Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests – Section II

*Alan E. Brownstein**

This Article is being published in two sections because of its length. The first section was published in Volume 29, issue 3 of the *U.C. Davis Law Review.* A complete introduction to the entire Article is available in that issue.[1] I offer the following paragraph as a brief alternative.

The first section of the Article discusses the constitutionality of regulations restricting conduct and unprotected speech by anti-abortion protestors outside of reproductive health clinics. Its focus is the validity of the Freedom of Access to Clinic Entrances Act, or FACE. The current section evaluates laws regulating anti-abortion protests that are directed at other kinds of expressive activity. First, because expressive harassment has never been formally recognized as a category of unprotected speech, the Article examines as a separate issue the constitutionality of regulations that are designed to protect clinic patients and staff from harassment. Second, this section considers whether there is any constitutional basis for regulating anti-abortion protests outside of clinics when the protestors do not harass anyone and do not engage in either proscribable conduct or unprotected speech.

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* Professor of Law, University of California, Davis. B.A. 1969, Antioch College; J.D. 1977, Harvard University. I wish to thank Vikram Amar, James Weinstein, and Leslie Jacobs for reading drafts of this Article and for providing helpful criticism. I also want to thank Stephanie Hamilton and Jennifer Holman for their work as research assistants on this project.

[1] *See* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553 (1996).

I. REGULATING HARASSMENT

While the regulation of conduct and unprotected speech provided for in FACE has been held to be constitutional, FACE does not represent the only attempt by government to regulate expressive activity related to the abortion controversy. Indeed, the extent to which anti-abortion protests outside of clinics may be restricted if they do not involve a recognized category of unprotected speech or some form of clearly disruptive conduct remains an open and heavily litigated question both for courts and commentators.[2]

One justification for restricting such protests that deserves careful evaluation is the suggestion that the state may constitutionally prohibit speech targeted at specific individuals that constitutes harassment.[3] The intuitive reasonableness of that contention, however, belies the doctrinal difficulty inherent in properly defining harassment as a basis for restricting expressive activity. The reality is that while there are numerous statutes currently in force throughout the United States that prohibit various forms

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[2] *See, e.g.*, Pro-Choice Network v. Schenck, 67 F.3d 377 (2d Cir. 1995) (affirming injunction restricting non-obstructive protest activities around abortion clinic against First Amendment challenge), *cert. granted*, 116 S. Ct. 1260 (1996); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989) (refusing to grant injunction limiting non-obstructive protests outside of clinic in part on First Amendment grounds).

[3] *See* Frisby v. Schultz, 487 U.S. 474, 477 (1988) (describing harassing nature of targeted residential picketing); *Schenck*, 67 F.3d at 383-87 (describing harassing behavior of "sidewalk counselors" and noting that while "[m]any of the sidewalk counselors have been arrested on more than one occasion for harassment, [they] persist in harassing and intimidating patients, patient escorts and medical staff"); Libertad v. Welch, 53 F.3d 428, 438 n.6 (1st Cir. 1995) (describing protestor harassment of clinic personnel and patients); New York State NOW v. Terry, 886 F.2d 1339, 1343 (2d Cir. 1989) (arguing that "free speech . . . exercised in close proximity to individual women entering or leaving [a] clinic so as to tortiously assault or harass them" is not constitutionally protected), *cert. denied*, 495 U.S. 947 (1990); Welsh v. Johnson, 508 N.W.2d 212, 214 (Minn. Ct. App. 1993) (upholding application of Minnesota anti-harassment statute to anti-abortion protestors); Bering v. Share, 721 P.2d 918, 928 (Wash. 1986) (explaining that protestors' verbal harassment increases patient's level of anxiety "which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter."); *see also* Amy M. Sneirson, Note, *No Place To Hide: Why State and Federal Enforcement of Stalking Laws May Be The Best Way to Protect Abortion Providers*, 73 WASH. U. L.Q. 635, 651 (1995) (arguing that "[h]arassment statutes have proved to be the most effective type of criminal statute to address problematic anti-abortion behavior"); Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1856-57 (1988) [hereinafter *Too Close for Comfort*] (describing harassment of patients and staff at reproductive health clinics).

of expressive activity described as harassment,[4] legislatures have not developed an accepted working definition of what constitutes harassment.[5] Similarly, although many harassment statutes have been upheld against First Amendment challenges,[6] courts have not provided a coherent and consistent analysis that explains why the First Amendment allows legislatures to prohibit harassment.[7] Without that foundation, courts cannot effectively

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[4] *See* Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL OF RTS. J. 179, 192-94 (1994) (describing number and range of telephone harassment statutes); Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 998-99 (1993) (describing various harassment laws); Kathleen G. McAnaney et al., Note, *From Imprudence To Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 824, 884-86 (1993) (describing diversity of anti-harassment laws and range of recently enacted anti-stalking laws); Andrea J. Robinson, Note, *A Remedial Approach To Harassment*, 70 VA. L. REV. 507, 522-25 (1984) (noting that every state has some form of telephone harassment statute and about 25 states "prohibit some form of nontelephonic harassment"). *A Remedial Approach To Harassment* does a particularly good job describing both the variations of behavior that constitute harassment and the diversity of statutory responses to harassment.

[5] Legislative definitions of harassment differ substantially. Some statutes emphasize the lack of any legitimate purpose for harassing behavior. *See, e.g.*, WIS. STAT. ANN. § 813.125(1)(b) (West 1995) (defining harassment as "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose"). Other laws focus on the victim's desire not to receive further communication. *See, e.g.*, HAW. REV. STAT. § 711-1106(1)(e) (1995) (defining harassment as "[m]ak[ing] repeated communications, after being advised . . . that further communication is unwelcome"). Still other regulations adopt a fighting words rubric. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1311(1) (West 1995) (providing that person is guilty of harassment when he "insults, taunts or challenges another person or engages in any other course of alarming or distressing conduct in a manner which [he] knows is likely to provoke a violent or disorderly response").

The range and diversity of anti-harassment and anti-stalking laws are described in considerable detail by the articles cited *supra* in note 4.

[6] *See, e.g.*, Robinson v. Township of Waterford, No. 84-15779, 1989 WL 94569, at **3-4 (6th Cir. Aug. 18, 1989) (upholding against vagueness challenge statute punishing anyone who "engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person, and which acts or conduct serve no legitimate purpose"), *cert. denied*, 494 U.S. 1078 (1990); *Welsh*, 508 N.W.2d at 214 (upholding application of anti-harassment statute to anti-abortion protestors); State v. Gattis, 730 P.2d 497, 501 n.1 (N.M. Ct. App. 1986) (citing decisions in 21 states and 2 federal circuits upholding telephone harassment statutes against constitutional challenge); Bachowski v. Salamone, 407 N.W.2d 533, 534 (Wis. 1987) (upholding harassment statute that criminalizes "[e]ngag[ing] in a course of conduct or repeatedly commit[ting] acts which harass or intimidate [another] person and which serve no legitimate purpose"); Brownstein, *supra* note 4, at 194-99 (describing numerous cases upholding telephone harassment statutes against constitutional challenges); Robinson, *supra* note 4, at 529-32 (reviewing several harassment cases, most of which uphold the constitutionality of statute under review).

[7] *See* Brownstein, *supra* note 4, at 194-200 (discussing various justifications used by

perform the job of evaluating anti-abortion protest activity outside of clinics to determine whether or not it should be protected from proscription.

A. Defining Harassment for First Amendment Purposes

One approach to distinguishing between protected expression and regulable harassment for First Amendment purposes is grounded on the difference between persuasive public speech and targeted private expression. This distinction has been implicitly recognized in the case law[8] and is explicitly supported by recent scholarship.[9] Not surprisingly, however, the differences between these categories are sharper at their outer boundaries than they are in the middle of the speech continuum in which the public and private spheres of discourse inevitably merge together. Despite this ambiguity, the distinction between persuasive public speech and targeted private speech provides a useful place to begin the process of defining harassment.

Persuasive public speech is directed at the public at large, at individuals who are consenting, self-selected members of the

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courts to uphold telephone harassment laws against First Amendment challenge including argument that harassment laws are directed at conduct rather than speech, that state's interest in protecting substantial privacy interests in home outweighs speakers' freedom of speech, and that telephone harassment involves speech of particularly low value).

[8] *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2527 (1994) (noting distinction between "focused picketing" directed at clinic patients and staff and more "generally disseminated communication" such as handbilling and solicitation); Frisby v. Schultz, 487 U.S. 474, 486 (1988) (identifying targeted expression directed at unwilling listener as form of speech that may be more easily proscribed); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-61 (1985) (reasoning that speech on matter of private concern is of less First Amendment value than speech on matter of public concern); Pro-Choice Network v. Schenck, 67 F.3d 377, 396 (2d Cir. 1995) (Winter, J., concurring) (suggesting that leeway provided to speakers to avoid censorship is less available and justified "where specific individuals are targeted at locations difficult or inconvenient for them to avoid"), *cert. granted*, 116 S. Ct. 1260 (1996).

[9] *See* Brownstein, *supra* note 4, at 179-80 (noting difference between "public discourse" and "targeted" speech). Much of the discussion in the next few pages summarizes arguments I presented in more depth in this previously published article. *See id.*; *see also* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigm of Free Expression*, 40 UCLA L. REV. 103, 113, 150-52 (1992) (noting that speech which forms no part of public discourse and is directed at targeted individual in unbearably offensive manner may be suppressed); Eugene Volokh, *Freedom of Speech and Harassment*, 39 UCLA L. REV. 1791, 1863-68 (1992) (arguing that directed speech communicated to people "who do not want to listen" should receive minimal First Amendment protection).

speaker's audience, and at persons who have an indeterminate willingness to hear what the speaker has to say.[10] The subject of what is being expressed in such public discourse typically involves a matter of public interest and concern. The purpose of public expression is to invite the attention of the audience and attempt to communicate a message that, at least in theory, is to be evaluated on its merit — on the truth and persuasiveness of its content. The First Amendment vigorously protects public speech in recognition of the speaker's right to communicate his or her ideas and out of respect for the autonomy of listeners who want to be able to decide for themselves whether the speaker has anything to say that is worth listening to.[11] Persuasive public speech addressed to the public at large almost by definition cannot constitute proscribable harassment even if some members of the audience are offended or outraged by the speaker's message.

Targeted private speech, on the other hand, is expressed to an individual on a subject that is primarily of relevance to the speaker and the person being addressed. It does not involve a matter of public concern. Targeted private speech presents the classic instance of expressive harassment. Not all targeted private speech is harassment, of course. Much of it is not. Yet most examples of expressive harassment fall within this category.[12]

Targeted private speech that constitutes harassment in its most blatant form is directed at a particular individual who presumptively or manifestly does not want to hear what is being said to her. The subject matter of the expression is typically abusive and lacks any connection to questions of public policy or issues of general interest. The speech is deliberately intended to cause harm to the victim. Its function is not to inform or persuade. If it is intended to change the listener's behavior at all, it seeks to do so through coercion by using the harm caused

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[10] Brownstein, *supra* note 4, at 189-91.

[11] *Id. See also Schenck*, 67 F.3d at 395 (Winter, J., concurring) (arguing that freedom of speech "inexorably requires that individuals who are subject to advocacy be left free to make up their own minds" as to what communications they will receive or believe). *See generally* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U. L. REV. 153 (1972) (discussing listeners' autonomy interest in refusing to receive communications).

[12] *See* Brownstein, *supra* note 4, at 184-89.

by the expression as negative reinforcement that will only be alleviated if the victim conforms her conduct to the speaker's demands.[13] Late night phone calls of sexually explicit ravings are an obvious example of this form of commonly regulated speech. Virtually every state and the federal government prohibit harassing phone calls of this kind.[14]

In between these poles on the expressive continuum is a third form of speech which might be called targeted public speech. This category includes speech that is at least arguably relevant to matters of public concern, but the speech is purposefully directed at particular individuals. Thus, the speaker does not simply want to talk about abortion, for example. She insists on talking about abortion to you and to no one else. This category of speech is the most relevant to the problem of regulating abortion-related protests outside of clinics. Targeted public expression in some circumstances may constitute regulable harassment. In order to understand when this occurs, however, it is necessary to more clearly explain why abusive, targeted private speech can be so readily recognized as harassment.

Expressive activities can be identified as harassment through a multi-factor analysis focusing on three criteria. First, the expression must severely and negatively affect the person to whom the speech is directed. The objective of protecting individuals against minor offense and annoyance is not a sufficient basis for prohibiting speech as harassment.[15]

Second, the speech at issue must be of very limited communicative value or social utility. That is why persuasive public speech is less likely to be identified as harassment. Persuasive public speech serves so many useful purposes that in many cases neither its primary effect, nor the speaker's motive in expressing her message, can be reasonably construed to be harassing.[16]

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[13] *Id.* at 200-01.

[14] *Id.* at 193; Robinson, *supra* note 4, at 522-24.

[15] *See* Brownstein, *supra* note 4, at 184-85.

[16] *Id.* at 184-85, 204-05. Speech on matters of public concern that is expressed for the ostensible purpose of persuading the listener of its merit may become low value speech, however, when it is persistently directed at an unwilling listener. *See generally* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.02(f), at 1-23 to 1-24 (1984) (arguing that even if privacy interests are not at issue, primary purpose of First Amendment, to permit communication of ideas in order to enlighten one's audience, has little relevance to speech addressed to audience that

Third, harassing speech invades the privacy of the victim or otherwise violates the victim's personal autonomy. This is the reason why we recognize certain locations to be particularly inappropriate sites for expressive activity by outsiders. Accordingly, speech directed at individuals in private locations, such as a person's home, is more likely to be identified as harassment.[17]

Our concern for personal autonomy also partially explains why we recognize expressive stalking of an individual as constituting harassment. People have a dignitary interest in being allowed to withdraw from an audience and to refuse to participate in an expressive interaction. A speaker violates the autonomy of third parties by attempting to override their lack of consent and conscripting them into an audience against their will.[18]

The defining quality of these three criteria in identifying proscribable harassment is established in part by induction. The kinds of speech that we conventionally recognize to be harassment, such as telephone harassment, satisfy these criteria.[19] Moreover, these factors provide necessary limits that prevent the definition of harassment from transgressing accepted First Amendment values.

