Rescue*.

This Note argues that sidewalk counseling may be prohibited based upon several legal theories: 1) sidewalk counseling is conduct that is not protected by the First Amendment, 2) women seeking abortions are a captive audience and thus may be protected from certain speech, 3) past violent behavior warrants tighter restrictions on otherwise protected expression, and 4) medical facilities should enjoy protection from certain types of expressive activity.

Part IV concludes that the Texas Supreme Court erred in its *Operation Rescue* holding because the court ignored the government's role in protecting a woman's right to unrestricted access to abortion clinics. Based upon the facts in *Operation Rescue*, the Texas Supreme Court should have upheld the buffer zone completely and banned sidewalk counseling.

II. RECITATION OF THE CASE

A. Facts

Operation Rescue is a national activist organization opposed to abortions.¹⁶ During the 1992 Republican National Convention,

14. 519 U.S. 357 (1997).

15. See *Operation Rescue*, 975 S.W.2d at 567.

16. See *Operation Rescue West, Sidewalk Counselor*, (visited Mar. 16, 2000) <<http://www.operationrescue.org/sidewalkcounselor/>> (listing several states in which

the group staged massive protests outside abortion clinics in Houston, Texas.¹⁷ Operation Rescue's strategy was to picket local abortion clinics and the homes of physicians who worked at the clinics.¹⁸ Prior to the convention, leaders of Operation Rescue held a press conference to announce their plans.¹⁹ In an effort to prevent the demonstrations, local clinics and doctors obtained a temporary restraining order banning anti-abortion protestors from demonstrating within 100 feet of the clinics.²⁰

Shortly thereafter, leaders of Operation Rescue violated the restraining order while demonstrating at Houston-area clinics.²¹ The district court issued a temporary injunction, which prohibited demonstrations within 100 feet of the clinics, but allowed four demonstrators to approach within twenty-five feet of the clinics.²² Under the injunction, one demonstrator was allowed to approach people entering or leaving the clinics for the purpose of one-on-one counseling.²³ This demonstrator was required to stay at least ten feet from the patient, unless the patient permitted the demonstrator to come closer.²⁴ The demonstrators repeatedly violated the order, often yelling at patients or coming within inches of the patients' faces and shouting at them.²⁵

B. Lower Court Decisions

Two years later, the clinics and doctors petitioned the court for a permanent injunction against the demonstrators.²⁶ They also filed suit based upon claims of civil conspiracy, tortious interference, and invasion of privacy and property rights.²⁷ At trial, evidence demonstrated that some protests were peaceful—demonstrators merely chanted, prayed, or carried signs.²⁸ Other protests, however, were more aggressive.²⁹ At these demonstrations, protestors yelled at patients, often using

Operation Rescue supporters conduct sidewalk counseling).

17. See *Operation Rescue*, 975 S.W.2d at 549-50.

18. See *id.* at 550.

19. See *id.*

20. See *id.*

21. See *id.* (describing the violation as intentional).

22. See *id.* (noting the injunction was "nearly as restrictive as the temporary restraining order").

23. See *id.*

24. See *id.*

25. See *id.* at 550-51 ("[M]any of the protestors' activities described in the record clearly violated [the injunction's] prohibitions.").

26. See *id.*

27. See *id.* at 551.

28. See *id.* at 550.

29. See *id.*

bullhorns.³⁰ The demonstrators also attempted to block access to the clinics by lying down in front of the clinics.³¹ Some of the demonstrators chained their necks to clinic fixtures.³² They glued the clinic locks shut, threw bottles and rocks at the buildings, and tossed butyric acid through the windows of the clinics, filling the offices with a nauseating smell.³³ The demonstrators also approached patients individually, attempting to disseminate pro-life literature.³⁴ As a result of these aggressive tactics, some patients required assistance to get past the demonstrators and into the clinics.³⁵

The doctors at the abortion clinics reported that patients were physically affected by the demonstrations.³⁶ Patients exhibited nervousness, accelerated heart rates, and increased blood pressure and often required a sedative to treat these symptoms.³⁷ Moreover, physicians and their families were threatened, and at least one physical altercation occurred between a doctor and a demonstrator.³⁸

The trial court awarded the abortion clinics and doctors a permanent injunction and assessed \$1.2 million in compensatory and punitive damages against Operation Rescue.³⁹ The trial court explained that the injunction “would ‘serve several significant governmental interests,’” including protecting access to healthcare, promoting public safety, preserving property rights, and ensuring the balance of competing constitutional rights.⁴⁰

The permanent injunction prohibited the demonstrators from entering onto the clinics’ premises without permission; obstructing the clinics’ entrances; interfering with anyone attempting to enter or exit the clinics; touching, physically or verbally abusing, or harassing patients; and demonstrating within established buffer zones.⁴¹ The demonstrators were also prohibited from using any sound amplification devices such as

30. *See id.* (noting that demonstrators also played loud music in an effort to disturb people).

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* (revealing that the sidewalk counselors occasionally became confrontational by coming very close to patients and shouting at them).

35. *See id.* at 550-51.

36. *See id.* at 551.

37. *See id.*

38. *See id.* at 550.

39. *See id.*

40. *See id.*

41. *See id.*

bullhorns or speakers.⁴² The court of appeals affirmed without modification.⁴³

C. The Texas Supreme Court's Decision

The Texas Supreme Court determined that portions of the injunction unduly burdened the protestors' right to free speech.⁴⁴ The court explained that restrictions on free speech are analyzed by considering two factors: 1) whether the forum is public or private and 2) whether the speech restriction is content based or content neutral.⁴⁵ The court concluded that the injunction at issue was a content-neutral restriction involving a public forum.⁴⁶

In its analysis of the *Operation Rescue* injunction,⁴⁷ the court employed the standard of review articulated by the United States Supreme Court in *Madsen v. Women's Health Center, Inc.*⁴⁸ The *Madsen* standard requires that "the injunction burden no more speech than necessary to serve a significant government interest."⁴⁹

The Texas Supreme Court declared that the *Madsen* standard applied to a content-neutral injunction that regulates free speech in a public forum.⁵⁰ The court then applied the *Madsen* rule to the facts of the case and upheld many of the injunction's buffer zone provisions, but stopped short of approving the complete buffer zone provision.⁵¹ Instead, the court modified the injunction to allow two "sidewalk counselors" inside the buffer zone.⁵² Under this scheme, only one protester may approach a patient, and the protester must retreat at the patient's request.⁵³ The court upheld the buffer zones around the residences of four doctors who performed abortions.⁵⁴

42. See *id.* at 553.

43. See *id.*

44. See *id.* at 564 (emphasizing that the injunction proscribed both peaceful conduct and aggressive protestor actions).

45. See *id.* at 556 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983)).

46. See *id.*

47. See *id.*

48. 512 U.S. 753 (1994).

49. See *id.* at 765. The *Madsen* standard is discussed fully in Part III.A.2 *infra*.

50. See *Operation Rescue*, 975 S.W.2d at 557.

51. See *id.* at 560-68 (examining each abortion facility that petitioned the court to determine whether the evidence supported a grant of injunctive relief restricting access to each particular clinic).