Not all targeted private speech that is experienced as painful or hurtful, for example, can or should be regulated as harassment. Hearing targeted speech may often be an

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manifestly refuses to hear speaker's message); Volokh, *supra* note 9, at 1863 (suggesting that "[i]f the main reason we value free speech is that it allows people to spread their ideas, then the value of directed speech, aimed solely at an unwilling listener, is modest indeed").

Moreover, even high value speech related to public issues may constitute harassment when the other defining factors in identifying harassment are strongly established and the speaker is addressing a targeted audience. In locations imbued with significant privacy interests, for example, when the targeted audience has an important reason for declining to receive disturbing messages, some attempts to communicate may be prohibited as harassment. *See infra* notes 17-19 and accompanying text.

[17] *See* Brownstein, *supra* note 4, at 188-92.

[18] *See* Pro-Choice Network v. Schenck, 67 F.3d 377, 395 (2d Cir. 1995) (quoting Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) for proposition that "'[n]o one has a right to press even "good" ideas on an unwilling recipient'"), *cert. granted*, 116 S. Ct. 1260 (1996); Brownstein, *supra* note 4, at 203.

[19] *See* Brownstein, *supra* note 4, at 184-202 (arguing that courts must consider value and impact of speech, privacy interest of audience, and autonomy interest of unwilling listener in order to uphold telephone harassment laws against constitutional challenge).

unpleasant experience for the person being spoken to, particularly if the speech is harshly critical of the listener's conduct; but that fact in and of itself cannot reduce the constitutional protection provided expression of this kind. Critical expression commonly discomforts the person being criticized. No one seriously suggests, however, that only compliments are protected by the First Amendment, even in face-to-face encounters and even if the subject matter of the speech is not a matter of public concern.[20] A definition of harassment, focusing on the value and impact of expression and the autonomy of audience members, recognizes and respects this constitutional principle.

Similarly, a commitment to these criteria effectively precludes most attempts to restrict targeted public speech as harassment. As we have seen, targeted speech becomes proscribable harassment only when its nature, location, and context demonstrate that the persuasive quality of the expression is minimal and is far outweighed by the discomfort it causes to people who do not want to hear, but are prevented from avoiding, its message. Because targeted public speech involves matters of public concern, it is difficult to establish that the speech at issue is sufficiently valueless that it can be proscribed as harassment. Accordingly, for targeted public speech to constitute harassment the circumstances must be such that we either firmly believe the speech cannot actually serve a persuasive function of any kind or are convinced that its communicative value will not outweigh its egregious and personally intrusive impact on the audience at which it is directed.

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[20] *See id.* at 197-98 (noting that many critical comments relating to private concerns are protected by First Amendment even if they are addressed directly to specific individual); *see also* Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (reversing conviction of neo-Fascist speaker addressing large crowd on grounds that speech must be protected even if it is "provocative and challenging," "stirs people to anger," and results in "a condition of unrest"); Cantwell v. Connecticut, 310 U.S. 296, 308-09 (1940) (citing First Amendment grounds for reversing convictions of Jehovah's Witnesses who played record harshly critical of Catholic religion to individuals in predominantly Catholic neighborhood).

B. Harassment as a Means of Protesting Abortion

1. The Case of Residential Picketing

Perhaps the clearest example of harassment of this kind in the context of the abortion debate involves residential picketing at the homes of physicians and staff who provide abortion services. The Supreme Court in *Frisby v. Schultz* upheld a content-neutral ban on residential picketing that had been enacted by the town of Brookfield in response to repeated anti-abortion picketing in front of the home of a local physician.[21] In so doing, the Court recognized the harassment dimension that is intrinsic in this form of expression. Justice O'Connor, writing for the majority, explained:

> The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas . . . . Here . . . the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy . . . . In this case, for example, appellees subjected the doctor and his family to the presence of a relatively large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions.[22]

Although *Frisby* is correctly decided and does recognize the harassment dimension of residential picketing, the majority's reasoning is not fully convincing. Under O'Connor's analysis, residential picketing may be prohibited because of its narrow focus and coercive intent, because it invades the privacy of the home, and because the "captive audience" of the anti-abortion protestors' speech cannot avoid receiving this unwanted message. It is not clear, however, that these factors alone should justify a complete ban on expression. An anti-abortion march through the physician's residential neighborhood might be coercively

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[21] Frisby v. Schultz, 487 U.S. 474, 488 (1988).

[22] *Id.* at 486.

motivated, difficult to avoid, and would intrude into the doctor's residential privacy, but it could not, I would argue, be constitutionally prohibited.

Justice Stevens's dissenting opinion in *Frisby* provides the sharper and more persuasive analysis. To Stevens, the harassing nature of residential picketing is critical and he would allow the prohibition of such expression only to the extent that it "unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose."[23] As Stevens recognized:

> The picketing that gave rise to the ordinance enacted in this case was obviously intended to do more than convey a message of opposition to the character of the doctor's practice; it was intended to cause him and his family substantial psychological distress . . . . I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected. I do believe, however, that the picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate their message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family. Thus, I agree that the ordinance may be constitutionally applied to the kind of picketing that gave rise to its enactment.[24]

Thus, while the speech at issue in *Frisby* relates to a matter of public concern, the legitimacy of abortion, nevertheless, the protestors' expressive activity may be prohibited as harassment. As the message is endlessly repeated to the same unconsenting audience, the expressive activities become less and less meaningful and worthy of protection as an attempt to persuade the physician of the merits of the protestors' views. Moreover, at the same time as its communicative utility declines, the picketing becomes more and more intrusive, disturbing, and bothersome to the doctor and his family.[25] Finally, the location of the picketing is invasive and violates the tranquility of the physician's home. This combination of factors, (1) directing speech with low social utility (because of its repetition), (2) at an unconsent-

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[23] *Id.* at 499 (Stevens, J., dissenting).

[24] *Id.* at 498-99.

[25] *See* Brownstein, *supra* note 4, at 200-02.

ing, captive audience, (3) causing the target significant discomfort and harm, (4) as well as invading her privacy and autonomy, demonstrates that the protestors' activities constituted regulable harassment.

2. The Case of Protests Outside of Clinics Providing Abortion Services

While restrictions on residential picketing are relatively easy to justify as a prohibition of harassment, the regulation of expressive activity outside of clinics providing abortion services raises more difficult issues. Part of the audience at which speech is directed, the patients seeking medical services at the clinic, is continually changing its composition.[26] Thus, the repetition of expression intrinsic to residential picketing which so strongly demonstrates the low value and harassing nature of that activity is much less likely to occur. Most commonly, demonstrators outside of a clinic will attempt to communicate with patients on the fairly limited occasions when the patient enters or leaves the clinic. In some cases they will have only one opportunity to speak to the audience that they are trying to persuade.[27]

Although repetition is a useful factor in identifying harassment, it is not essential to a finding that harassment has occurred. Even a single act of critical expression can still constitute harassment if the nature, location, and circumstance of the expression demonstrates that the hurtfulness of the speech and the extent to which it violates privacy and autonomy interests overwhelmingly outweighs its persuasive or informational value. In order to provide adequate protection to freedom of speech, however, this standard must be enforced with considerable caution. Establishing that speech constitutes harassment on the basis

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[26] While protestors near abortion clinics harass doctors and staff workers as well as patients, and one may reasonably defend the constitutionality of regulations designed to protect clinic personnel, the primary focus of this Article is the regulation of speech addressed to clinic patients.

[27] *See, e.g.*, Edwards v. City of Santa Barbara, 883 F. Supp. 1379, 1382 (C.D. Cal. 1995) (describing protestor's claim that "Bubble Zone Provision [of ordinance] prevents her from conducting effective one-on-one counseling or leafletting, as the eight-foot zone makes it impossible to hand leaflets to people and forces her to speak at a volume that 'prevents empathy and sometimes even causes stress'"), *vacated*, No. 95-55595, 1995 WL 697223 (9th Cir. Nov. 22, 1995).

of a single expressive interaction must be a difficult burden to meet. Calling a woman who has recently had an abortion at her home at three o'clock in the morning to tell her she has just murdered her baby is harassment. Telling a woman walking into a clinic that if she has an abortion she will regret murdering her baby for the rest of her life is not at all so easily characterized.[28]

Not only does anti-abortion speech outside of the clinic have a clear informational and persuasive component, the time and location of such expression can be explained by motives other than harassment. There are few alternative vehicles available for directly addressing women who are planning to have an abortion.[29] For the same reason that striking employees picket di-

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[28] For a single act of expression to constitute harassment, the speech at issue must typically be abusive, targeted at a victim, and on a subject unrelated to public discourse. *See* Brownstein, *supra* note 4, at 200-02 (explaining that "[s]omeone who disturbs a woman at three in the morning with a phone call filled with vulgar sexual ravings may be guilty of harassment on the basis of that call alone").

Examples of single acts of harassment involving expression concerning a matter of public concern, such as the middle-of-the-night phone call criticizing a woman for having just murdered her baby by having an abortion, are much less common. Outside of the middle-of-the-night phone call scenario, it is difficult to establish harassment if the speech at issue, while deliberately hurtful, is related to a matter of public concern.

Still, one could find harassment on the basis of public discourse if the victim's vulnerability to hurtful expression at a particular time and location is acute or if the speech in context is uniquely harmful and threatening. Thus, it may be harassment for two large men to approach the diminutive director of a women's health center on her way to work, and tell her that "we are picketing your home '[b]ecause you are wicked, wicked, wicked, and we are going to expose you, and everyone will know who you are and what you are, and when you are dead and the maggots crawl in and out of your eyes, then you will know the wrath of God.'" Welsh v. Johnson, 508 N.W. 2d 212, 214 (Minn. Ct. App. 1993).

[29] Some courts challenge this conclusion. *See, e.g.*, Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1352 (3d Cir. 1989), (suggesting that anti-abortion activists have "numerous *legal* alternatives" other than protesting in front of clinics in that they can "march, go door-to-door to proselytize their views, distribute literature, personally or through the mails, and contact residents by telephone"), *cert. denied*, 493 U.S. 901 (1989). While the Third Circuit's analysis is a technically correct application of current doctrine, the statement's accuracy says more about the anemic nature of this component of the multi-factor balancing test used to review content-neutral laws than it does about the efficacy of the court's suggestions. As labor picketers have long since learned, there are few locations as efficient for communicating with consumers of goods or services as the area in front of the entrance to the establishment providing the goods or services. *See infra* note 30 and accompanying text (explaining effectiveness and efficiency of on-location picketing). Anti-abortion protestors may argue similarly that it will be difficult to effectively communicate with women planning to have abortions through means other than demonstrating in front of reproductive health clinics without incurring the expense and effort of addressing a

rectly in front of their employer's business in order to discourage consumers from patronizing the establishment, abortion opponents have a legitimate expressive basis for wanting to protest in front of clinics that perform abortions.[30]

The other side of the balance is hardly inconsequential, however. A woman attempting to enter a clinic to have an abortion is far more vulnerable to harm than a person attempting to enter a supermarket during a labor dispute to buy a loaf of

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much larger audience.

Clinic protests and sidewalk counseling, however, also involve significant drawbacks for anti-abortion activists who hope to persuade women through the merits of their argument not to have abortions. Their argument is presented after the conclusion of what will be for most women a difficult deliberative process. As has often been noted, targeted protests outside of clinics are typically "directed at individuals who have already given considerable thought to the subject at hand, do not agree with the protestor, and are quite unlikely to be moved by peaceful persuasion." Pro-Choice Network v. Schenk, 67 F.3d 377, 396 (2d Cir. 1995) (Winter, J., concurring), *cert. granted*, 116 S. Ct. 1260 (1996).

Furthermore, because the protestors' message is delivered immediately before a stressful medical procedure is about to be performed at a time and location that will almost certainly be experienced as intrusive and disturbing, many women will be predisposed not to listen to the protestors' message. Thus, the messages delivered in front of clinics are unlikely to be effective in persuading women to change their minds about having an abortion.

The blunt reality is that there may not be any precise and effective way for anti-abortion activists to reach their intended audience. All the alternative avenues of communication may be problematic. If that is true, the protestors' decision to demonstrate or engage in sidewalk counseling in front of clinics may not be motivated by an intent to harass potential patients. They may simply be adopting one of several unsatisfactory alternatives.

While this conclusion may protect anti-abortion protestors against overly precipitous accusations of harassment, there is a downside to the analysis as well. If all of the alternative avenues of communication available to anti-abortion protestors are problematic in significant ways, then it becomes more difficult to argue that a content-neutral regulation prohibiting any specific communicative approach materially interferes with the protestors' ability to deliver their message persuasively. The loss of one of several problematic means of communication available to a group is less burdensome in objective terms than the loss of the only, or most effective, means of communicating the group's message.

[30] *See* Hudgens v. NLRB, 424 U.S. 507, 533-34 (1976) (Marshall, J., dissenting) (explaining that when intended audience of picketing is consumers of goods and services marketed by business, alternative means of communication will always be less effective and more expensive than on location picketing); Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (striking down law prohibiting picketing in front of employer's premises because it prohibits "nearly every practicable, effective means whereby those interested — including the employees directly affected — may enlighten the public on the nature and causes of a labor dispute"). Indeed, given the strength of the analogy it is hardly coincidental that the Court's decision in *Madsen* cites so frequently to labor cases as precedent for its conclusions. *See* Madsen v. Women's Health Ctr. Inc., 114 S. Ct. 2516, 2525, 2527, 2528-29 (1994) (citing various labor law cases).

bread.[31] Emotional distress resulting from the expressive activities of anti-abortion protestors, or delay in obtaining an abortion out of a desire to avoid that distress, may have significant medical consequences.[32]

Moreover, the patient entering a clinic is engaged in an activity of a particularly private and personal nature as to which the comments of strangers will be experienced as deeply intrusive. Although a medical clinic plays a very different role in society than a person's home, there is an important privacy dimension intrinsic to this location as well. Certainly, the patients of medical clinics may claim some entitlement to tranquility and confidentiality at a site where medical treatment is offered and surgical procedures performed, just as homeowners insist that their dwelling should be protected as a sanctuary against invasive and offensive speech.[33]

Thus, the consequences of critical expression directed at women entering a clinic to obtain abortion services may be more damaging to their physical and psychological well-being than the impact of residential picketing, and equally invasive of their privacy. Nonetheless, it is not clear that the former expression can be restricted on the ground that it constitutes harassment, regardless of the manner of its communication. The First Amendment's protection of critical speech intended to persuade listeners to change their behavior is simply too powerful to per-

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[31] *See* Alan E. Brownstein & Steven 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, 1139-40 (1991) [hereinafter Brownstein & Hankins, *Pruning* Pruneyard] (arguing that anti-abortion protests outside of clinics are "experienced as far more invasive and disruptive than someone trying to convince a customer not to purchase a pair of socks at a department store that is allegedly 'unfair to labor'").