52. See *id.* at 567.

53. See *id.* The requirement that a sidewalk counselor retreat when told to do so by a patient is generally known as a "cease and desist" provision. See, e.g., *Schenck v. Pro-Choice Network*, 519 U.S. 357, 383-85 (1997) (allowing two sidewalk

D. The Concurring and Dissenting Opinions

Justice Spector filed an opinion, concurring in part and dissenting in part.⁵⁵ Justice Spector disagreed with the majority's finding that the buffer zones burdened more speech than necessary.⁵⁶ Justice Spector also expressed concern that allowing two sidewalk counselors inside the buffer zones may endanger the patients' safety.⁵⁷

Justice Gonzalez also filed an opinion, concurring in part and dissenting in part.⁵⁸ Justice Gonzalez asserted that the central issue in the case was whether a person may approach a woman seeking an abortion to discuss her other options without the risk of arrest and prosecution.⁵⁹

Justice Gonzalez concurred with the majority's sanction of peaceful sidewalk counseling.⁶⁰ Justice Gonzalez's dissent focused on the injunction's cease and desist provision, which, in his opinion, "chills protected speech far beyond that necessary to accomplish the injunction's legitimate goals."⁶¹

III. ANALYSIS

A. Background

1. Early Doctrine Governing Content-Neutral Statutory Restrictions on Free Speech. The United States Supreme Court clarified the test for content-neutral restrictions on free speech in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.⁶² *Perry* arose out of a dispute between two local teachers' unions.⁶³ The Perry Education Association (PEA) was elected to represent teachers in collective bargaining with the school district.⁶⁴ As part of the collective bargaining agreement, the PEA was granted

counselors, who were subject to a cease and desist provision, inside a buffer zone).

54. See *Operation Rescue*, 975 S.W.2d at 568-69 (emphasizing the heightened governmental interest in protecting residential privacy).

55. See *id.* at 570 (Spector, J., concurring in part and dissenting in part).

56. See *id.* (Spector, J., concurring in part and dissenting in part).

57. See *id.* (Spector, J., concurring in part and dissenting in part) (stressing the inherently volatile nature of abortion protests).

58. See *id.* at 573 (Gonzalez, J., concurring in part and dissenting in part).

59. See *id.* (Gonzalez, J., concurring in part and dissenting in part).

60. See *id.* (Gonzalez, J., concurring in part and dissenting in part).

61. *Id.* (Gonzalez, J., concurring in part and dissenting in part).

62. 460 U.S. 37, 45 (1983).

63. See *id.* at 39.

64. See *id.* at 38-39.

exclusive access to the schools' mail system and teacher mailboxes.⁶⁵ Perry Local Educators' Association (PLEA), a rival teacher's union, argued that its restricted access to the school mail system violated PLEA's First and Fourteenth Amendment rights.⁶⁶

The *Perry* Court characterized the state's power to restrict communication in traditionally public forums as "sharply circumscribed."⁶⁷ The Court explained that the state may impose content-neutral restrictions on "the time, place, and manner of expression" that are "narrowly tailored to serve a significant government interest" and permit alternative methods of communication.⁶⁸ By contrast, a restriction based upon the content of the speech or message is subject to strict scrutiny.⁶⁹ Under the strict scrutiny analysis, the government must show that the restriction is narrowly drawn to serve a compelling governmental interest.⁷⁰ The *Perry* Court found that the school mail system was not a traditional public forum, and thus the restriction was not subject to this test.⁷¹

2. *The Madsen Standard for Injunctions.* The Supreme Court developed a new test for content-neutral injunctions restricting speech in *Madsen v. Women's Health Center, Inc.*⁷² The Court distinguished this new, more rigorous test from the time, place, and manner standard that it applied to ordinances and other statutory restrictions.⁷³ Under facts similar to those in *Madsen*, the Texas Supreme Court in *Operation Rescue* relied upon the *Madsen* standard in determining the constitutionality of the injunction in the case.⁷⁴

In *Madsen*, abortion protesters repeatedly violated a temporary injunction that prohibited the harassment of clinic personnel and patients at abortion clinics and at private residences.⁷⁵ A Florida state court issued an amended injunction

65. See *id.* at 39.

66. See *id.*

67. See *id.* at 45 (defining "public forums" as "places which by long tradition or by government fiat have been devoted to assembly and debate" and providing the example of public streets and parks as "quintessential public forums").

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.* at 46.

72. 512 U.S. 753, 765 (1994).

73. See *id.*

74. See *Operation Rescue v. Planned Parenthood, Inc.*, 975 S.W.2d 546, 557 (Tex. 1998).

75. See *Madsen*, 512 U.S. at 758-61.

that restricted the anti-abortion protesters' access to the clinics and their methods of protest.⁷⁶ The Florida Supreme Court upheld the injunction.⁷⁷

The lower state court's decision was also challenged in federal district court.⁷⁸ While the matter was before the Florida Supreme Court, the federal district court's refusal to enjoin the state court's injunction was appealed to the United States Court of Appeals for the Eleventh Circuit.⁷⁹ The Eleventh Circuit found that the injunction was content based and neither served a compelling state interest nor was narrowly tailored to achieve that end.⁸⁰ Thus, the court reasoned, the injunction unconstitutionally infringed upon the protesters' First Amendment rights.⁸¹ The United States Supreme Court granted certiorari to resolve the dispute between the Florida Supreme Court and the Eleventh Circuit regarding the injunction.⁸²

The *Madsen* Court upheld the thirty-six-foot buffer zone, explaining that it was necessary in light of the previous injunction's failure to protect access to the clinic.⁸³ The Court chose not to speculate regarding the appropriateness of the size of the buffer zone, but rather deferred to the state court's judgment on the issue.⁸⁴ Thus, the Court upheld the absolute buffer around the clinic, thereby closing the area off to all protesters, including sidewalk counselors.⁸⁵

The Court explained that the standard for injunctions restricting speech or other expression requires a significant government interest.⁸⁶ Further, the injunction may impose no more of a burden on speech than is necessary to protect that interest.⁸⁷ The government interests identified and upheld in *Madsen* were protecting a woman's freedom to seek medical

76. See *id.* at 759-60 (noting that protesters were prohibited from the following: 1) making excessive noise by using sound-amplification devices; 2) yelling, singing or chanting; 3) approaching patients seeking abortions within 300 feet of the clinic unless the patient expressed an interest in speaking with the protester; and 4) demonstrating within 300 feet of the clinic employees' private residences).

77. See *id.* at 761.

78. See *id.*

79. See *Cheffer v. McGregor*, 6 F.3d 705, 706-07 & n.3 (11th Cir. 1993).

80. See *id.* at 710-11.

81. See *id.* (characterizing the dispute as "between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights").

82. See *Madsen*, 512 U.S. at 762.

83. See *id.* at 770.

84. See *id.* at 769-70 (stressing the state court's familiarity with the factual history of the case).

85. See *id.*

86. See *id.* at 765.

87. See *id.*

services associated with pregnancy and preserving the public safety.⁸⁸ The Court found that the injunction's noise restriction and buffer zone provisions burdened no more speech than necessary to stop the targeted unlawful conduct and, therefore, upheld those provisions of the injunction.⁸⁹

3. *The Application of the Madsen Rule in Schenck v. Pro-Choice Network.*⁹⁰ Only three years after deciding *Madsen*, the Supreme Court applied the *Madsen* rule in *Schenck v. Pro-Choice Network*. Like the *Madsen* demonstrators, the anti-abortion demonstrators in *Schenck* harassed both doctors and patients at abortion clinics.⁹¹ For instance, the protesters engaged in large-scale blockades in which groups used their bodies to stop cars from entering the clinic parking lot.⁹² Sidewalk counselors approached women heading toward the clinics, attempting to hand out literature and dissuade them from having an abortion.⁹³ If the women ignored them, the sidewalk counselors yelled at the women and occasionally pushed, shoved, or grabbed them.⁹⁴ To prevent future blockades, the district court issued a temporary restraining order that established a fifteen-foot buffer zone, but allowed two sidewalk counselors inside.⁹⁵ However, a cease and desist provision required sidewalk counselors to retreat if patients indicated that they did not want counseling.⁹⁶ The court issued a permanent injunction after protesters repeatedly violated the temporary restraining order.⁹⁷ The permanent injunction modified the temporary order in two ways. First, it extended the buffer zone by creating a "floating buffer" around people and vehicles coming and going from the facilities.⁹⁸ Second, it attached a fifteen-foot retreat requirement to the cease and desist provision.⁹⁹

88. See *id.* at 767-68.

89. See *id.* at 776.

90. 519 U.S. 357 (1997).

91. See *id.* at 362-63.

92. See *id.* at 362.

93. See *id.* at 363.

94. See *id.* The patients and clinic staff were not the demonstrators' sole targets; police officers, including the deputy police chief, were also harassed. See *id.* at 364.

95. See *id.* at 362.

96. See *id.* at 364.

97. See *id.* at 366.

98. See *id.*

99. See *id.* at 366-67. This provision required sidewalk counselors to move at least 15 feet from clinic patrons who were not receptive to sidewalk counseling. See *id.*

The Supreme Court upheld the injunction's fixed buffer zone provision that allowed two protesters inside the zones to offer "sidewalk counseling" to patients seeking abortion services.¹⁰⁰ The Court also upheld the injunction's cease and desist provision.¹⁰¹

4. *Resolving the Issue of Sidewalk Counseling Based upon Madsen and Schenck.* Although it initially appears that *Schenck's* admission of two sidewalk counselors inside the buffer zone conflicts with *Madsen's* complete buffer zone provision, an analysis of the cases' procedural histories reveals a commonality of judicial deference to the decisions of the lower courts.¹⁰² In both cases, the Supreme Court evaluated and upheld the lower courts' recommended injunctive relief.¹⁰³ And in both cases, the Supreme Court considered the nature and escalation of violent activity leading up to the lower courts' orders for injunctive relief.¹⁰⁴ Yet in *Operation Rescue*, the Texas Supreme Court modified the lower court's injunction by injecting a provision that allowed sidewalk counseling,¹⁰⁵ thus distinguishing *Operation Rescue* from *Madsen* and *Schenck*.

B. *Operation Rescue's Arguments for "Sidewalk Counseling"*

The Texas Supreme Court concluded that the district court's prohibitions against sidewalk counseling and other public expression were unconstitutionally broad.¹⁰⁶ The court employed two legal arguments to support sidewalk counseling inside buffer zones. First, it asserted that peaceful sidewalk counseling was not harmful to the health of patients.¹⁰⁷ Second, the court asserted that the state did not have an interest in protecting citizens from upsetting speech.¹⁰⁸ Justice Gonzalez provided a

100. See *id.* at 380-83.

101. See *id.* at 383-85.

102. Compare *id.* at 380-81, with *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 769-70 (1994).

103. Refer to Parts III.A.2 & III.A.3 *supra* (discussing the Court's First Amendment analyses of the *Madsen* and *Schenck* injunctions).

104. See *Madsen*, 512 U.S. at 769-70 (opining that "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties"); see also *Schenck*, 519 U.S. at 381.

105. See *Operation Rescue v. Planned Parenthood, Inc.*, 975 S.W.2d 546, 567 (Tex. 1998). The lower court's injunction established a complete buffer zone. See *id.* at 551-53. The modified injunction allowed two demonstrators within the zone. See *id.* at 567.

106. See *id.* at 563-64 (pointing out the original injunction's restrictions against prayer and the distribution of anti-abortion literature).

107. See *id.*

108. See *id.* at 564.

third argument that sidewalk counseling was analogous to missionary activity in labor disputes, which the courts have determined is protected by the First Amendment.¹⁰⁹

1. *The First Amendment Protects Peaceful Sidewalk Counseling.* The *Operation Rescue* court reviewed the statements of two sidewalk counselors who testified that their interactions with abortion clinic patrons were intended to be peaceful and were most successful when conducted in a nonthreatening manner.¹¹⁰ Because these witnesses were not members of Operation Rescue, their testimony represented only a subjective account of the sidewalk counseling methods employed by the petitioners.¹¹¹

The witnesses testified that when they counseled, they would merely approach women entering the clinics, offer literature regarding alternatives to abortion, and attempt to persuade the women not to get an abortion.¹¹² The counselors stated that it was necessary that sidewalk counselors approach women in a quiet, nonthreatening way in order to effectively communicate the message without frightening the women away.¹¹³

The clinics' expert witnesses testified about the extreme emotional distress caused by sidewalk counseling.¹¹⁴ One psychologist testified that "protesting, including leaflet distribution, traumatized patients and staff members."¹¹⁵ Another expert testified that "demonstrations caused lingering fear and stress among patients and staff members, and that a complete buffer zone was necessary to avoid continued emotional abuse."¹¹⁶ The court rejected this recommendation.¹¹⁷

The court focused its evaluation of the health risks associated with sidewalk counseling on the sidewalk counselors' testimony that "their activities were peaceful and unobtrusive;

109. See *id.* at 580 (Gonzalez, J., concurring in part and dissenting in part) (arguing that sidewalk counseling is a unique form of communication worthy of protection, analogous to missionaries in labor protests).

110. See *id.* at 563-64.

111. See *id.* at 571 (Spector, J, concurring in part and dissenting in part) (highlighting the witnesses' ignorance of Operation Rescue's sidewalk counseling methods).

112. See *id.* at 562-63.

113. See *id.*

114. See *id.*

115. *Id.*

116. *Id.*

117. See *id.* at 563-64 (noting that the doctors testified only about harm caused by aggressive conduct).

indeed, to be successful, . . . sidewalk counselors could not frighten people away.”¹¹⁸ The court contended that this form of sidewalk counseling was not harmful to patients.¹¹⁹ However, this analysis did not address the sidewalk counselors’ actual conduct in the instant case.¹²⁰ Although the psychologists did not offer evidence of past violent activity, the record was replete with accounts of sidewalk counselors who had pushed, prodded, and yelled at women entering the clinics.¹²¹ Ignoring this evidence, the court invoked the principle that “the threat must come from . . . conduct and not merely from . . . speech”¹²² and struck down an absolute ban on protesters within the buffer zone.¹²³

The majority refused to consider the actual conduct that led the district court to ban all protest activity inside buffer zones.¹²⁴ The record before the court clearly reflected that on several occasions sidewalk counselors approached people who drove or walked toward the clinics, offering anti-abortion literature.¹²⁵ If patients did not respond to peaceful overtures, the encounters often grew confrontational, requiring clinic workers to shield the patients from aggressive protesters.¹²⁶ Ultimately, many of these situations became chaotic shouting matches, resulting in patients being pushed and prodded by protesters.¹²⁷ In light of the evidence that these aggressive episodes created a health risk to patients,¹²⁸ the court’s analysis on this point is flawed.

The court justified modifying the district court’s ban on sidewalk counseling by arguing that allowing two protesters within the buffer zone protected the demonstrators’ right to engage in peaceful speech.¹²⁹ The court ignored the fact that it was not peaceful speech that compelled the injunction—it was

118. *Id.* at 563.

119. *See id.* at 563-64.

120. *See id.* at 563-65 (hypothesizing that future sidewalk counseling would be peaceful and quiet).

121. *See id.* at 550-51.

122. *Id.* at 564.

123. *See id.* at 563-64.

124. *See id.* at 571 (Spector, J., concurring in part and dissenting in part). The temporary injunction issued by the lower court allowed four sidewalk counselors inside the buffer zones, but prohibited them from physically intimidating clinic patients. *See id.* (Spector, J., concurring in part and dissenting in part). These measures did not stop the protesters from harassing the patients and clinic staff. *See id.* (Spector, J., concurring in part and dissenting in part).

125. *See id.* at 550.

126. *See id.* at 550-51.