[32] *See infra* notes 85-88 (describing medical consequences of distress or delay on abortion patients).

[33] *See infra* note 37 and accompanying text; *see also Schenck*, 67 F.3d at 389 (finding district court's reasoning persuasive that "'in the context of health care facilities treating women who are already undergoing the stress normally associated with having an abortion, there is an attendant need for a calm, quiet, stress-free atmosphere'"); State v. Migliorino, 442 N.W.2d 36, 42 (Wis. 1989) (noting that "[a]ny medical consultation, treatment or procedure usually is a very personal, very private activity . . . [that] often creates a great deal of apprehension and tension even under the most optimum of circumstances . . . [and that] such activities are usually conducted away from the gaze or the comments of outsiders"), *cert. denied sub nom.*, Haines v. Wisconsin, 493 U.S. 1004 (1989); Brownstein & Hankins, *Pruning* Pruneyard, *supra* note 31, at 1139-41.

mit a blanket restriction of expression in this circumstance.[34] Anti-abortion protestors beseeching women to reconsider their decision to have an abortion, without more, cannot be sanctioned on harassment grounds.[35]

Given the substantial privacy interests and vulnerability of the patients entering clinics, however, expressive activity outside of a clinic may arguably constitute harassment if the speaker engages in conduct that thwarts a patient's attempt to avoid participating in an expressive interaction directed at her. Even when a speaker is discussing a matter of public concern, she cannot continually target an audience that seeks to avoid her communication. In places imbued with significant privacy concerns, the audience has the right to shut the door in the speaker's face, metaphorically as well as physically, once the audience determines that it does not want to hear what the speaker has to say.[36]

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[34] The Court has made it abundantly clear that speech may be discomforting and even painful, but the reality of those consequences alone cannot justify prohibiting its expression. *See Madsen*, 114 S. Ct. at 2529 (recognizing that in public discussions "citizens must tolerate insulting, and even outrageous, speech") (citations omitted); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (recognizing that although "novel and unconventional ideas might disturb the complacent" such expression cannot be restricted).

[35] In addition to the speakers' right to communicate their message, the patient approaching a clinic providing reproductive health services has a right to judge for herself whether she would like to receive information from a protestor approaching her. Even when important privacy interests are at stake in locations such as a private residence, as a general matter the legislature cannot "substitut[e] the judgment of the community for the judgment of the individual householder" in determining that the speaker being addressed does not want to receive the speaker's message. *Martin*, 319 U.S. at 143-44. *See also* Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (observing that First Amendment guarantees "'public access to discussion, debate, and the dissemination of information and ideas'" (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978))); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (arguing that federal law holding certain mail until addressee is notified and requests delivery is unconstitutional because "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them . . . . [For] [i]t would be a barren marketplace of ideas that had only sellers and no buyers"); Kreimer v. Bureau of Police, 958 F.2d 1242, 1250-55 (3d Cir. 1992) (holding that First Amendment encompasses positive right of public access to information and ideas).

[36] *See Martin*, 319 U.S. at 148 (holding that while city cannot ban all door-to-door solicitation, it can punish those who solicit residents in their homes, "in defiance of the previously expressed will of the occupant" who has posted "no soliciting" sign).

Judge Winter's concurring opinion in *Schenck* emphasizes the right of an audience to refuse to accept messages directed at it. *Schenck*, 67 F.3d at 395. Judge Winter cites a number of cases: International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S.Ct. 2701, 2708 (1992) (noting that "risk[ ] of duress" in expressive interactions presents "appropriate

While this principle is aggressively enforced to protect residential privacy against expressive intrusions, the case law on this issue remains ambiguous when speech is not directed at a person in her home.[37] There is a considerable body of case law suggesting that the privacy concerns of unconsenting captive audiences must often be subordinated to the speaker's First Amendment rights when expression occurs in public locations.[38]

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target of regulation"); Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970) (stating "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (explaining that visitor cannot "insert a foot in the door and insist on a hearing," and pedestrians may be "offered a pamphlet in the street but cannot be made to take it"); and Schneider v. State, 308 U.S. 147, 162 (1939) (recognizing that right to distribute literature extends only "to one willing to receive it"). *Schenck*, 67 F. 3d at 395.

[37] Since several cases are grounded on the state's interest in protecting both residential privacy and the autonomy interest of an unwilling audience member in being able to decline to hear a speaker's message, it is difficult to evaluate the weight that the Court would assign to the latter interest alone. *See* Frisby v. Schultz, 487 U.S. 474 (1988); *Rowan*, 397 U.S. 728; *Martin*, 319 U.S. 141; *see also* Brownstein, *supra* note 4, at 186-89.

[38] Several Supreme Court cases support the conclusion, either explicitly or implicitly, that the state's interest in protecting captive audiences from speech they do not want to hear in public locations cannot justify the content-based suppression of protected speech. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (holding that one's limited privacy interest on public street does not justify censoring otherwise protected speech); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that First and Fourteenth Amendments prohibit states from punishing public display of expletives).

An argument can be made that other cases, most particularly Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), uphold content-based restrictions on expression outside the home as a means of protecting captive audiences. *See* Marcy Strauss, *Sexist Speech in The Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 12-13 (1990) (applying captive audience doctrine to protect women employees against offensive speech at workplace); *Too Close for Comfort*, *supra* note 3, at 1863-64 (noting that while weight of privacy interests at home compels courts to protect listeners inside their home more than outside, courts have upheld protection of captive audiences in public locations on several occasions). However, a close reading of the various opinions cited in *Lehman* casts considerable doubt on this conclusion. *See* Volokh, *supra* note 9, at 1836-38 (arguing that *Lehman* does not approve content-based restrictions aimed at protecting captive audience outside home).

The obvious, and to some extent unsatisfactory, limitations of the "captive audience" concept have been noted by both courts and commentators. Thus, Professor Tribe writes:

> The Court seems understandably troubled that the individual may be able to find refuge from such bombardments of his sensibilities only in the sanctuary of the home — a castle fortress under siege. Yet the Court has not generally allowed government to suppress speech solely to protect unwilling listeners from "offensive" expression unless substantial privacy interests have been invaded . . . . In public places an individual's privacy interests in avoiding offensive communications are generally thought insubstantial unless the person is deemed a member of a "captive audience," either because the person is literal-

In most of these cases, however, the speech at issue was not targeted at particular individuals.[39] Indeed, prior to the Court's decision in *Frisby* upholding a ban on residential picketing, it had not been clear that the Court distinguished targeted speech from public expression and recognized the state's legitimate interest in protecting individuals from targeted expression.[40]

a. Madsen v. Women's Health Center, Inc.

In *Madsen v. Women's Health Center, Inc.*,[41] the United States Supreme Court reinforced the current level of doctrinal uncertainty regarding harassment in reviewing an injunction issued by a Florida state court restricting protest activity outside of a clinic providing abortion services. The trial court's order created a thirty-six foot, protest-free, buffer zone in front of the clinic. The Florida Supreme Court, in upholding the order, compiled a list of the important state interests furthered by the challenged injunction. While two of those interests, protecting a woman's freedom to seek lawful medical counseling and promoting the public safety and order through traffic and crowd control,[42] have independent significance, one listed interest correlates

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> ly not free to leave without great burden, or because the person is in a place where there is a basic right to remain and where one cannot readily avoid exposure to the unwanted communication.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 948-49 (2d ed. 1988) (footnotes and citations omitted). Significantly, Tribe provides no case authority in support of the last proposition.

[39] *See* Brownstein, *supra* note 4, at 192 (explaining that offensive language in *Cohen* was not directed at particular individuals). Thus, those few courts that employ the captive audience doctrine in public locations to support the regulation of targeted expression directed at manifestly unwilling listeners have a legitimate basis for refusing to follow the counsel of *Cohen* and similar cases. *See, e.g., Scheck*, 67 F.3d at 392 (affirming cease and desist order requiring anti-abortion protestors to stop communicating with captive audience of clinic patients who have affirmatively indicated they want protestors to stop bothering them).

[40] *See, e.g.*, Brownstein, *supra* note 4, at 192 (arguing that Court's analysis in *Frisby* distinguishes between targeted speech and public expression); Volokh, *supra* note 9, at 1864 (relying on *Frisby*, for want of other authority, in arguing that targeted abusive expression directed at victim may constitute proscribable harassment).

[41] 114 S. Ct. 2516 (1994).

[42] *Id.* at 2526.

closely with concerns about expressive harassment. Thus, the Florida court believed, as Justice Rehnquist reported:

> [T]he State's strong interest in residential privacy, acknowledged in Frisby v. Schultz . . . , applied by analogy to medical privacy. The court observed that while targeted picketing of the home threatens the psychological well-being of the "captive" resident, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held "captive" by medical circumstances.[43]

The United States Supreme Court provided important but incomplete support for this analysis. The Court agreed that the combination of the interests identified by the Florida court was "sufficient to justify an appropriately tailored injunction to protect [those interests]."[44] The Court also explicitly noted the distinction between focused picketing "directed primarily at patients and staff of the clinic," the kind of expressive activity at which the trial court's order had been directed, and "generally disseminated communication" which cannot be prohibited in public places.[45] Thus, it seems clear that the fact that the protestors at whom the injunction was directed wanted to engage in focused and intrusive picketing helped persuade the Court to uphold the buffer zone in front of the clinic. What remains unclear is how much weight the Court assigned to the state's interest in protecting women against expressive harassment and whether that goal alone would have justified the creation of a buffer zone in its own right. If the protestors in *Madsen* had never engaged in behavior that physically impeded access to and from the clinic, creating safety and order concerns, there is some doubt whether a buffer zone order would have been upheld solely to protect patients against expressive harassment.[46]

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[43] *Id.* (citations omitted).

[44] *Id.*

[45] *Id.* at 2527.

[46] *See* Tara K. Kelly, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in* Madsen v. Women's Health Center, 68 S. CAL. L. REV. 427, 464-66 (1995) (explaining confusion resulting from majority's focus "on the technical necessity for the buffer zone injunction: pro-life protestors had repeatedly violated the prior order" rather than on original order's purpose of "protect[ing] women's access, safety, and health in seeking health care services").

Notwithstanding this ambiguity in the *Madsen* opinion, lower courts have read *Madsen*

The relevance of the state's interest in protecting women against harassment is further clouded by the Court's explanation for striking down a different provision which prohibited the enjoined parties from approaching any person seeking services at the clinic within a 300-foot radius unless the person being approached indicated a desire to communicate. The Florida court had justified this restriction as necessary to prevent the stalking or shadowing of patients, explaining that despite the substantial protection provided to freedom of speech, "[n]o picketer can force speech into the captive ear of the unwilling and disabled."[47] The majority in *Madsen* disagreed and ruled that a "prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be" burdens more speech than is necessary to "prevent intimidation and to ensure access to the clinic."[48]

Justice Stevens, concurring in part and dissenting in part in *Madsen*, challenged the majority's conclusion and argued that the lower court's prohibition against protestors physically approaching patients was constitutional. He recognized that the First Amendment might limit a court's power to "restrict a speaker's ability to physically approach or follow an unwilling listener" in some circumstances. To Justice Stevens, however, the injunction in this case was proper in light of the state court's findings describing the increased anxiety and hypertension the clinic's patients experienced as a result of the protests.[49]

The Court in *Madsen* is probably correct that the specific injunction under review in that case unconstitutionally limited the right of protestors to initiate communication with patients. Merely approaching a patient walking toward a clinic and attempting to talk to her does not necessarily constitute harassment. The Court cannot presume that the person being ap-

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to support injunctions that are not needed to maintain physical access to clinics by patients and staff. *See, e.g.*, Planned Parenthood Shasta-Diablo, Inc. v. Williams, 898 P.2d 402, 409 (Cal. 1995) (citing *Madsen* to support court's conclusion). The California Supreme Court's interpretation of *Madsen* may be vindicated ultimately and proven correct. However, I believe the issue is more uncertain than the *Williams* opinion suggests.

[47] *Madsen*, 114 S. Ct. at 2533 (Stevens, J., concurring in part and dissenting in part) (citing Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 675 (Fla. 1993)).

[48] *Id.* at 2529.

[49] *Id.* at 2533.

proached would not consider listening to the speaker's message simply because she has not affirmatively consented to being addressed. Even in an attempt to protect the quintessential sanctuary of the home, the state cannot prohibit all door-to-door solicitation. Only when the homeowner manifests her desire not to be bothered by expressive visits will the First Amendment permit a ban on direct, personal communication to residents at their dwellings.[50]

Although the terms of the injunction at issue in *Madsen* were overbroad in prohibiting protestors from initiating any contact with patients, the Court's reference in its opinion to preventing intimidation and ensuring access to the clinic as the permissible goals of the injunction under review are disturbing. If the Court is suggesting that only intimidating speech or expressive activity that blocks access to the clinic may be proscribed, it ignores the issue of harassment and a court's proper authority to restrict such activity. Harassment is a broader concept than intimidation. Speech need not be threatening to be proscribable harassment. Expressive harassment is harmful enough to warrant prohibition even if it does not instill fear in its victim.[51]

Certainly, a substantial risk of harassment exists in the kind of interaction between anti-abortion protestors and patients outside of reproductive health clinics described in *Madsen*. Harassment, as noted, commonly occurs through persistent repetition of unwanted expression. It may also occur when a speaker disturbs a targeted victim in a circumstance in which the victim has a particularly important reason for wanting to be left alone. Late night phone calls are easily characterized as harassment because, as a society, we recognize the importance of undisturbed sleep. In that circumstance, we are willing to presume that a single call is unwanted, very bothersome, invasive of the listener's privacy,

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[50] *See* Martin v. City of Struthers, 319 U.S. 141 (1943).