127. *See id.* at 551.

128. *See id.*

129. *See id.* at 567.

the protesters' boisterous, abusive, and threatening behavior.¹³⁰

This approach reflects an attempt to examine the sidewalk counselors' activity by focusing only on the content of their speech while ignoring their conduct. Although the content of protected speech can be offensive, violent conduct accompanying such speech supports a curtailment of First Amendment rights.¹³¹

2. *The State Has No Interest in Protecting Citizens from Upsetting Speech.* The court in *Operation Rescue* acknowledged that "protecting the health and safety of clinic patients is . . . a legitimate state interest that justifies limitations on threatening conduct."¹³² However, threatening speech alone will not trigger state protection.¹³³

Justice Gonzalez supported his argument for the sidewalk counseling provision with a vigorous discussion of free speech jurisprudence.¹³⁴ He reminded the court that the "State does not have a legitimate interest in prohibiting speech because the content of the message is emotionally upsetting or causes psychological harm."¹³⁵ Justice Gonzalez also argued that the Supreme Court has traditionally refused to restrict speech solely on the ground that the message has a negative emotional impact on the listener.¹³⁶ Moreover, he characterized the sidewalk counselors' activity as "peaceful, . . . pro-life appeals [that] may stress a patient by exacerbating her moral anxiety about having an abortion."¹³⁷

The seminal case on this subject is *Boos v. Barry*.¹³⁸ In *Boos*, the Supreme Court struck down a city ordinance that prohibited citizens from displaying signs in front of a foreign nation's

130. See *id.* at 550-51.

131. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (arguing that "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment").

132. *Operation Rescue*, 975 S.W.2d at 564.

133. See *id.*

134. See *id.* at 576-78 (Gonzalez, J., concurring in part and dissenting in part).

135. *Id.* at 578 (Gonzalez, J., concurring in part and dissenting in part) (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (finding that speech may not be restricted solely to silence the speaker's message); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (arguing that "[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action").

136. See *Operation Rescue*, 975 S.W.2d at 578 (Gonzalez, J., concurring in part and dissenting in part).

137. *Id.* (Gonzalez, J., concurring in part and dissenting in part).

138. 485 U.S. 312 (1988).

embassy if the signs subjected that nation to “public disrepute.”¹³⁹ The Court asserted that “citizens must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”¹⁴⁰

Applying *Boos*’s reasoning, Justice Gonzalez argued that although “moral confrontation” may prove to be “emotionally upsetting,” restricting “pro-life speech” was not justified.¹⁴¹

Justice Gonzalez cited *Consolidated Edison Co. v. Public Service Commission*¹⁴² to illustrate the distinction between speech that offends because of its form and that which offends because of its content.¹⁴³ In *Consolidated Edison*, the Court pointed out that certain offensive forms of speech might warrant appropriate regulation.¹⁴⁴ The Court held, however, that if the offensive character of an idea is the only issue, censorship of that speech is not justified.¹⁴⁵

Justice Gonzales focused on the content of the sidewalk counselors’ speech, finding that such speech was “stressful because it increas[ed] the woman’s anxiety and guilt about her consent to the killing of her baby.”¹⁴⁶ This reasoning again ignores the most traumatic health effects on patients resulting from the sidewalk counselors’ physically threatening activities.¹⁴⁷

3. *Sidewalk Counseling Is Analogous to Missionary Activity in Labor Protests and Leaflet Distribution.* Justice Gonzalez asserted that prohibiting all sidewalk counselors from entering the buffer zone unnecessarily burdened free speech.¹⁴⁸

He analogized the sidewalk counselors in this case to labor

139. See *id.* at 315.

140. *Id.* at 322 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)) (internal quotations omitted).

141. See *Operation Rescue*, 975 S.W.2d at 578 (Gonzalez, J., concurring in part and dissenting in part).

142. 447 U.S. 530 (1980).

143. See *Operation Rescue*, 975 S.W.2d at 578-79 (Gonzalez, J., concurring in part and dissenting in part).

144. See *Consolidated Edison Co.*, 447 U.S. at 546-47 (asserting that communication may be offensive either because of the message or because of the form).

145. See *id.* at 548.

146. *Operation Rescue*, 975 S.W.2d at 579 (Gonzalez, J., concurring in part and dissenting in part).

147. Refer to Part II.B *supra* (recounting various acts of violence by protesters and the consequent harm experienced by patients).

148. See *Operation Rescue*, 975 S.W.2d at 578 (Gonzalez, J., concurring in part and dissenting in part).

movement picketers.¹⁴⁹ In *American Steel Foundries v. Tri-City Central Trades Council*,¹⁵⁰ the Supreme Court confirmed labor picketers' right to send missionaries into a zone similar to the buffer zone in *Operation Rescue*.¹⁵¹ The labor picketers' face-to-face interactions were similar to the sidewalk counselors' methods in *Operation Rescue*.¹⁵²

In *American Steel Foundries*, the Court examined a restraining order against labor protesters who were picketing an employer.¹⁵³ The steel mill and the labor union were involved in a dispute over wages.¹⁵⁴ The union posted a sign in front of the mill announcing the strike and formed a picket line.¹⁵⁵ Shortly thereafter, a series of assaults occurred, injuring employees who attempted to cross the picket line.¹⁵⁶ As the dispute grew more heated, "violent methods were pursued . . . in such a way as to characterize the attitude of the picketers as continuously threatening."¹⁵⁷ Many employees slept in the plant because they were afraid to attempt to go home.¹⁵⁸

In evaluating the constitutionality of the injunction, the Court asked, "How far may men go in persuasion and communication and still not violate the right of those whom they would influence?"¹⁵⁹ The Court recognized that "[w]e are a social people" and that merely approaching one another to communicate is generally not viewed as aggressive or obtrusive.¹⁶⁰ The Court warned, however, that if "the offer [to communicate] is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction."¹⁶¹

The *American Foundries* Court found that, in our society, the opportunity to stop one another in an attempt to communicate and share information is not a violation of another

149. See *id.* at 580 (Gonzalez, J., concurring in part and dissenting in part).

150. 257 U.S. 184 (1921).

151. See *id.* at 206. The Court allowed one missionary to remain in front of the plant. See *id.*

152. See *Operation Rescue*, 975 S.W.2d at 580 (Gonzalez, J., concurring in part and dissenting in part) (noting that the United States Supreme Court recognizes the right of activists to pursue converts through personal confrontation).

153. See *American Steel Foundries*, 257 U.S. at 193-94.

154. See *id.* at 196.

155. See *id.*

156. See *id.* at 197-98.

157. *Id.* at 200.

158. See *id.*

159. *Id.* at 204.

160. See *id.*

161. *Id.*

person's rights.¹⁶² Thus, the Court allowed one "missionary" to approach employees entering or leaving the plant.¹⁶³ A number of cases have followed the reasoning of *American Steel Foundries* by limiting, rather than prohibiting, picketing activity.¹⁶⁴

Justice Gonzalez's offer of labor picketers as a model in support of the *Operation Rescue* court's decision to allow sidewalk counseling ignores a critical detail of the *American Steel Foundries* injunction.¹⁶⁵ As Justice Spector pointed out in her dissent, the *American Foundries* provision that allowed one missionary to approach employees was to the exclusion of all other picketing activity at the site.¹⁶⁶ Based upon the facts in *Operation Rescue*, the provision to allow two sidewalk counselors inside the buffer zone would be more tolerable if it also prohibited the boisterous crowds of anti-abortion protesters from gathering on the sidewalk across the street from the clinics.¹⁶⁷

Some commentators have argued that the right to personally approach and offer information to a person is at the heart of First Amendment jurisprudence.¹⁶⁸ Another argument is that sidewalk

162. See *id.*

163. See *id.* at 206. The Court reasoned that "the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business." *Id.*; accord *United Auto., Aircraft & Agric. Implement Workers v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 269-70 (1956) (upholding a state board order limiting the number of picketers around an employer's entrances).

164. See, e.g., *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 775 (1942) (allowing a limited number of picketers in front of bakeries). The Court in *Wohl* remarked:

[T]here are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing.

Id.

165. See *American Steel Foundries*, 257 U.S. at 206-07 (mandating that "all other [missionaries are] enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, [and] that [the missionaries] . . . shall not in their single efforts at communication or persuasion obstruct an unwilling listener by . . . dogging his steps").

166. See *Operation Rescue v. Planned Parenthood, Inc.*, 975 S.W.2d 546, 572 (Tex. 1998) (Spector, J., concurring in part and dissenting in part).

167. See *id.* (Spector, J., concurring in part and dissenting in part) (pointing out that in *American Steel Foundries*, the United States Supreme Court allowed missionaries to the exclusion of all other demonstrators "to prevent the inevitable intimidation of the presence of groups of pickets." (quoting *American Steel Foundries*, 257 U.S. at 207)).

168. See Darrin Alan Hostetler, *Face-to-Face with the First Amendment: Schenck v. Pro-Choice Network and the Right to "Approach and Offer" in Abortion Clinic Protests*, 50 STAN. L. REV. 179, 179 (1997) (arguing that "the Court has inadvertently trampled on a fundamental First Amendment value that figures

counseling is a protected activity because of the value that the First Amendment places on personal communication.¹⁶⁹

In *Martin v. City of Struthers*,¹⁷⁰ the Supreme Court addressed the issue of whether door-to-door leafleting could be restricted by a city ordinance without offending the First Amendment.¹⁷¹ In *Martin*, the petitioner, a member of the Jehovah's Witnesses, was fined for violating a city ordinance forbidding handbilling at private residences.¹⁷² The City advanced two primary objectives in support of the ordinance.¹⁷³ First, the City noted that Struthers, Ohio was an industrial community where most of the residents were employed in the iron and steel industry.¹⁷⁴ The City asserted that the protection of the "householders from annoyance, including intrusion upon the hours of rest" was an important goal.¹⁷⁵ The City argued that citizens frequently worked on swing shifts, meaning they worked nights and slept during the day, so that "casual bell ringers" would interfere with the citizens' ability to sleep.¹⁷⁶

The City also contended that the statute served a public safety interest because many criminals posed as missionaries to gain access to homes they planned to burgle.¹⁷⁷ The criminals posed as canvassers in an effort to discover whether a house was vulnerable to burglary.¹⁷⁸

The Supreme Court struck down the law as overbroad.¹⁷⁹ The Court pointed out that "[w]hile door to door distributors of

prominently in free speech jurisprudence: the right of an individual to personally 'approach and offer' a message or idea to another person through face-to-face contact"); see also Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests-Section II*, 29 U.C. DAVIS L. REV. 1163, 1173 (1996) (noting that demonstrators have limited opportunities to communicate the anti-abortion message with patients).

169. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (emphasizing that the First Amendment protects the right to advocate a cause by the most effective means); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 798 (1985) (reasoning that face-to-face encounters afford a greater opportunity to exchange ideas). But see *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992) (stating that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation").

170. 319 U.S. 141 (1943).

171. See *id.* at 141-42.

172. See *id.*

173. See *id.* at 144.

174. See *id.*

175. *Id.*

176. See *id.*

177. See *id.*

178. See *id.*

179. See *id.* at 149.

literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion.”¹⁸⁰ Furthermore, the Court found that the “[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulation of time and manner of distribution, it must be fully preserved.”¹⁸¹ Finally, the Court opined that dangers associated with distribution may be controlled by other legal means, so that “stringent prohibition [of distribution] can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.”¹⁸²

A major distinction between *Martin* and *Operation Rescue* is the element of violence prominent in the abortion clinic cases, which stems from the combination of sidewalk counselors, crowds of picketers, and patients.¹⁸³ The Jehovah’s Witnesses in *Martin* did not resort to violence during their attempts to communicate with Struthers residents.¹⁸⁴ In fact, the Court pointed out in *Martin* that one of the reasons for striking down the statute was that the residents had other, less restrictive means of denying solicitors access to their homes.¹⁸⁵ For example, the homeowner could choose not to answer the door or simply close the door if the homeowner did not want to listen to the message.¹⁸⁶

When a woman approaches an abortion clinic to secure services offered within its walls, she is not in the same position as the homeowners in *Martin*.¹⁸⁷ If she wishes to avoid the protestors’ message, she cannot simply close a door on the protestors. There are no alternative means for getting into the clinic without some form of confrontation with the sidewalk counselor. Therefore, the *Martin* rationale for allowing

180. *Id.* at 145.

181. *Id.* at 146-47.

182. *Id.* at 147.

183. See SUSAN FALUDI, BACKLASH 400, 411 (1991) (recounting acts of violence against abortion clinic employees and patients).

184. Refer to Part II.B *supra* (describing abortion protestors’ use of physical violence during protest blockades).

185. See *Martin*, 319 U.S. at 148.

186. See *id.* (asserting that homeowners’ ability to decline the message was a preferred alternative to government restriction of expression).

187. See Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors’ First Amendment Rights in Schenck v. Pro-Choice Network*, 62 BROOK. L. REV. 547, 580 (1996) (indicating that women entering abortion clinics were unable “to avoid either the initial or subsequent communication . . . because they could not physically remove themselves” without foregoing desired medical treatment).

missionaries to leaflet does not apply to the facts of *Operation Rescue*.¹⁸⁸

C. The Historical Context of Sidewalk Counseling

The ban against sidewalk counseling may not be adequately analyzed without first putting the matter in the proper context. This context often includes offensive or even violent acts by the protestors.¹⁸⁹ For example, in *Madsen, Schenck, and Operation Rescue*, acts of violence were rampant prior to the issuance of temporary restraining orders.¹⁹⁰ In these cases, the defendants continued the violent behavior after receiving notice that such activities had been enjoined by a court order.¹⁹¹

Some sidewalk counselors, in their zeal to persuade patients, utilize extremely graphic materials. For example, protestors have thrust “plastic replicas of fetuses on patients attempting to enter the clinic.”¹⁹² This is just one of the methods abortion protesters use to discourage patients from getting abortion services.¹⁹³

Patients are often so unnerved by the sidewalk counselors that they turn away from the clinics and return to their cars.¹⁹⁴

188. See *id.* at 580-81 (referring to the fact that women entering clinics “cannot . . . shut out sounds so easily or quickly, and often cannot do so at all” (alteration in original) (quoting Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 NW. U. L. REV. 153, 183 (1972))).

189. Refer to Part III.A.2 *supra* (reasoning that in *Madsen* the complete buffer zone was justified based upon the protestors’ history of violent behavior).

190. Refer to Parts II.A and III.A.2-3 *supra* (recounting protest activities that compelled injunctive relief). In *Operation Rescue*, aggressive demonstration tactics were utilized:

Protesters yelled, used bullhorns, and played loud music to disturb people in clinics and homes. Protesters tried to block access to clinics by lying down in front of an entrance en masse, and even invaded the premises and chained their necks to cement blocks or to fixtures within the clinic. . . . Some protestors also acted as “sidewalk counselors”, approaching people who drove or walked towards clinics and offering them anti-abortion literature. These encounters were often peaceful efforts to convey information in a helpful, persuasive way, but sometimes protestors were confrontational, coming within inches of patients’ faces and shouting at them, causing the respondents to have to provide “escorts” to shield patients from protestors.