[51] *See* Brownstein, *supra* note 4, at 192-94 (noting that "[t]elephone harassment statutes typically prohibit speech intended to annoy, torment, embarrass, disturb, and, of course, harass the recipient of the call"); Robinson, *supra* note 4, at 507, 523 (explaining diverse forms of "persistent and unwelcome communication" constituting harassment and quoting congressional reports recognizing that telephone has "been perverted by some to make it an instrument for inflicting incalculable fear, abuse, annoyance, hardship, disgust and grief on innocent victims").

and of far too little utility to justify the burden it imposes on the unfortunate individual who receives it.

While the claim of patients to undisturbed access to medical clinics immediately before they are to receive treatment is arguably similar to the angry protest of persons wakened in the middle of the night by harassing phone calls,[52] there are important distinctions between the two situations. We are relatively certain that calling a person at three o'clock in the morning is harassment in part because the caller's message could be so easily communicated the following morning without disturbing anyone's sleep. The protestors outside of a clinic arguably have far fewer effective alternatives for reaching their audience.[53]

More importantly, not all late night phone calls constitute harassment. A phone call truthfully reporting to the awakened party that her house is on fire, for example, is obviously justified and gratefully received. The anti-abortion message of protestors outside of a clinic is not as presumptively acceptable to its audience as is a warning of fire, but some patients may elect to receive it. That is why the Court in *Madsen* was correct in recognizing that a ban on initiating discussions with clinic patients was unconstitutionally restrictive.

Notwithstanding these distinctions, however, sufficiently important reasons exist for protecting the interests of patients approaching reproductive health clinics in being left alone to justify some precaution against expressive harassment. Accordingly, the line separating permissible speech from proscribable harassment in this circumstance should be carefully and narrowly drawn, and expressive activity crossing the line properly sanctioned. While a protestor has a constitutional right to initiate dialogue with a patient, continuing to walk along side a patient, haranguing her after she has indicated that she wants to be left alone, violates the patient's autonomy and privacy in a context in which the patient's autonomy interests deserve special respect.

The scope of freedom of speech depends on the context in which speech occurs; an important aspect of that context relates to the location, condition, and lack of receptivity of the audience a speaker is addressing. However much someone may be-

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[52] *See supra* note 28.

[53] *See supra* notes 29-30 and accompanying text.

lieve that a surgical patient should not receive the treatment she has scheduled, continued calls or visits to the patient's hospital room in an attempt to convince her to change her mind while she is waiting to be wheeled into the operating theater should constitute prohibitable harassment.[54] Following a patient to the

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[54] In the context of labor disputes, the courts have repeatedly emphasized the legitimacy of speech regulations intended to protect people who are receiving treatment in health care facilities from disturbing expression. In *Madsen*, the Court quotes the following passage from Justice Blackmun's concurrence in Beth Israel Hospital v. NLRB, 437 U.S. 483, 509 (1978): "Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry . . . [and] need a restful, uncluttered, relaxing and helpful atmosphere." *Madsen*, 114 S. Ct. at 2528.

While the Court upheld the NLRB's decision requiring the hospital in *Beth Israel* to allow the distribution of union literature and union solicitation in the hospital's cafeteria, it did so only after carefully examining the potential impact of such expression on hospital patients and their families. In particular, the Court noted: (1) that less than two percent of the patrons using the cafeteria were patients, (2) that patients who would be discomforted by seeing or hearing union solicitations "could avoid the cafeteria without interfering with the hospital's program of care," and (3) that the hospital already prohibited the distribution of union literature to patients and their families. *Beth Israel*, 437 U.S. at 502-03. The controlling principle underlying the Court's decision was the understanding that "in the context of health care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid." *Id.* at 505.

In NLRB v. Baptist Hospital, 442 U.S. 773 (1979), the Court rejected the NLRB's order forbidding the hospital from banning union solicitation in the corridors or sitting rooms of floors on which patients are treated. In so doing, the Court accepted the hospital's evidence suggesting that union organizational activity might disturb patients and that the "psychological attitudes of patients play a good part in determining the success of their treatment." *Id.* at 783. The Court did uphold the Board's order permitting solicitation in the cafeteria, gift shop, and first floor lobbies of the hospital, however. *Id.* at 786.

Moreover, in a statement of particular relevance to the issue of protests outside of outpatient clinics, the Court questioned the Board's general approach to union organizing in hospital settings:

> The Board . . . should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings — recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even the corridors, where patients often are encouraged to walk, or to visit with their families . . . . In addition, *outpatient clinics such as the Hospital's emergency room and "shortstay" unit . . . may raise special considerations because of the nature of the services rendered to patients there.*

Id. at 790 n.16 (emphasis added).

Lower court opinions that allow the distribution of union literature or other expressive activities in hospital settings make it clear that they do so only in those circumstances in which the hospital has failed to demonstrate that its speech regulations are reasonably tailored to protect patients against disturbance. Thus, in NLRB v. Southern Maryland Hos-

door of the clinic she is attempting to enter despite her repeated demands that she be left alone should be treated as proscribable harassment for the same reason.[55] The mere fact

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pital Center, 916 F.2d 932 (4th Cir. 1990), the Board's determination that the hospital violated the National Labor Relations Act in prohibiting union soliciting at 6:30 in the morning at the front entrance to the hospital when employees arrive for work was upheld. While the court recognized that the hospital's interest in protecting patients from disturbance justified prohibitions on organizing activity, here the hospital did "not explain how many patients arrive in the early morning or what impact the brief exposure to the distribution of literature would have on them as they arrived." *Id.* at 935.

Similarly, in Dallas Ass'n of Community Organizations for Reform Now v. Dallas County Hospital District, 670 F.2d 629 (5th Cir. 1982), the court held that a public hospital could not constitutionally prohibit solicitation of any kind on hospital premises without the prior approval of the hospital's administration. The court made it clear that the hospital might impose carefully drawn restrictions on freedom of expression, even employing content discriminatory regulations where necessary, to protect patients from disturbance. Thus, "literature distributed among patients, awaiting medical care, that stated that the doctors are incompetent and will do more harm then good could quite easily cause further disturbances to those already suffering ailments" and, accordingly, might be prohibited. *Id.* at 632. Similarly, "a hospital might [also] adopt a regulation prohibiting the distribution in patient's rooms of literature that exclaimed in pejorative terms that the surgeons are 'butchers trying to kill patients.' [I]n such a case, the medical need to protect patients from emotional disturbance might warrant some content regulation . . . ." *Id.* at 631. What the hospital could not do is reserve to itself the power to prohibit any speech without standards and without any basis for believing that the speech would interfere with hospital operations or disturb patients. *Id.* at 632.

[55] *See supra* note 3. Some commentators concede that anti-abortion protests outside of clinics may constitute harassment, but the reasons underlying their conclusions are unclear. Thus, Bruce Ledewitz writes:

> There is one sense in which even peaceful pro-life protests cause great personal harm to pregnant women. Undeniably, pro-life protests proceed through harassment. "Harassment" is an appropriate term even for those, like myself, who sympathize with the tactics of these protests. The major tactic of such protests — legal or not — is to shame or disturb women seeking abortions so that they change their minds. Naturally, the resulting pain to pregnant women, including the women who go ahead with the abortion, is resented by pro-choice advocates.

Bruce Ledewitz, *Civil Disobedience, Injunctions, and The First Amendment*, 19 HOFSTRA L. REV. 67, 89-90 (1990).

Disturbing speech, however, does not constitute harassment even if the speaker knows that his message will be experienced by his audience as painful. Harassment involving issues of public concern occurs when the speaker's message at a particular time and place, or conveyed in a specific manner, produces special discomfort that substantially exceeds any distress that may result from the content of the speaker's message alone. The intrusiveness, emotional impact, and potential medical consequences of being followed and condemned by strangers while walking to a clinic's entrance immediately prior to the performance of a significant medical procedure is what transforms a critical message into harassment. *See* Brownstein, *supra* note 4, at 200-02 (arguing that speakers' repeated communica-

that medical technology allows serious medical treatment to be provided on an outpatient basis does not alter a patient's need for privacy and tranquility prior to the administration of surgical procedures.[56]

*b. Post-*Madsen *Decisions Reviewing the Regulation of Clinic Protests*

An injunction attempting to protect clinic patients against harassment, narrower than the order reviewed in *Madsen*, was evaluated by a panel of the Second Circuit in *Pro-Choice Network v. Schenck*[57] last fall. At issue was a provision of an injunction issued against a group called Project Rescue. The challenged order stated:

> [N]o one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants not to have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling . . . .[58]

A divided panel of the Court of Appeals determined that the injunction was unconstitutional.[59]

While the Second Circuit panel recognized that this provision was less restrictive than the injunction provision struck down in *Madsen*, it concluded that both a "do not even approach patients without their consent" provision and a "cease and desist from continuing to attempt to counsel patients who demand that you leave them alone" provision suffered from the same constitutional defect. Both orders allowed the prospective counselee to con-

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tion and following of audience member are important factors in identifying harassment); Haiman, *supra* note 11, at 193-94 (arguing that although law should not attempt to insulate listeners from communication's initial impact, it should protect their right to escape from it if they wish to do so).

[56] *See* discussion *supra* note 54.

[57] Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir.), *vacated in part*, 67 F.3d 377 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996).

[58] *Id.* at 363.

[59] *Id.* The Court also reviewed and reversed a provision in the district court's order creating a 15-foot buffer zone around the entrances to the clinic and people entering or leaving the facility. *Id.* at 365.

trol the prospective counselor's opportunity to engage in protected expression.[60] Thus, as the Second Circuit panel explained:

> Although the prospective counselee need not listen to the counselor, she does not have the right to stop the counselor's communication, absent any evidence that the communication is independently prescribable . . . or that the counselor is engaging in pure conduct that is not protected by the First Amendment.[61]

What is so problematic about this analysis is its implicit conclusion that expressive harassment is not independently proscribable. Apparently the two-judge majority of this panel believes that the First Amendment permits speakers to follow their intended audience around, continually ignoring her insistence that she does not want to listen to their message, even in cricumstances in which the psychological and physical health of the person being spoken to is in jeopardy. Unless the speakers engage in unprotected conduct, such as physically blocking the entrance to a clinic, or use unprotected speech, such as fighting words, "[c]itizens must tolerate insulting, and even outrageous speech" that harasses them when they seek medical attention.[62]

Judge Oakes's dissent in *Schenk* presented the better analysis. Oakes recognized that the purpose of the cease and desist order is not to silence anti-abortion protesters or to suppress their message. It is to allow "people who are the targets of focused counseling efforts by the protesters to walk away from the counseling" and avoid potentially harmful stress and anxiety prior to receiving medical treatment. As the Court noted in *Frisby*, Oakes explained, this kind of focused expressive activity "is fundamentally different from generally disseminated communication that cannot be banned from public places."[63] A court order that only "prevents . . . protesters from persistently badgering people at a close range" in particularly trying circumstances does not violate the First Amendment.[64]

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[60] *Id.* at 371.

[61] *Id.*

[62] *Id.* at 372 (quoting Hustler Magazine v. Falwell, 405 U.S. 46 (1988)).

[63] *Id.* at 374 (Oakes, J., dissenting) (citing *Madsen*, 114 S. Ct. at 2527).

[64] *Id.* at 376.

Judge Oakes's dissenting position in *Schenk* was vindicated when the Second Circuit voted 13-2 en banc to vacate the panel's invalidation of the cease and desist order.[65] Oakes wrote the majority opinion in terms that make it clear that an important focus of the court's decision was the need to protect vulnerable people who are about to receive serious medical care from harassment. The government has no general authority to suppress speech because some members of the audience that hear it may experience discomfort or anxiety. Speakers, however, do not have unlimited power to force a message on an unconsenting audience at whatever time and place and through whatever manner of expression the speaker chooses. At times of emotional stress, when privacy concerns are paramount, the state can protect the right of a listener to escape from an undesired expressive encounter.[66] When a protestor's rights of free speech "'were exercised in close proximity to individual women entering or leaving . . . clinics so as to tortiously assault or harass them, [the speaker's rights ended] where those women's rights began.'"[67]

Nine Second Circuit judges also joined a concurring opinion by Judge Winter. Seeking to ground Oakes's analysis on a broader principle, Winter's opinion makes clear that legitimate regulation of anti-abortion protests outside of reproductive health clinics can be based on the difference between persuasive speech and targeted harassment. Winter recognizes that persuasive speech need not be polite. The First Amendment protects the use of strong language, epithets, and insults in an attempt to shame an individual into forsaking the immoral conduct she is contemplating.[68] Not all speech that is painful to hear constitutes harassment.

Instead, the distinction between protected speech and unprotected harassment turns on the difference between criticism and coercion, between attempting to persuade people through the

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[65] Pro-Choice Network v. Schenck, 67 F.3d 377 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996). The 13-2 majority also vacated the panel decision striking down the 15-foot buffer zone provision. *Id.* at 381.

[66] *Id.* at 389.

[67] *Id.* at 392 (quoting New York State NOW v. Terry, 886 F.2d 1339, 1343 (2d Cir. 1989)).

[68] *Id.* at 395 (Winter, J., concurring).

merit of what you say and attempting to force them to change their behavior because of the pain you can cause them by virtue of the time, place, and manner of your expression.[69] A speaker has the right to direct hurtful criticism at others, but:

> [T]here is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion.[70]

Filling in the gap left open in *Madsen*,[71] Winter acknowledges that states may have other legitimate reasons for restricting protests, such as maintaining order, facilitating traffic, and protecting privacy. These concerns may supplement an anti-harassment basis for regulating protests, but they are not an essential condition for restricting expressive activity. Judge Winter writes:

> [C]oercion or obstruction does not gain First Amendment protection simply because no one is physically injured, traffic moves, and private property is not invaded. A placid scene that is the result of citizens not going where they wish to be in order to avoid bullying is hardly consistent with a marketplace of ideas.[72]

Recognizing that harassment may be proscribed, however, still leaves open the question of how restrictive an injunction or ordinance may be in accomplishing that goal. An order or statute directly prohibiting harassment is probably the narrowest restriction that may be adopted. The cease and desist order at issue in *Schenck* is also narrowly directed at harassing behavior since it allows protestors to approach patients and only applies when the speakers refuse to leave their target alone. On its face, a buffer zone prohibiting all expression is more restrictive than necessary to prevent harassment since it applies to benign, non-harassing expression. As *Madsen* suggests, however, more restrictive measures can be imposed on protestors and will be upheld if less severe limits prove to be inadequate to protect patients.[73]

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[69] *Id.*

[70] *Id.* at 396.