Operation Rescue v. Planned Parenthood, Inc., 975 S.W.2d 546, 550 (Tex. 1998).

191. Refer to Parts III.A.2-3 *supra* (highlighting the protestors’ repeated disregard of court orders).

192. See *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402, 404 (Cal. 1995).

193. See *Armes v. City of Philadelphia*, 706 F. Supp. 1156, 1159 (E.D. Pa. 1989) (describing the efforts of anti-abortion protestors to talk approaching patients out of keeping medical appointments for abortion services).

194. See *Operation Rescue v. Women’s Health Ctr., Inc.*, 626 So. 2d 664, 668 (Fla. 1993) (recounting one doctor’s comment that “he observed some patients turn

Patients who enter the clinics are often “visibly shaken, crying, and nervous.”¹⁹⁵ Moreover, physicians reported “increased respiration, heart rate, and blood pressure among patients, which at times required sedatives to treat.”¹⁹⁶ In many cases, sidewalk counseling clearly has a detrimental effect on the health of women entering abortion clinics.¹⁹⁷ The combination of violent acts and health risks has justifiably sparked opposition to this method of protest.¹⁹⁸

D. *Legal Precedent Justifying a Ban on Sidewalk Counseling*

The Texas Supreme Court erred in permitting two sidewalk counselors inside buffer zones that were designed to protect abortion clinics and their patients.¹⁹⁹ The protection of a woman’s unrestricted access to an abortion clinic justifies heightened restrictions on expressive activity in the form of sidewalk counseling.²⁰⁰ Legal precedent allows the courts to fashion stringent relief without offending the First Amendment.²⁰¹

Several doctrines support curtailing the activities of the sidewalk counselors: 1) sidewalk counseling is a form of conduct that is not protected by the First Amendment; 2) women pursuing abortion services are a “captive audience” and should be

away from the crowd in the driveway to return at a later date”), *aff’d in part and rev’d in part sub nom. Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994).

195. *Operation Rescue*, 975 S.W.2d at 551.

196. *Id.*

197. See, e.g., Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women’s Psychological Responses to Abortion*, 13 J. SOC. & CLINICAL PSYCHOL. 404, 406-23 (1994) (exposing the detrimental effects of anti-abortion demonstrators on women seeking abortion services).

198. See generally Robert O’Harrow, Jr., *Booklet Preaches, Teaches Violence*, WASH. POST, Jan. 17, 1995, at A8 (reporting on a federal grand jury investigation of anti-abortion protest tactics); Kevin Merida, *House Approves Bill to Combat Violence at Abortion Clinics*, WASH. POST, Nov. 19, 1993, at A11 (noting the passage of a bill making obstruction of access to abortion clinics a federal crime).

199. See *Operation Rescue*, 975 S.W.2d at 570 (Spector, J., concurring in part and dissenting in part) (arguing that the lower court’s permanent injunction burdened no more speech than necessary to protect clinic patients’ health).

200. See Leslie Gielow Jacobs, *Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions About the Proper Scope of Government Regulations*, 70 TUL. L. REV. 1359, 1369-70 (1996) (asserting that proponents of the Freedom of Access to Clinic Entrances (FACE) Act of 1994, 18 U.S.C. § 248 (1994) argue that restrictions on free speech are required “to protect abortion seekers and providers from physical and emotional injury, and to vindicate the constitutional right to choose abortion, which the protests threaten to render practically unavailable”). The FACE Act prohibits protesters from interfering with unfettered access to abortion clinics. See 18 U.S.C. § 248.

201. Refer to Part III.D *infra* (discussing doctrinal justifications for speech restrictions).

afforded protection against certain forms of speech; 3) the history of violent activity by sidewalk counselors justifies rigorous restraints, such as a complete ban on sidewalk counseling; and 4) the unique nature of medical facilities allows restriction of expressive activity.

1. *Sidewalk Counseling Is Conduct Not Protected by the First Amendment.* If sidewalk counseling threatens a woman's constitutional right to choose to have an abortion,²⁰² may it be proscribed without offending the First Amendment? Some proponents of a ban on sidewalk counseling contend that protest activity is conduct, not speech, and may therefore be restricted.²⁰³ Courts have been tempted to characterize protest activities, such as physically blocking access to the abortion clinics, shoving pamphlets into the faces of the patients, and yelling, as conduct rather than speech.²⁰⁴ This distinction is significant because First Amendment protects speech, but not all types of conduct.

It is well settled that certain types of expressive conduct are protected by the First Amendment.²⁰⁵ Anti-abortion protesters have asserted that their activity is expressive conduct equivalent to burning an American flag.²⁰⁶ The distinction between flag burning and sidewalk counseling is found in the intent behind the expression.²⁰⁷ If the intended function of the activity is to harm private listeners, restriction of the expression is permissible under the Constitution.²⁰⁸

202. See Alan E. Brownstein & Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1182-85 (1991) (arguing that violent abortion protests infringe on the right to privacy in having an abortion by intruding on the physician-patient relationship, threatening to publicize the woman's decision to abort the pregnancy, causing patients to experience emotional distress, and disrupting the operations of abortion clinics and neighboring establishments).

203. See Laurence J. Eisenstein & Steven Semeraro, *Abortion Clinic Protest and the First Amendment*, 13 ST. LOUIS U. PUB. L. REV. 221, 238 (1993) (positing that courts should address the harm caused by the protester's message, rather than the message itself).

204. See *id.* at 230. "Judges seem content to rest on the notion that protesters are engaged in 'conduct' and not 'speech,' sometimes coupled with the notion that this conduct is treading on the constitutional rights of others." *Id.* at 233.

205. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (affording First Amendment protection to citizens who burned an American flag); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966) (holding that a silent library sit-in is a constitutionally protected form of expression).

206. See Eisenstein & Semeraro, *supra* note 203, at 230.

207. See *id.* at 237.

208. See *id.* at 239.

Under this doctrine, the harm must be intentionally inflicted upon a private person.²⁰⁹ Although flag burning may produce emotional and perhaps even physical effects, these are not the expression's intended results.²¹⁰ If the purpose of the speech is to make a political statement, the First Amendment protects the expressive conduct.²¹¹

Aggressive sidewalk counseling and other forms of violent protest are intended to intimidate.²¹² This conduct is targeted at women in an effort to dissuade them from exercising their constitutional right to an elective abortion.²¹³ The intent of the protestors' conduct is to emotionally or physically harm patients who seek abortions and to harass or frighten medical professionals who provide abortion services.²¹⁴

Politically motivated expressive behaviors, such as flag burning or sit-ins, are constitutionally sacred.²¹⁵ Constitutional libel law instructs that speech that defames the government is clearly protected.²¹⁶ A law forbidding individuals from making negative expressions aimed at the government would likely be declared unconstitutional.²¹⁷ However, defamatory speech directed at private individuals is subject to a lawsuit for libel and slander.²¹⁸ The different levels of protection afforded by the legal system highlight the deferential treatment that is reserved for political free speech, unlike communication aimed at private individuals.²¹⁹ "[W]here the message is directed to a private person, and particularly where the subject matter is also private, evidence that the manner of speech causes emotional harm should justify regulation."²²⁰

209. See *id.* at 238.

210. See *id.*

211. See *United States v. Eichman*, 496 U.S. 310, 319 (1990) (characterizing this principle as a foundation of the First Amendment).

212. See *Operation Rescue v. Planned Parenthood, Inc.*, 975 S.W.2d 546, 550 (Tex. 1998) (discussing protesters' tactics aimed at shutting down women's clinics).