[71] *See supra* notes 41-50 and accompanying text.

[72] *Schenck*, 67 F.3d at 397 (Winter, J., concurring).

[73] *See Madsen*, 114 S. Ct. at 2527 (noting that failure of state court's initial injunction without buffer zone to adequately protect access to clinic "may be taken into consideration

Moreover, not all buffer zones are equally restrictive. A buffer zone may be tailored to exclude harassing conduct while permitting less disturbing expressive activity.[74]

A particularly problematic approach to the concerns created by potentially harassing protests outside of reproductive health clinics was reviewed by the Ninth Circuit in *Sabelko v. City of Phoenix*.[75] At issue was an ordinance adopted by the Phoenix City Council requiring demonstrators within 100 feet of a health care facility to honor the request of individuals in the area who ask them to withdraw a distance of at least 8 feet from the person making the request. The Ninth Circuit upheld the ordinance as a narrowly tailored, content-neutral law serving various important state interests, including the need to protect the medical privacy and right to have an abortion of the "captive audience" of women patients seeking access to reproductive health clinics.[76]

The ordinance upheld in *Sabelko* cannot be justified as a legitimate response to anti-abortion harassment of patients. The ordinance appears to apply on its face to leafletting and other relatively passive forms of expression that cannot easily be construed to be harassment.[77] Even more intrusive forms of expressive activity, such as picketing, are not inherently harassing in nature if they are conducted peacefully and in a non-obstructive manner with a limited number of participants.[78] Moreover, it is difficult to understand why a person standing motionless on a public sidewalk distributing leaflets within 100 feet of a clinic's entrance must move 8 feet away when a patient walks by him

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in evaluating the constitutionality of the broader order"). By analogy, if a narrowly drawn anti-harassment injunction proves to inadequately protect clinic patients, a second injunction creating a buffer zone might appropriately be issued to prevent further harassment.

[74] *See Schenck*, 67 F.3d at 387 (affirming injunction creating floating, 15-foot, protest free, buffer zone in which two sidewalk counselors at one time are permitted to engage in non-threatening expressive activity).

[75] 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 4, 1996) (No. 95-1415).

[76] *Id.* at 1173.

[77] *Id.* (stating that "[c]ounselors can handbill and approach anyone outside the 100-foot barrier, and anyone within the 100-feet until and unless that person objects").

[78] *But see* Bering v. Share, 721 P.2d 918, 930 (Wash. 1986) (arguing that "[e]ven if all picketers agreed to refrain from using 'harassing language,' it is difficult to ascertain what constitutes 'harassment' in the apprehensive mind of a woman coming face-to-face with the picketers").

and orders him to do so. As long as the protestor makes no attempt to follow the patient, or to otherwise engage in harassing conduct, the patient has the unfettered ability to continue to the clinic's door.

Thus, the *Sabelko* ordinance, as is true of buffer or "bubble" zones generally, burdens more speech than is necessary to protect patients against harassment.[79] Unless there is a history of harassing activity that continues despite the enforcement of less stringent restrictions, or substantial on-going harassment exists or is threatened, neither a "protestor must walk away" order nor a completely protest-free buffer zone in front of a clinic can be upheld to further anti-harassment goals alone.[80] If these kinds of restrictions on expressive activity are constitutional, they must serve alternative state interests with the precision the First Amendment requires.[81]

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[79] If the state's only legitimate interest in regulating protests outside of reproductive health facilities is to protect patients from harassment, a buffer zone arguably violates the two different standards of review applied to content-neutral injunctions and to content-neutral statutes because it burdens more speech than is necessary to further the state's purpose. This conclusion is uncertain, however, because the relationship between these two standards of review remains ambiguous. In examining content-neutral injunctions to determine if they violate the First Amendment, courts must inquire "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2525 (1994). In evaluating content-neutral statutes, however, courts must determine whether the regulations "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

While a "no more speech than necessary" standard is clearly more rigorous than a "substantially more speech than necessary" standard, the degree of increased rigor required when injunctions are reviewed is indeterminate. Thus, all else being equal, it is more likely that a court will strike down an injunction creating a buffer zone than an ordinance creating a buffer zone. What is unclear is whether an ordinance creating a buffer zone will be found to burden enough speech unnecessarily to violate the First Amendment.

[80] *See* Horizon Health Ctr. v. Felicissimo, 638 A.2d 1260, 1272-73 (N.J. 1994) (recognizing that total restriction on expressive activity within buffer zone in front of clinic is not necessary to protect patients against harassment and obstruction).

[81] Thus, the floating, "permeable" buffer zone upheld in *Schenck* cannot be understood to serve the goal of protecting women from harassment exclusively. Under the district court's order, only two sidewalk counselors at a time were to be allowed within the zone. It should be clear, however, that picketing and other expressive activity involving more than two people is not intrinsically harassing in nature and cannot be prohibited as such.

Indeed, Judge Oakes defends the buffer zone in *Schenck* not simply as an anti-harassment mechanism, but also as a necessary regulation to ensure the medical safety of clinic patients. Even non-harassing expressive activity can cause stress and delay which in turn may result in unacceptable medical risks for patients. *Schenck*, 67 F.3d at 389. It is this latter

II. CONSTITUTIONAL COMPROMISES RECONCILING CONFLICTING RIGHTS

A. Limiting Speech to Protect Women's Health

If anti-abortion protest activity outside of clinics neither physically obstructs patients from entering or leaving the facility nor harasses them when they do, is there any other basis for restricting such expressive activity that is consistent with First Amendment guarantees? Can loud, passionate picketing that is harshly critical of patients that pass by, but neither obstructs, surrounds, nor follows anyone be restricted? In one sense that question can be answered easily. Freedom of speech is not an absolute right. Few rights are. At some point the state's interest in regulating even protected speech may be so compelling that it justifies the imposition of substantial limits on what may be expressed in particular locations. Of course, the standard of review applied to laws that discriminate on the basis of the content or viewpoint of speech is so rigorous that it is rarely met.[82] But even under strict scrutiny, some speech regulations are upheld.[83] The question then becomes whether any compelling state interests justify prohibiting anti-abortion protest activity outside of clinics that does not involve impermissible conduct or unprotected speech.

The state may have a compelling interest in protecting people from harmful expression that, because of its time and location, will result in their physical injury. Arguably, harshly critical and deprecating expressive activity involving large groups of protes-

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interest, in addition to concerns relating to harassment, that justify the creation of a buffer zone to protect women about to receive medical treatment from disturbing expression. *Id.* *See also infra* notes 84-88 and accompanying text.

[82] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 318-19 (1988) (strictly scrutinizing and striking down statute regulating content-based speech outside embassies); Carey v. Brown, 447 U.S. 455, 461-62 (1980) (applying strict scrutiny to invalidate ordinance that distinguished between permissible and impermissible speech on basis of its content).

[83] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 196 (1992) (holding that prohibiting distribution of campaign materials and solicitation of votes outside polling place does not violate First Amendment). Strict scrutiny has also been met when other rights are at issue. *See, e.g.*, United States v. Lee, 455 U.S. 252, 259-60 (1982) (holding that free exercise rights of Amish, abridged by mandatory participation in social security system, are outweighed by compelling governmental interest in functioning of tax system); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318-20 (1978) (Powell, J., concurring) (holding that racial preferences in college admissions survive strict scrutiny and do not violate equal protection principles if they serve compelling interest of diversity).

tors outside of a hospital or medical clinic directed at patients entering the facility for treatment may be restricted on this ground.[84] Such protests may cause a woman intending to have an abortion to delay the procedure in order to avoid having to walk through a gauntlet of picketing protesters.[85] Moreover, other patients seeking medical treatment for a range of problems may be unintentionally dissuaded from keeping an appointment with their physician by the turmoil outside of a clinic and because they fear that the crowd's animosity might be misdirected toward them.[86] For some patients, significant delay in ob-

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[84] *See* Dallas Ass'n of Community Org. for Reform Now v. Dallas County Hosp. Dist., 670 F.2d 629, 631-32 (5th Cir. 1982) (suggesting that content-discriminatory speech regulations might be appropriate to prevent speakers from disturbing patients immediately prior to surgery); Bering v. Share, 721 P.2d 918, 929 (Wash. 1986) (explaining that "the State has a *compelling* interest in protecting a woman's ability to effectuate her constitutional right to obtain an abortion by mitigating the harassing effect of anti-abortion picketers"); Kelly, *supra* note 46, at 474 (arguing that "[t]he evidence of the medical risks associated with the protestors' harassment, and the simple threat posed by refusing women timely access to licensed clinics should warrant treatment as a compelling government interest").

Certainly, at a minimum the state's interest in protecting the health of clinic patients is sufficiently important that it will justify content-neutral restrictions on speech. *See Schenck*, 67 F.3d at 389 (holding that "significant government interest of ensuring medical safety" justifies creation of permeable, floating, buffer zone to protect clinic patients); Planned Parenthood Shasta-Diablo, Inc. v. Williams, 898 P.2d 402, 411 (Cal. 1995) (holding that state's interest in protecting health and safety of medical patients about to undergo surgery justifies imposing buffer zone to prevent stressful and anxiety-producing confrontations with protestors); Horizon Health Ctr. v. Felicissimo, 638 A.2d 1260, 1269-70 (N.J. 1994) (holding that because of its interest in preserving health, State has "significant interest in insuring unrestricted access to [the clinic's] medical services, including family planning, prenatal care . . . [and] first-trimester abortions," and courts have "power to issue injunctive restrictions to preserve health even if those restrictions affected defendants' First Amendment rights").

[85] *See Schenck*, 67 F.3d at 383 (describing how expressive activities of protestors have so intimidated and confused patients approaching clinics that they left, causing them to suffer delay in obtaining medical care); Right to Live Advocates, Inc. v. Aaron Women's Clinic, 737 S.W.2d 564, 569 (Tex. Ct. App. 1987) (describing how one couple, intimidated by protesters, arrived and left three times before they could enter clinic building), *cert. denied*, 488 U.S. 824 (1988); *Bering*, 721 P.2d at 928 (explaining that "the very presence of antiabortion picketers directly in front of [a] clinic could have such a coercive impact upon a woman that she forgoes the exercise of [her right to have an abortion] or seeks to exercise it [with] a licensed or unlicensed physician not of her first choosing").

[86] In *Bering*, for example, the court described evidence indicating that protesters were "interfering with parents bringing young patients to see their respiratory allergist and . . . with patients in advanced stages of pregnancy." *Bering*, 721 P.2d at 923. The court also heard the following testimony:

taining the medical services they desire may result in an increased risk of adverse health consequences.[87] Other patients,

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> [P]icketers interfered with ill patients, placing a pregnant woman possibly suffering from toxemia in acute medical danger, and delaying a patient who was miscarrying a wanted pregnancy and bleeding heavily . . . . A pediatric nurse asked picketers to please refrain from bothering [a physician's] young patients because his office did not provide abortion-related services. The picketers told the nurse to "move out" of the building.

Id. See also New York State NOW v. Terry, 886 F.2d 1339, 1362 (2d Cir. 1989) (concluding that "[a]bortion may be the principal focus of defendants' efforts, but their tactics interfere with" the right to obtain general medical services); *Horizon Health Ctr.*, 638 A.2d at 1263 (noting that "three women scheduled for non-abortion services, including a high-risk patient in need of immediate diabetes testing" missed scheduled appointments because of anti-abortion protests outside of clinic); Bernard Meyer, *Abortion Isn't Key Issue in Tenant-Ouster Case*, NEWSDAY, Nov. 17, 1993, at A43 (landlord evicted abortion clinic because "the illegal activities against the clinic threatened the safety of other tenants"). Further, most clinics provide a full range of reproductive health services such as family planning counseling, contraception, breast exams, pap smears, blood screening, and prenatal care as well as abortion, all of which may be impeded by protests. *See Hearing on Violence at Women's Health Clinics Before the Senate Appropriations Subcommittee on Labor, Health, and Human Services*, (1995) (statement of Kate Michelman, President of National Abortion Rights Action League). Postponed pap smears or breast examinations can delay detection of precancerous cells or a lump, causing serious and unnecessary health risks to the patient. Protests also scare away teens from contraceptive counseling, which can increase the risk of teen pregnancy and the spread of AIDS. *Id.*

[87] *See* Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (explaining that some patients are so upset by protestors' conduct that they reschedule their appointments and later require more advanced, and therefore more dangerous medical procedures); NOW v. Operation Rescue, 726 F. Supp. 1483, 1489 (E.D. Va. 1989) (stating that substantial numbers of patients, up to 50% at one clinic, travel out of state to reach clinics, so rescheduling results in considerable delay in treatment), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, aff'd in part*, 505 U.S. 263 (1993); *Williams*, 873 P.2d at 1232 (noting that patients who reschedule appointments because of stress-induced emotional trauma could face additional risks and complications arising from delay, such as increased risk of second trimester abortion); Feminist Women's Health Ctr. v. Blythe, 22 Cal. Rptr. 2d 184, 188 (Ct. App. 1993) (explaining that protests have forced some patients to reschedule or miss appointments thus delaying provision of abortion services), *vacated sub nom.*, Reali v. Feminist Women's Health Ctr., 114 S. Ct. 2776 (1994); N.J. Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 CLIN. OBSTET. GYNEC. 83, 85 (1986) (asserting that advanced gestational age "is associated with an increased risk of abortion mortality"); James W. Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 AM. J. OBSTET. GYNEC. 14, 14 (1985) (stating that "advanced gestational age is recognized as a major risk factor for serious complications following abortion"); Willard Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 FAM. PLANN. PERSP. 266, 267 (1977) (within first 12 weeks of pregnancy, "the main risk to a woman who wants an abortion results from delay" because any delay increases risk of complications); Richard M. Selik et al., *Behavioral Factors Contributing to Abortion Deaths: A New Approach to Mortality Studies*, 58 OBSTET. GYNECOL. 631,

who withstand the speech directed at them and keep their appointments at clinics, may experience emotional distress that complicates the treatment they are to receive and impedes their recuperation.[88]

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635 (1981) (noting that delay was significant factor in contributing to death due to abortion and that risk of death increases as length of gestation increases); *Surgeon General's Report: The Public Health Effects of Abortion*, 101st Cong., 1st Sess. (1989) (Surgeon General Koop) (explaining that early abortions are medically safer because later complications "may be serious, particularly in the second and third trimesters when a hemorrhage, a bowel injury, or a perforated uterus may occur"). The *Schenck* court explained the potential complications resulting from delay this way:

> [F]or example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding, and other potentially serious complications. If a woman returning to the clinic to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . . the above-mentioned complications may result.