213. See *id.*

214. See Jennifer Bullock, Note, *National Organization for Women v. Scheidler: RICO and the Economic Motive Requirement*, 26 CONN. L. REV. 1533, 1550 (1994) (relating one woman's account of being told by members of Operation Rescue that abortions could cause her to die, bleed internally, or go into a coma).

215. See Eisenstein & Semeraro, *supra* note 203, at 238 (noting that the "law draws meaningful distinctions between speech that harms the government or public figures and speech that harms private individuals").

216. See *id.*

217. See *id.*

218. See *id.*

219. See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992).

220. Eisenstein & Semeraro, *supra* note 203, at 239.

2. *The Captive Audience Doctrine Justifies Regulation.* The Supreme Court in *Madsen* explained that “targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held ‘captive’ by medical circumstance.”²²¹ Based upon this assertion, pro-choice advocates argue that the captive audience doctrine justifies regulation of the violent protest methods used at abortion clinics.²²²

The Supreme Court applied and clarified the captive audience doctrine in *Frisby v. Schultz*.²²³ In *Frisby*, the Supreme Court evaluated the constitutionality of a city ordinance making it “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual.”²²⁴ The petitioners were anti-abortion activists who expressed their views on abortion by picketing the home of a doctor who performed the procedure.²²⁵ Although the protesters were generally peaceful, the activity “generated substantial controversy and numerous complaints.”²²⁶ In response, the City passed the ordinance restricting residential picketing activity.²²⁷

In evaluating the ordinance, the Court concluded, “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”²²⁸ The Supreme Court upheld the ordinance on the basis that an individual subjected to targeted picketing at his home is “figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding unwanted speech.”²²⁹ The Court explained that the restriction

221. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994).

222. See, e.g., Kathryn D. Piele, Note, *Sabelko v. City of Phoenix: Ninth Circuit Refuses to Burst “Bubble” Protecting Women Entering Health Care Facilities*, 75 OR. L. REV. 1297, 1314 (1996) (arguing that the *Madsen* Court opened the door to the use of the captive audience doctrine in abortion demonstration cases).

223. 487 U.S. 474 (1988).

224. *Id.* at 477.

225. See *id.* at 476. The record indicated that the petitioners and others picketed outside the home of the doctor on at least six occasions. See *id.*

226. *Id.*

227. See *id.*

228. *Id.* at 487; accord *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1978) (protecting airport patrons from solicitations). But see *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the Court emphasized that “the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.” *Id.* at 21. Mr. Cohen had been convicted for wearing a jacket with the words, “Fuck the Draft” on the back, in violation of a California statute that prohibited disturbance of the peace by offensive conduct. See *id.* at 16. The Court struck down the statute as offensive to the First and Fourteenth Amendments. See *id.* at 26.

229. *Frisby*, 474 U.S. at 487.

may be upheld provided that it is narrowly tailored to promote a significant government interest and that there are alternative means of communication available.²³⁰

Although *Frisby* applied the captive audience doctrine in the residential setting, the Court had previously stated that the doctrine may be applied beyond the private forum only when it is impractical for the unwilling target to avoid the message.²³¹ The threshold question under this doctrine is whether a woman seeking abortion services is a “captive.”²³²

In *Lehman v. City of Shaker Heights*,²³³ the Supreme Court recognized that the captive audience doctrine was not limited to the residential setting.²³⁴ *Lehman* arose when the City denied petitioner, a political candidate, paid advertising space on the City’s bus lines.²³⁵ The *Lehman* Court affirmatively answered the question of whether bus passengers were a “captive audience.”²³⁶ Thus, the Court found that the City acted within constitutional boundaries when it limited the types of advertising displayed on its buses.²³⁷ The Court held that the City reasonably “limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.”²³⁸ *Lehman* supports the application of the captive audience doctrine to cases like *Operation Rescue* because a woman approaching an abortion clinic cannot choose not to hear the protesters’ messages and, thus, is a captive target.²³⁹

230. See *id.* at 488.

231. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (applying the captive audience doctrine to passengers on municipally owned buses); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (upholding a ban on amplified sound trucks because the broadcasts’ amplification exceeded the scope of a public forum and invaded private homes, thereby making it impossible for people to escape the message). *But see Sabelko v. City of Phoenix*, 120 F.3d 161, 165 (1997) (rejecting application of the captive audience doctrine to a case involving picketers in front of medical facility).

232. See *Ellis & Wu*, *supra* note 187, at 577 (declaring that the *Madsen* decision “suggests that the [captive audience] doctrine provides an alternative ground” for justifying injunctions that restrict free speech in abortion clinic access cases).

233. 418 U.S. 298 (1974).

234. See *id.* at 299-300, 304 (upholding a city’s ban of political advertising on the City’s public transit system under the captive audience doctrine).

235. See *id.* at 299-300 (recounting that the bus line denied petitioner advertising space because it did not permit political advertising on its buses).

236. See *id.* at 302 (recognizing that “[t]he streetcar audience is a captive audience” (quoting *Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting))).

237. See *id.* at 304.

238. *Id.*

239. *Cf. id.* (observing that viewers have no choice but to see billboards, unlike

Just as the Supreme Court applied the captive audience doctrine to women seeking abortions in *Madsen*,²⁴⁰ the *Operation Rescue* court could also have applied the doctrine to exclude sidewalk counselors from its buffer zone.

3. *Past Violent Behavior Justifies the Ban.* The ban on sidewalk counselors passes constitutional muster because Operation Rescue's past violent behavior justifies broader restrictions on its freedom of expression.²⁴¹ The Supreme Court upheld a similar sanction in *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*,²⁴² thereby sustaining an injunction prohibiting labor union members from picketing in front of stores.²⁴³

Meadowmoor Dairies involved a labor dispute between a dairy and a labor union over an alleged violation of their labor agreement.²⁴⁴ Meadowmoor Dairies sued the union to enjoin its disruption of the dairy's business operations.²⁴⁵

The union had engaged in various protest activities, including smashing windows and detonating bombs, which caused Meadowmoor Dairies substantial injury.²⁴⁶ The perpetrators were consistently identified as being union members.²⁴⁷ The trial court enjoined future violent acts but permitted peaceful picketing.²⁴⁸ The Illinois Supreme Court reversed the trial court and issued a permanent injunction

the choice available in turning off a radio or not reading a magazine); see also Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 NW. U. L. REV. 153, 177-85 (1972) (exploring proposals to expand the captive audience doctrine); Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447, 1451-56 (1976) (linking the privacy interest in preserving repose to the captive audience doctrine).

240. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (agreeing with the lower court's determination that women entering abortion clinics are captive listeners).

241. Cf. *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978) (concluding that prior violations of the law justified appropriate restraints of First Amendment freedoms to avoid future recurrences).

242. 312 U.S. 287 (1941).

243. See *id.* at 291-92.

244. See *id.*

245. See *id.*

246. See *id.* (observing that stench bombs were dropped in five stores; several of the vendor's trucks were wrecked; another truck was driven into a river; two other trucks were burned; several employees who continued to work were beaten severely; and in one instance, protestors shot at a truck and driver).

247. See *id.* at 292.

248. See *id.* (stating that although the master recommended enjoining all picketing, the trial court chose to allow peaceful picketing).

prohibiting all picketing activity.²⁴⁹ The United States Supreme Court granted certiorari to resolve the issue of whether the injunction unconstitutionally infringed upon the protesters' free speech rights.²⁵⁰

The Court framed the issue in *Meadowmoor* as whether a state can enjoin peaceful picketing activities that are intertwined with episodes of violent and illegal conduct.²⁵¹ The Court stressed that free speech guarantees exist to encourage expression of ideas by peaceful means.²⁵² Thus, an idea expressed under violent circumstances surrenders its claim to constitutional protection.²⁵³ In conclusion, the Court opined, "Such utterance was not meant to be sheltered by the Constitution."²⁵⁴ The Court ultimately held that the state acted within its power to curtail otherwise peaceful expression that had become enmeshed in violence.²⁵⁵

Meadowmoor Dairies exemplifies the Court's acknowledgement of the state's authority to grant injunctive relief in the face of illegal acts.²⁵⁶ Operation Rescue's history of violent behavior is well documented.²⁵⁷ Accordingly, an injunction against all picketing activity within a buffer zone is justified.²⁵⁸

4. *Protecting Medical Facilities Justifies Speech Restrictions.* As Justice Spector argued in her separate opinion, "The Supreme Court has recognized that . . . public health

249. See *id.*

250. See *id.* at 291.

251. See *id.* at 292.

252. See *id.* at 293 ("It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope.").

253. See *id.*

254. *Id.*

255. See *id.* at 299 ("Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states . . . the power to deal with coercion due to extensive violence.").

256. See *id.* at 294 (finding that there is no "doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings").

257. Refer to Part III.C *supra* (exposing the many violent acts carried out by protesters against patients and clinic workers).

258. See *Operation Rescue v. Planned Parenthood, Inc.*, 975 S.W.2d 546, 572 (Tex. 1998) (Spector, J., concurring in part and dissenting in part) (arguing that "[i]t is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it" (quoting *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 206 (1921))). Justice Spector argued that in light of the temporary injunction's failure, the district court legitimately resorted to stronger safeguards against further violence. See *id.* (Spector, J., concurring in part and dissenting in part).

concerns may justify restrictions even on otherwise protected activities.”²⁵⁹ In *Beth Israel Hospital v. NLRB*,²⁶⁰ the Supreme Court determined the legality of a restriction on nonemployee solicitation within hospital grounds.²⁶¹ The Court, relying upon an earlier NLRB decision,²⁶² characterized hospitals as special places subject to special rules.²⁶³ The Court reiterated the NLRB’s finding “that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.”²⁶⁴

Furthermore, the Court asserted that “hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted.”²⁶⁵ Specifically, solicitation may be restricted “in strictly patient care areas, such as the patients’ rooms, operating rooms, and places where patients receive treatment.”²⁶⁶ The restriction is warranted because “[s]olicitation . . . in [patient care] areas might be unsettling to the patients.”²⁶⁷ The restriction in *Beth Israel Hospital* was ultimately struck down after the hospital failed to prove that solicitation was occurring in patient care areas.²⁶⁸

In *NLRB v. Baptist Hospital, Inc.*,²⁶⁹ the Supreme Court upheld a hospital policy that prohibited solicitation that could be

259. *Id.* at 570 (Spector, J., concurring in part and dissenting in part); *accord* *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978) (recognizing that a healthcare facility may restrict otherwise protected employee speech in the interest of protecting patients); *see also* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1859, 1862-66 (1988) (arguing that ordinances creating bubble zones around medical clinics are an appropriate and permissible way of “balancing the rights of speakers against the privacy interests of certain unwilling listeners”).

260. 437 U.S. 483 (1978).

261. *See id.* at 486-87.

262. *See* *St. John’s Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976).

263. *See Beth Israel Hosp.*, 437 U.S. at 494-95; *see also* *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 790-91 (1979) (upholding a ban on labor solicitation in patient care areas); *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989) (upholding an ordinance that restricted noise levels outside of medical treatment and convalescent institutions); *Portland Feminist Women’s Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 686-87 (9th Cir. 1988); *Planned Parenthood Ass’n v. Project Jericho*, 556 N.E.2d 157, 161-62 (Ohio 1990) (upholding an injunction that restricted protest activities outside medical clinics).

264. *Beth Israel Hosp.*, 437 U.S. at 495 (quoting *St. John’s Hosp.*, 222 N.L.R.B. at 1150).

265. *Id.*

266. *Id.*

267. *Id.*

268. *See id.* at 506-07 (finding that the potential for disruption of patient care was remote). The evidence revealed that 77% of cafeteria patrons were hospital employees, and 1.56% were patients. *See id.* at 490.

269. 442 U.S. 773 (1979).

potentially upsetting to patients.²⁷⁰ The hospital had previously instituted a policy that prohibited solicitation in the hospital's patient care areas and areas that were accessible to the public.²⁷¹ The Court upheld the portion of the policy that prohibited solicitation in patient care areas,²⁷² reasoning that the restriction was "necessary to avoid disruption of health-care operations or disturbance of patients."²⁷³ Based upon *Baptist Hospital's* acknowledgment of a need to preserve a tranquil environment in the medical setting, the Texas Supreme Court should have preserved the sanctity of the buffer zones in *Operation Rescue*.²⁷⁴

E. Implications of Operation Rescue

The implications of the Texas Supreme Court's holding in *Operation Rescue* are the same as those contemplated when *Schenck* was decided.²⁷⁵ On its face, *Operation Rescue* illustrates the Texas Supreme Court's refusal to recognize that the constitutionally protected right to seek an abortion requires complete, unencumbered access to abortion facilities.²⁷⁶ Meanwhile, doctors continue to report that, because of the anti-abortion movement's violent reputation, the mere presence of sidewalk counselors is detrimental to the health of many patients.²⁷⁷

IV. CONCLUSION

Roe v. Wade was the first step toward a woman's access to abortion services.²⁷⁸ Sadly, decisions like *Operation Rescue* erode

270. See *id.* at 781, 790.

271. See *id.* at 775 (noting that "[f]or several years . . . the Hospital enforced a rule against solicitation anywhere on its premises").

272. See *id.* at 790.

273. *Id.* at 781 (quoting the standard in *Beth Israel Hospital* as the appropriate standard by which to test the legality of restricting solicitation in a medical setting).

274. Refer to Part III.C *supra* (establishing that protest activities disrupt medical treatment).

275. See David G. Savage, *You Have a Right to Be Really Annoying*, HOUS. CHRON., Feb. 22, 1997, at 21A (lamenting that the Supreme Court's decision "came down on the side of . . . shouting sidewalk protestors").

276. See Ellis & Wu, *supra* note 187, at 547-48 (asserting that "[p]rotecting the safety of patients at reproductive health care facilities is crucial because without access, the constitutional right to abortion will become a nullity").

277. Refer to Part III.C *supra* (describing physicians' reports of protest-related health problems in patients).

278. See JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURAL WAR* 17 (1994) (recognizing that the landmark *Roe v. Wade* decision was the first spark in the controversy over how far a woman's right to abortion extends).

the liberties of those attempting to exercise that right.²⁷⁹ In Texas, a woman contemplating an abortion wrestles not only with the medical risks inherent in the abortion procedure itself, but also with the risk of her physical harm at the hands of angry protesters before even entering the clinic.²⁸⁰

Many women prefer to keep their decision to have an abortion private.²⁸¹ Moreover, the protesters' presence deters women desiring other clinic services (e.g., examinations) from seeking care.²⁸² Ultimately, the use of buffer zones as applied in *Madsen* helps ensure women the opportunity to freely exercise the right to a legal abortion. *Operation Rescue* continues the disturbing trend established in *Schenck* by allowing sidewalk counselors to pierce the protective haven that buffer zones afford patients.

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279. Cf. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) (warning that “[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties” (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring))).

280. See SUE HERTZ, *CAUGHT IN THE CROSSFIRE: A YEAR ON ABORTION'S FRONT LINE* 7 (1991) (asserting that “after the Supreme Court had legalized abortion . . . picketers were as much a part of the clinic's routine as pregnancy tests”).

281. See *Thornburgh*, 476 U.S. at 766 (“A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly.”).

282. See *Bullock*, *supra* note 214, at 1549.