Pro-Choice Network v. Schenck, 67 F.3d 377, 383 (2d Cir. 1995) (en banc) (quoting district court's opinion), *cert. granted*, 116 S. Ct. 1260 (1996).

[88] *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2521 (1994) (noting state court finding that patients with heightened anxiety show more resistance to analgesics and require higher levels of sedation, which increases risks of surgery, and that some patients' surgery had to be rescheduled because of extreme agitation); *Schenck*, 67 F.3d at 384 (describing how confrontational protests cause severe distress that may lead to elevated blood pressure, hyperventilation, need for sedation, special counseling, increased risk in operating room from anxiety induced agitation, delay, and risks associated with delay); American College of Obs. & Gyn. v. Thornburgh, 613 F. Supp. 656, 666 (E.D. Pa. 1985), *aff'd*, 476 U.S. 747 (1986) (describing patients who entered clinics during protests as "visibly upset and distressed" and experiencing heightened "emotional problems associated with the abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself"); *Blythe*, 22 Cal. Rptr. 2d at 186-87 (noting that "the heightened level of anxiety [caused by picketing and demonstrations] has required that abortion patients receive greater amounts of medication and has lengthened the time necessary to perform abortion procedures, thereby increasing the risks to patients"); Hirsh v. City of Atlanta, 401 S.E.2d 530, 532 (Ga. 1991) (detailing how patients arrived at clinic in "a shaken state" with elevated blood pressure and pulse rate which subjected them to additional health risks); *Hearing on Violence at Women's Health Clinics Before the Senate Appropriations Subcommittee on Labor, Health, and Human Services*, 103d Cong., 2d Sess. (1995) (statement of Kate Michelman, President of National Abortion Rights Action League) (stating that increased anxiety from encounters with confrontational protesters can result in need for more sedation during surgical procedures, which increases medical risks); WARREN M. HERN, ABORTION PRACTICE 35-37 (1984) (explaining that general anesthesia is associated with two- to four-fold increase in first trimester abortion fatalities and significant

Many of these concerns regarding the impact of protests on women's health might be successfully addressed through content-neutral time, place, and manner regulations sharply limiting the size and nature of protest activity in the vicinity of medical clinics.[89] While such laws would be much easier to justify than content-discriminatory regulations,[90] authority remains ambiguous[91] and the constitutionality of these

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increases in uterine perforation, cervical injury, blood transfusions, and corrective major surgery); Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations*, 12 POPULATION & ENV'T 379, 380, 381 (1991) (noting that on protest days, many patients "exhibited evidence of adrenergic 'fight-or-flight' reaction, such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention," and that if patient becomes agitated before or during the procedure, "she could easily experience serious complications of the abortion that would be extremely unlikely under other circumstances."); Kelly, *supra* note 46, at 438-39 (describing adverse medical consequences resulting from delay and stress caused by anti-abortion protests outside of clinics); G.C. Polk-Walker, *Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion*, 28 NURSING FORUM 22, 23 (1993) (reporting that women who are anxious or fearful chose general anesthesia, despite its higher risk than local anesthesia, more frequently than calmer women); Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 INT'L J. ORAL MAXILLOFAC. SURG. 688, 688 (1987) (explaining that in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anesthesia "[i]mportant factors are fear, anxiety, and stress"); *Too Close for Comfort*, *supra* note 3, at 1865-66 (indicating that "medical staff members at abortion clinics, . . . have testified that [protest] activity leaves patients crying and in great distress, inducing stress that complicates their counseling, increases their health risks, and prolongs their recovery time").

[89] For example, states could pass laws generalizing and codifying injunction provisions such as those creating the permeable buffer zone upheld in *Schenck*.

[90] The degree of tailoring required of content-neutral laws is far less demanding than the least restrictive alternative standard applied to content-discriminatory regulations. *See* Ward v. Rock Against Racism, 491 U.S. 781, 796-800 (1989) (refusing to apply least restrictive means analysis when reviewing "tailoring" of content-neutral regulation).

[91] *Compare* Edwards v. Santa Barbara, 883 F. Supp. 1379, 1390-91 (C.D. Cal. 1995) (striking down ordinance prohibiting demonstrations within 8 feet of driveway of health care facility and requiring demonstrators to withdraw distance of 8 feet upon request by persons within 100-foot access area surrounding health care facility), *vacated*, No. 95-55595, 1995 WL 697223 (9th Cir. Nov. 22, 1995) *and* Thompson v. Jernigan, 770 F. Supp. 1195, 1198-99, 1203 (E.D. Mich. 1991) (invalidating city council decision to vacate public pedestrian and parking access to cul-de-sac in front of family planning clinic) *with* Sabelko v. City of Phoenix, 68 F.3d 1169, 1169-70 (9th Cir. 1995) (upholding ordinance requiring demonstrators to withdraw distance of eight feet upon request of anyone within 100 feet of health care facility), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 4, 1996) (No. 95-1415), Medlin v. Palmer, 874 F.2d 1085, 1091-92 (5th Cir. 1989) (upholding ban on landspeakers within 150-foot quiet zone surrounding health care facilities) *and* Fischer v. City of St. Paul, 894 F. Supp. 1318, 1329 (D. Minn. 1995) (upholding creation of gated buffer zone around family planning clinic open only to clinic invitees in response to threat of blockades by Operation Rescue).

regulations is still in question.[92] The willingness of courts to uphold content-neutral injunctions creating buffer zones,[93] even under a more rigorous standard of review than is applied to content-neutral statutes,[94] suggests that some buffer zone

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[92] Many cases upheld content-neutral injunctions limiting expressive activity. *See* Kelly, *supra* note 46, at 492 n.16 (describing cases upholding injunctions creating buffer zones around clinics and statutes creating buffer zones through legislation). The nature of the protests leading to the issuance of these injunctions, however, varies considerably and typically involves some form of obstruction or harassment. *See* cases cited *infra* note 95. While these cases may raise issues that are relevant to determining the constitutionality of a statute regulating non-obstructive and non-harassing expressive activity, they are not controlling on that question.

[93] *See* Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57, 59 (3d Cir. 1991) (affirming injunction sharply restricting expressive activity within 500 feet of health care facility of defendants who had previously engaged in violent, illegal, and intimidating conduct); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681, 686 (9th Cir. 1988) (affirming injunction designating 12.5-foot protest free zone around front door of health center); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 626 (N.D. Cal. 1991) (enjoining demonstrating, picketing, distributing literature, and counseling within 25 feet of entrance to clinic); Feminist Women's Health Ctr. v. Blythe, 22 Cal. Rptr. 2d 184, 189 (Ct. App. 1993) (affirming creation of speech-free zone 20 feet on either side of clinic door extending to 3 feet short of sidewalk curb), *vacated sub nom.*, Reali v. Feminist Women's Health Ctr., 114 S. Ct. 2776 (1994); Hirsh v. City of Atlanta, 401 S.E.2d 530, 534 (Ga. 1991) (affirming injunction creating permeable, protest free zone that requires demonstrators to remain at least five feet away from patients entering the clinic), *cert. denied*, 502 U.S. 818 (1991); Horizon Health Ctr. v. Felicissimo, 638 A.2d 1260, 1272-73 (N.J. 1994) (rejecting completely speech-free buffer zone in front of clinic but remanding to create an injunction "imposing a general buffer zone (requiring the bulk of the demonstrators to remain across the street)" from clinic, while allowing "protestors to make their presence known"); Bering v. Share, 721 P.2d 918, 930 (Wash. 1986) (affirming injunction prohibiting protests on sidewalk in front of clinic building). *But see* Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993) (reviewing and vacating injunction creating 36-foot buffer zone as viewpoint discriminatory abridgment of speech), *vacated*, 41 F.3d 1421 (11th Cir. 1994); Fargo Women's Health Org., Inc. v. Lambs of Christ, 488 N.W.2d 401, 409 (N.D. 1992) (striking provision of injunction creating buffer zone within 100 feet of clinic property on grounds that record was inadequate to determine if zone was narrowly tailored and provided ample alternative avenues of communication).

[94] *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2525-27 (1994) (affirming injunction creating 36-foot protest-free buffer zone under more rigorous standard of review than would be applied to content-neutral statute regulating speech); Pro-Choice Network v. Schenck, 67 F.3d 377, 387-90 (2d Cir. 1995) (applying *Madsen* test in affirming injunction creating "floating" 15-foot protest-free buffer zone in which only two "sidewalk counselors" could simultaneously engage in non-threatening expression), *cert. granted*, 116 S. Ct. 1260 (1996); Planned Parenthood Shasta-Diablo, Inc. v. Williams, 898 P. 2d 402, 411 (Cal. 1995) (applying *Madsen* test in affirming injunction effectively creating protest-free buffer zone around women's health clinic by restricting demonstrations to sidewalk across street from clinic).

ordinances will satisfy First Amendment scrutiny. The injunctions in these cases, however, were often responses to protests involving harassment and obstruction, not merely critical speech and picketing.[95]

Even if these laws are upheld as constitutional, the price to be paid for such general regulations is that expressive activity at the restricted location will be limited whether it is likely to be burdensome to patients or not. In some circumstances, local authorities may decide that the cost of prohibiting such harmless speech is too high and too unnecessary, and a narrow, location-specific, content-discriminatory rule will be adopted. It is at least arguable that such a law should be able to withstand strict scrutiny review if the state can provide an adequate factual showing of the unique impact of the speech to be restricted on the health of women.

The state's interest in protecting patients from distress immediately prior to receiving medical treatment is not the only justification for limiting expressive activity at the entrances of clinics providing abortion services, however. The right to have an abortion is a fundamental right.[96] Protecting the ability of individuals to exercise a fundamental right may be an independently

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[95] *See Schenck*, 67 F.3d at 383 (noting that while protestors did not physically blockade clinic, they surrounded, grabbed, pushed, shoved, and harassed patients entering and leaving clinic); *McMonagle*, 939 F.2d at 63 (finding that protestors engaged in illegal, violent, and intimidating conduct); New York State NOW v. Terry, 886 F.2d 1339, 1343 (2d Cir. 1989) (stating that protestors assaulted and harassed women entering clinic); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 796 (5th Cir. 1989) (finding no evidence of obstruction or harassment, therefore refusing to grant injunction); *Portland Feminist*, 859 F.2d at 683 (noting that demonstrators screamed at, grabbed, pushed, and intimidated clinic clients); *Holy Angels*, 765 F. Supp. 619 (finding that protestors intimidated women and shoved plastic fetus replicas in their faces); *Williams*, 898 P.2d at 405 (reporting that demonstrators obstructed entrance to and exit from clinic and harassed patients); *Blythe*, 22 Cal. Rptr. 2d at 188 (stating that demonstrators banged on hoods of cars and impeded people from entering clinic by stepping into their path and blocking doors of their vehicles); *Hirsh*, 401 S.E.2d at 531-32 (noting that demonstrators blockaded buildings by locking arms and lying down); *Fargo Women's Health Org., Inc.*, 488 N.W.2d at 404-05 (indicating that protestors committed trespass, assault, and other tortious acts); *Bering*, 721 P.2d at 923 (discribing picketers who grabbed, blocked, threatened, and screamed at patients).

[96] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 856-57 (1992) (affirming women's right to have abortion); Roe v. Wade, 410 U.S. 113, 154 (1973) (declaring that right of personal privacy includes abortion decision).

compelling justification for regulating expressive activity outside medical clinics that provide abortion services.

Of course, freedom of speech is also a fundamental right protected by the Constitution and one might argue that when such rights come into conflict with each other, the state is powerless to protect one by limiting the exercise of the other. Thus, when the private exercise of one individual's constitutionally protected rights interferes with the ability of another person to exercise a different fundamental right, the state is obligated to remain neutral and may not intervene. The Constitution only prohibits the state from abridging rights. It does not prohibit private interference with the exercise of rights.[97] According to this hierarchy of values, the goal of avoiding governmental impairment of rights will always supersede the state's interest in removing private barriers to the exercise of rights.[98]

To state the problem from a slightly different doctrinal perspective, constitutional rights are enforceable against the government, not against private actors. Thus, when the exercise of one right interferes with the exercise of a different right, the government may not intervene to resolve the conflict. Government intervention would constitute state action and state action that interferes with the exercise of rights is unconstitutional. State passivity that allows private interference with the exercise of rights is constitutionally permissible precisely because it is not state action.[99] Accordingly, the only constitutionally appropriate

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[97] *See* Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (holding that decision of owner of private shopping center to exclude speakers from using center property for expressive purposes does not violate First Amendment because such private decisions do not constitute state action).

[98] *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338, 2340-41 (1995) (holding that state public accommodations law violates First Amendment right of parade organizers in requiring parade to allow gay marchers to participate as unit carrying their own banner).

[99] Of course, state action is a relatively malleable doctrine and may often be extended to constitutionalize what might normally be considered private conduct. Thus, for example, judicial enforcement of privately developed, racially restrictive covenants limiting the sale of real property violates the Equal Protection Clause. *See, e.g.*, Shelly v. Kraemer, 334 U.S. 1 (1948). Perhaps even more on point, state tolerance of private speakers invading and using private shopping center property for expressive purposes creates a potential violation of the owner's property rights under the Takings Clause. Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 82-83 (1980).

response to the private exercise of a right that interferes with the exercise of another right is for the state to do nothing.[100]

This state action analysis overstates the problem with state intervention to a considerable degree. To begin with, while the burden imposed by private speech on the exercise of other constitutional rights does not technically create a true clash of rights, it is common for courts to describe this conflict in just such terms.[101] Indeed, courts evaluating restrictions on anti-abortion protests outside of reproductive health clinics are particularly prone to describing the issue before them as involving competing constitutional interests.[102] More importantly, al-

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[100] States may act to prevent interference with the exercise of rights if in doing so they do not abridge the constitutionally protected interests of other private individuals. *See Pruneyard*, 447 U.S. at 81 (holding that state may require shopping center owners to allow speakers to use center for expressive purposes so long as speaker's activity does not undermine value and utility of owner's property in violation of Takings Clause).

[101] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198 (1992) (noting that issue of speech regulations limiting political expression outside of polling places "presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy").

[102] *See* Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993) (acknowledging how difficult it is "to weigh the relative value of different constitutional rights"), *vacated*, 41 F.3d 1421 (11th Cir. 1994); New York State NOW v. Terry, 886 F.2d 1339, 1364 (2d Cir. 1989) (explaining that injunction restricting protests outside of clinic "ensures that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another"); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 790 (5th Cir. 1989) (noting that requested injunction "presents a conflict between competing rights declared by the Court to be constitutional ones: freedom of expression and the right to have an abortion"); Edwards v. City of Santa Barbara, 883 F. Supp. 1379, 1393 (C.D. Cal. 1995) (describing review of ordinance regulating demonstrations in front of health care facilities as involving "a balance between countervailing constitutional rights") *vacated*, No. 95-55595, 1995 WL 697223 (9th Cir. Nov. 22, 1995); Bering v. Share, 721 P.2d 918, 921 (Wash. 1986) (explaining that review of injunction limiting protests outside clinic "presents . . . constitutional issues requiring the accommodation of conflicting rights").

The idea of constitutional conflict between rights is more complicated than these brief quotations suggest, as Professor James Weinstein demonstrates in his thoughtful article. *See* James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471 (1996). While I agree with much of Weinstein's analysis, there is one point on which we differ that deserves a brief response.

Professor Weinstein argues that there is nothing to be gained by conceptualizing private expressive activity that interferes with a woman's opportunity to obtain an abortion as a clash between rights. *See id.* at 491-92. Judicial rhetoric to the contrary, Weinstein suggests that we protect certain interests and identify them as rights because we recognize their inherent importance. Thus, it is the importance of a woman's interest in reproductive autonomy that may justify a state in restricting anti-abortion protests outside of clinics. The fact that there is a constitutional right to have an abortion is largely irrelevant to that conclusion. Indeed, Weinstein asks, if the Supreme Court decided that there is no

though states are not constitutionally compelled to intervene to protect rights against private interference, the objective of doing so may constitute the kind of compelling state interest that justifies the abridgment of rights under strict scrutiny. Thus, while under state action doctrine, no right exists against private abridgment, it is by no means clear that the state's interest in protecting the exercise of a right against private interference can never justify state intervention to protect one right at the cost of restricting another. In certain cases, some kind of accommodation of the state's interest in restricting the exercise of one right to support opportunities to exercise another with the individual's interest in exercising her rights without governmen-

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constitutional right to have an abortion, would the interest of women in being protected against intrusive anti-abortion protests be any less compelling than it is today.

Weinstein is certainly correct when he argues that identifying an interest as a right provides legal affirmation of the interest's intrinsic value. We protect an interest as a right because the interest itself is important. He is also correct that one may argue forcefully that protecting a woman's choice to have an abortion is a compelling state interest even if there were no constitutional right to have an abortion. Neither of these premises, however, requires the further conclusion that the designation of an interest as a right is irrelevant to judicial evaluation of the importance of the interest.

Clearly, the state may have a compelling state purpose in protecting an interest that is not a right. Fundamental rights do not exhaust the set of all compelling state interests. The issue, however, is not whether an interest must be a right to be recognized as compelling. It is whether it makes sense to recognize an interest as a right while at the same time concluding that state attempts to protect the interest against private interference deserve little if any respect. Thus, the key point is this: If we protect interests as rights because we believe that certain interests are very important, how can we ignore the fact that an interest is a right when we evaluate state efforts to protect the interest against interference. In a sense, Weinstein's analysis would seem to support, rather than contradict, this conclusion.

Perhaps Weinstein's basic argument is a more limited one. Perhaps he is suggesting that identifying an interest as a right is superfluous and unnecessary to the evaluation of a state's protective efforts. Weinstein may believe that the value of interests such as reproductive autonomy are so obvious that the guidance provided by their identification as a right adds little to a court's analysis.

If this is Weinstein's main point, I have less confidence than he does in judicial attempts to identify important or compelling state interests. Put simply, I see little in the way of doctrinal coherence in the determination of what constitutes an important or compelling state interest or the weight assigned to such interests in the application of judicial standards of review. One of the virtues of considering the protection of rights against private interference to be a presumptively important state interest is that it provides an arguably "neutral" basis for reaching such a conclusion in at least some cases, assuming, of course, that we have some confidence in the rights identification process. See *infra* note 117. A presumption here may be no more than an island in largely indeterminate waters, but any doctrinal port ought to welcome in an otherwise empty sea.

tal restraint may be both necessary and constitutionally permissible.[103]

The legitimacy of such accommodations seems to be an implicit assumption underlying the criticism that some law professors have directed at FACE. Thus, Michael McConnell and Michael Paulsen have argued:

> The constitutional right to protest against abortion — forcefully and face-to-face if necessary — is no less important than the constitutional right to abortion. Those who seek abortions have no constitutional right to be spared the indignity and distress of learning that many of their fellow citizens consider the act of abortion tantamount to murder.[104]

While Paulsen and McConnell appear to recognize, correctly, the necessity of judicial accommodations of conflicting rights in this area, their conclusion as to how to resolve this specific conflict between freedom of speech and reproductive autonomy needs to be tempered and carefully limited. If the private exercise of one right comes into conflict with the exercise of another right, and the state, out of a sense of mutual respect, allows both rights to be exercised without limitation, the state's attempt to treat both rights equally will often result in the sacrifice and subordination of one right to the other.

To say that two rights in conflict are of equal importance does not mean that the exercise of the two rights are equally disruptive of each other. Often, as is true with the conflict between abortion rights and freedom of speech, the effect of the conflict will be uneven. Thus, the exercise of the right to have

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[103] While the state may not be constitutionally obligated to protect the exercise of constitutional rights against private interference, it should be obvious that complete abdication of such responsibilities would substantially undermine the utility of most rights. The protection provided private property by the Takings Clause would be of little benefit to many owners, for example, if state laws prohibiting trespass, conversion, and theft were repealed. Indeed, it is precisely because permitting private interference with property would undermine the nature of property rights in such a fundamental way that the Court defines state action more expansively in Takings Clause cases than it does in cases involving other constitutionally protected interests. *See* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENTARY 401, 403-08 (1996).

Similarly, if a state refused to enact any content-neutral laws regulating expression in public forums, the resulting disorder and confusion might limit the utility of expression far more than many regulations directly limiting speech. *See infra* note 118.

[104] Michael S. Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL'Y & L. 261, 263 (1994).

an abortion does not in itself interfere with the right to express oneself, while the right to freedom of speech can substantially burden a person's ability to choose to have an abortion.

Some rights, particularly dignitary rights and autonomy rights, are private and inwardly directed.[105] They are unlikely to directly interfere with the exercise of other constitutionally protected interests. Other rights, and freedom of speech is an obvious example, have a significant instrumental dimension and are intended to effect third parties or the general public.[106] In a circumstance in which an autonomy right comes into conflict with freedom of speech, a policy of non-involvement by the state will commonly subordinate the autonomy right to freedom of expression. The formal equality of a policy of non-regulation will result in substantive inequality.

To understand the point I want to make here, consider the tension between another right, freedom of religion, and freedom of speech. We could paraphrase McConnell and Paulsen's argument by saying that the constitutional right to protest the Jewish or Catholic or Quaker religion — forcefully and face-to-face if necessary — is no less important than the constitutional right to freely exercise one's faith.

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[105] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraceptives in family planning).

[106] Obviously freedom of speech serves dignitary as well as instrumental values. The instrumental function of speech is paramount, however, for First Amendment purposes. *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 114 (1990) (explaining that unlike free exercise rights, core purpose of freedom of speech is to facilitate democratic decision making). In any case, neither the autonomy nor instrumental values furthered by freedom of speech are directly burdened by the decision of women to have abortions.

Of course, governmental regulations restricting anti-abortion protests outside of clinics will interfere with both the instrumental and autonomy components of freedom of speech at least to some extent. While that impact should not be ignored, it may be legitimated as a necessary accommodation to allow both reproductive autonomy and free speech rights to be exercised.

More importantly, the extent of the impact of such regulations on freedom of speech would have to be carefully considered by the courts before any state orchestrated accommodation of conflicting rights could be sustained. A laissez-faire response to the problems of conflicting rights, on the other hand, permits the exercise of one right to substantially conflict with the exercise of another right without any review of regard for the extent of the interference.

Of course, there is an element of truth to this contention. People have the right to critically examine and challenge the tenets of any religious faith[107] just as they have the right to challenge any personal decision made by a third party. But do they have the right to do so outside the house of worship of a minority faith in a community, so that sabbath services and religious celebrations are often marred by dozens of protesters challenging the congregants as they enter their church or synagogue and shouting at them face-to-face about the perfidy of their beliefs? The problem with such expressive activity is not that it communicates a message that undermines or condemns the religious beliefs of the persons whose faith is being derogated. The content of that message, however hostile it may be to the exercise of a particular religion, cannot be suppressed. Indeed, there is no inherent conflict between expression that is critical of a religious faith and free exercise rights because the Constitution does not protect religious believers from the cognitive dissonance that may result from hearing persuasive arguments that are inconsistent with their faith. What is of concern is the location and occasion of the message and the emotional disturbance it will generate.

Many ceremonial events and rituals conducted at a house of worship presuppose an environment both within and around the building that is conducive to the spiritual nature of the activities occurring there. Participants and guests at traditional services or life events of religious significance such as weddings, confirmations, baptisms, or Bar Mitzvahs deserve an opportunity to experience without unreasonable interference the feelings of reverence, awe, solemnity, joy, or sorrow commonly associated with religious observances. To suggest one obvious example, a hostile and intrusive demonstration outside a church or synagogue before, during, and after a wedding to protest the religion of the participants would totally distort the event and unduly bur-

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[107] *See* Terminiello v. Chicago, 337 U.S. 1, 3 (1949) (protecting expression of anti-semitic viewpoints); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (recognizing right of members of Jehovah's Witness religion to express message critical of Catholic faith); Collin v. Smith, 578 F.2d 1197, 1201 (7th Cir. 1978) (upholding National Socialist Party's right to demonstrate and express anti-semitic message in predominently Jewish village), *cert. denied*, 439 U.S. 916 (1978).

den the right of the couple to seek religious sanction for their marriage.[108]

Allowing expressive protests to transform the nature of religious ceremonies does not accommodate freedom of speech and freedom of religion. Rather it sacrifices the latter right to protect the exercise of the former right. In such a circumstance, a different kind of analysis that carefully recognizes the nature and value of both rights when they are in conflict is necessary.

A suitable accommodation of free exercise rights and freedom of speech does not require courts to balance the importance of one right against the value of another. It does demand some

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[108] There are few, if any, cases directly on point to support this argument. Many states have enacted statutes that explicitly prohibit the disruption of religious services. These laws on their face would extend to expressive activity in close proximity to a house of worship. *See* ALA. CODE § 13-6-102 (1975) (substantially modified current version no longer including reference to religious worship at ALA. CODE § 13A-11-7) (stating that "any person who wilfully interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior or any other act, at or near the place of worship" shall be guilty of criminal offense); D.C. CODE ANN. § 22-1114 (1989) (stating that "[i]t shall not be lawful for any person or persons to molest or disturb any congregation engaged in any religious exercise or proceedings in any church or place of worship in the District of Columbia"); N.Y. PENAL LAW § 240.21 (Consol. 1989) (stating that "[a] person is guilty of aggravated disorderly conduct, who makes unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof").

The cases applying these statutes, however, typically involve individuals who have entered the house of worship and disrupted the service, although some of the language used by courts in upholding the statute's application to a trespasser is broad enough to encompass picketing outside of the building. *See, e.g.*, Hill v. State, 381 So. 2d 206, 212 (Ala. Crim. App. 1979) (noting that statute applies to conduct that occurs after conclusion of religious services when congregation is dispersing); Riley v. District of Columbia, 283 A.2d 819, 824 (D.C. 1971) (suggesting that "one may not exercise First Amendment right at any place or at any time . . . nor do so at the expense of the constitutional rights of another"), *cert. denied*, 405 U.S. 1066 (1972); People v. Morrisey, 614 N.Y.S.2d 686, 691 (1994) (insisting that "the [s]tate has a justifiable interest in protecting the rights of those who wish to exercise their freedom of religion over the interest of those individuals who intend to infringe these First Amendment rights").

Other related cases are ambiguous for similar reasons. *See, e.g.*, Olivieri v. Ward, 766 F.2d 690, 694 (2d Cir. 1985) (concluding that police order preventing protestors from conducting lengthy demonstration directly in front of cathedral, but allowing them to demonstrate on nearby side street, provides ample alternative channels of communication despite denying speakers "their preferred forum"); Action v. Gannon, 450 F.2d 1227, 1232-33 (8th Cir. 1971) (enjoining defendants from demonstrating inside cathedral but noting that defendants "have a right to engage in peaceful pamphleteering and picketing on public property . . . provided, of course, that they do not interfere with those entering or leaving the church").

evaluation of the degree to which a constitutional compromise would burden the exercise of both of the rights in question. A hypothetical involving both the free exercise of religion and the right to marry may clarify the kind of analysis that should be employed here.

Demonstrators protesting the marriage of an inter-faith couple, where one spouse has agreed to convert to the religion of the other, for example, might plausibly argue that the impact of their expression would be reduced if they were required to hold up signs across the street from the house of worship where the wedding is to occur instead of being able to directly confront the wedding party. It is certainly easier for the intended audience to ignore a message on a sign twenty feet away, the protestors would contend, than it is to ignore a person speaking to them face-to-face. Thus, any accommodation relocating the demonstration to protect the couple's right to marry and free exercise rights will make it more difficult for the speakers opposed to the wedding to communicate their message to the persons they seek to address.[109]

The virtues of a face-to-face encounter to the speaker, however, arguably presuppose the audience's lack of inclination to hear what the speaker has to say. The same message can be communicated at a distance to a receptive audience (indeed, it may encourage the audience to approach the speaker and engage in dialogue), but it may not reach the eyes and ears of the intended addressee who has no interest in receiving it. While that may be an unsatisfactory result for the speaker, it is not clear that a primary purpose of the First Amendment is to assist speakers in communicating with people who do not want to hear them.[110] There is every reason to suppose that the marital couple has thought long and hard about their decision and it is hardly surprising that they believe that they do not need the last minute advice of strangers to assist them in making a private

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[109] *See Too Close for Comfort, supra* note 3, at 1859-60 (describing value to speaker of achieving forced proximity to audience). Proximity allows the speaker to establish both aural and visual contact with the listener in a personal manner. This facilitates and amplifies the transmission of the message being conveyed by enhancing the dramatic impact of expression and demonstrating the intensity of the speaker's beliefs.

[110] *See supra* notes 9-11, 35-36 and accompanying text (discussing limited free speech value in protecting speech directed at unreceptive audience).

and intimate decision.[111] In such circumstances, where the likelihood of the speaker's message being welcomed and heeded is slight, and the message to be communicated remains clearly available to those who elect to receive it, the burden on the speaker may be experienced as bothersome, but the loss in First Amendment terms is tolerable.[112]

The interference with the free exercise rights and marital autonomy of persons marrying outside their faith caused by face-to-face encounters with protestors in front of the sanctuary where the wedding is to occur, on the other hand, would be extreme. The entire tenor of the event would be transformed. The alternative available to the marital couple of having a secret

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[111] The analogy to a woman who is entering a clinic to have an abortion after reflecting thoughtfully about her decision should be obvious. *See supra* note 29 (discussing Judge Winter's argument concurring on this point in *Schenck*).

[112] *See generally* Sabelko v. City of Phoenix, 68 F.3d 1169, 1173 (9th Cir. 1995) (holding that opportunity to engage in expressive activity 100 feet from clinic entrance or within 8 feet of patients closer to entrance provides ample alternative means of communication for protestors' message), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 4, 1996) (No. 95-1415); New York State NOW v. Terry, 886 F.2d 1339, 1363-64 (2d Cir. 1989) (holding that provision in injunction that permits "sidewalk counseling, consisting of reasonably quiet conversation of a non-threatening nature by not more than two people" adequately balances rights of protestors and right of women seeking abortion at clinics), *cert. denied*, 495 U.S. 947 (1990); Planned Parenthood Shasta-Diablo, Inc. v. Williams, 898 P.2d 402, 412 (Cal. 1995) (holding that assigned demonstration site across street from clinic "was in plain view of persons entering and leaving the clinic and afforded petitioners a reasonable vantage from which to communicate their viewpoint without subjecting patients to physical intimidation"); Feminist Women's Health Ctr. v. Blythe, 22 Cal. Rptr. 2d 184, 193 (Ct. App. 1993) (suggesting that speech free zone in front of clinic will not prevent protestors from communicating their anti-abortion message to patients), *vacated sub nom.*, Reali v. Feminist Women's Health Ctr., 114 S. Ct. 2776 (1994); Hirsh v. City of Atlanta, 401 S.E.2d 530, 533-34 (Ga. 1991) (noting that permeable protest free zone in which demonstrators must remain at least five feet away from unconsenting patients leaves ample alternative channels of communication available to anti-abortion protestors to reach their audience), *cert. denied*, 502 U.S. 818 (1991); Bering v. Share, 721 P.2d 918, 930-31 (Wash. 1986) (noting that terms of injunction do not prevent anti-abortion protestors from picketing "anywhere in the city, except upon a limited stretch of sidewalk fronting the [clinic]," they can picket "at a point reasonably close to the [clinic] and the people [they] wish[] to address," and protestor's signs "clearly are visible to anyone entering the [clinic]"). *But see* Cheffer v. McGregor, 6 F.3d 705, 711-12 (11th Cir. 1993) (arguing that "potential hinderance to the free exercise of abortion rights" caused by allegedly "disruptive, discourteous, and offensive" protests cannot justify "actual prohibition of speech" resulting from injunction creating buffer zone in front of clinic), *vacated*, 41 F.3d 1421 (11th Cir. 1994); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 794-96 (5th Cir. 1989) (holding that as long as women have physical access to abortion clinic, their interest in avoiding protestors' speech and tense atmosphere is outweighed by demonstrators' right to loudly denounce abortion).

wedding in a private location is far more disruptive to their rights and interests than are the expressive alternatives available to the disgruntled speakers. Accordingly, a requirement that the protest demonstration be relocated across the street from the house of worship might be accepted as a reasonable accommodation of competing rights.

The same kind of analysis could be applied to the conflict between freedom of speech and abortion rights. McConnell and Paulsen are surely correct that people who believe that abortion is murder may express their opinion loudly and forcefully. And those women who have had an abortion or who plan to have an abortion have no constitutional immunity that shields them from ever having to learn of the intensity of such feelings. But that does not mean that persons who are opposed to abortion may always communicate their disapproval to a woman at a location and time of the protestors' choosing that maximizes their ability to interfere with and substantially burden the ability of women to exercise their right to choose to have an abortion. Freedom of speech has its limits, and those limits may be defined in part by the boundary between one right and another.

In many cases, a constitutional balance is struck by resorting to a third right that often acts as a buffer between rights that are in conflict. That buffer, of course, is property and the rights that accrue to owners of property — a central tenet of which is the power to exclude others from one's land.[113] If anti-abortion protesters insisted on expressing their opposition to abortion not only on the public sidewalks outside of clinics but also in the clinic's waiting rooms and examining rooms, the clinic owner's property rights would trump the protesters' freedom of speech and they would be removed from the clinic as trespassers.[114] Protesters demonstrating against a particular religious faith would find their expressive activities similarly restricted if they attempted to carry on their protest inside some other

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[113] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (explaining that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'") (citations omitted).

[114] *See* Brownstein & Hankins, *Pruning* Pruneyard, *supra* note 31, and cases cited therein.

faith's house of worship.[115] Aside from a very limited line of state constitutional cases allowing unwanted speakers to engage in expressive activity in the public areas of large shopping centers, no court seriously disputes this kind of an accommodation between speech and property today.[116]

Yet why should property be the only constitutionally acceptable buffer that protects the right to have an abortion, to marry, and to exercise one's religion from expressive interference? Not everyone can afford to acquire sufficient property to fortify their exercise of constitutional rights against expressive intrusions by creating a moat of land around them that forces protesters to keep their distance. Moreover, the exercise of certain rights, such as freedom of religion, depend in part on the public accessibility of important facilities. We do not want our houses of worship or our medical clinics hidden behind barriers and as far away from public thoroughfares as possible. A more sensible alternative is to recognize that private locations that are indispensable for the exercise of constitutional rights may be located adjacent to public walkways. Moreover, as a consequence of respecting such locational choices, the unfettered expression we tolerate in our streets and parks may have to be marginally limited to accommodate the exercise of other constitutional rights nearby.[117]

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[115] *See* discussion *supra* note 108 (noting statutory limitations on interrupting religious worship).

[116] *See* Brownstein & Hankins, *Pruning* Pruneyard, *supra* note 31, at 1092-1124.

[117] One of the perceived virtues of relying on property as a buffer that provides a basis for reconciling any conflict between rights is the recognition that the protection of property operates as a neutral background principle in our society. If property ownership controls the question of whether the private exercise of one right will be allowed to interfere with the exercise of a different right, government can avoid making difficult value judgments regarding the opportunity to exercise rights. The problem with this perception is that it fails to explain why the selection of property as a universal buffer is in any sense a "neutral" decision in the first place. Certainly, property is not equally available to everyone who has an interest in protecting the exercise of their rights from private interference.

Indeed, one can reasonably argue that all fundamental rights protected by the Constitution are in a real sense "neutral" background principles in that their status and value is not derived from any conventional political process. Or, to put it another way, the opportunity to exercise all fundamental rights deserves state protection against private interference to some degree because the constitutional system presumes that the exercise of rights is generally available to citizens. A society that did not enforce *any* crimes against property and did not prohibit *any* private interference with expression would make a mockery of the idea that property and speech were constitutionally protected interests.

This proposed accommodation of conflicting constitutional interests is hardly unique in constitutional law. If speech itself is the right being interfered with, one speaker will sometimes have to be silenced to prevent her from disrupting another speaker's expression.[118] The constitutional rights of hecklers have often been subject to abridgment even though we identify the act of heckling by the content of the heckler's speech.[119] A shout

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Finally, one can argue that we protect property and respect its use as a buffer between rights precisely because it provides people privacy and an opportunity to engage in protected personal autonomy choices. As Professor Nimmer explained:

> "[P]roperty" is a catch-all term for that bundle of rights which the law ordinarily accords to one who has acquired "title," and is, therefore, a property owner. Perhaps the most central of these is the right to exclude the world, which is to say, a right of privacy over the domain in which a property interest resides. It is the right to privacy, derived perhaps from a property interest in the premises, but not the property interest per se, which explains why there is no First Amendment right to speak in or at the threshold of a private residence contrary to the occupant's wishes.

NIMMER, *supra* note 16, § 4.09[D] at 4-118 to 4-119.

If that is the case, it is difficult to understand why an independently recognized interest in privacy and autonomy is not equally deserving of protection against expressive interference when property rights are not directly infringed.

[118] While some heckling, particularly of public figures, may be tolerated out of First Amendment concerns for the free speech rights of audience members, serious disruption of a speaker by outsiders can be subject to sanction. As the California Supreme Court explained in *In Re Kay*, "[t]he Constitution does not require that any person, however lofty his motives, be permitted to obstruct the convention or continuation of a meeting without regard to the implicit customs and usage or explicit rules governing its conduct." 464 P.2d 142, 147 (Cal. 1970). The court continued:

> [T]he state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion . . . . Freedom of everyone to talk at once can destroy the right of anyone effectively to talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship.

Id. at 149 (citations omitted). *See also* McIntosh v. Arkansas Republican Party-Frank White Election Comm., 766 F.2d 337, 341 (8th Cir. 1985) (purchaser of ticket at fund raising luncheon has no constitutional right to disrupt event by expressing uninvited message); Morehead v. Texas, 807 S.W.2d 577, 581 (Tex. Crim. App. 1991) (narrowly construing statute to prohibit "verbal utterances that substantially impair ordinary conduct of lawful meetings and thereby curtail exercise of others' First Amendment rights").

[119] *See* Iowa v. Hardin, 498 N.W.2d 677, 679 (Iowa 1993) (noting that state did not arrest audience members who clapped and cheered in support of speaker, but still upholding conviction of protestors who disrupted speech during fundraising event for President Bush). Similarly, one would assume the parade organizers who were recently found by the Supreme Court to have a First Amendment right to exclude a contingent of gay marchers

from the audience for the speaker to "Give them hell!" isn't heckling. A shout from the audience for the speaker to "Go to hell!" is disruptive and can be silenced in appropriate circumstances.

Speech and association rights have come into conflict with equal protection rights on several occasions when organizations with racially discriminatory membership policies apply for permits to use public facilities ranging from auditoriums to the streets for meetings or parades. By granting such permits, the city will protect the First Amendment rights of the racist organization but only at the price of denying members of the excluded racial group access to public property for a limited period of time because of their race. While courts have struggled to reconcile these conflicting interests, free speech and association rights often have been vindicated over equality interests in the case law.[120]

On the other hand, courts recognize that sometimes freedom of speech must be curtailed when conflicts arise between speech and other rights.[121] Speech may be limited to protect the accused's Sixth Amendment right to a fair trial.[122] In another

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from participating in the St. Patrick's Day parade in Boston could obtain police assistance in removing the gay contingent from the parade if they attempted to march without the organizer's permission. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338 (1995).

[120] *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974) (cautioning against any policy excluding segregated groups from having access to public facilities); Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122, 1125 (5th Cir. 1978) (suggesting that KKK must be allowed access to school buildings after hours despite its racially discriminatory membership); Cason v. City of Jacksonville, 497 F.2d 949, 954 (5th Cir. 1974) (suggesting that private groups practicing racial discrimination may have First Amendment right to use public facilities for its meetings); Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 286-87 (D. Md. 1988) (holding that First Amendment requires town to permit KKK to exclude blacks from participating in racist parade on public streets).

[121] As the Court noted in *Burson v. Freeman*, the application of strict scrutiny review does not "avoid the truly difficult issues involving the First Amendment . . . . Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings." 504 U.S. 191, 198 (1992). *See also* Sheppard v. Maxwell, 384 U.S. 333, 361-63 (1966) (outlining restrictions on speech of trial participants that courts may impose to protect accused's right to fair trial).

[122] The Court balances freedom of the press against a defendant's Sixth Amendment right to a fair trial with a heavy presumption in favor of the First Amendment in cases involving gag orders relating to pre-trial proceedings and issues of press access. *See, e.g.*,

example, private religious expression on public property has been restricted to avoid a situation where the state appears to endorse a particular faith in violation of the Establishment Clause.[123]

In the case most closely on point, *Burson v. Freeman*,[124] the Supreme Court upheld a Tennessee statute that prohibited the display or distribution of political campaign materials within 100 feet of the entrance of polling places on election day. Since the law at issue involved a content-discriminatory prohibition of political speech in a traditional public forum, the Court applied strict scrutiny to the challenged provision. Nonetheless, the law was upheld. Recognizing that in this circumstance "the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of in-

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Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986) (allowing closure of preliminary hearing only if there is "a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and . . . reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-64 (1976) (describing balancing test used to evaluate constitutionality of prior restraints issued to limit pretrial publicity and insure right of accused to fair trial).

The balance shifts noticeably, however, if the issue is the constitutionality of a state statute restricting demonstrations in the vicinity of a courthouse in which a trial is occurring. The Court has stated clearly that "the legislature has the right to recognize the danger that some judges, jurors, and other court officials will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial." Cox v. Louisiana, 379 U.S. 559, 565 (1965). Nor is the legislature restricted to curtailing only those demonstrations creating a clear and present danger that justice will be impaired. Instead, the Court concluded that "crowds . . . demonstrating before a courthouse may . . . be prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process." *Id.* at 566.

[123] The range of private religious expression on public property recognized as violating the Establishment Clause includes: placing a creche in the foyer of city hall, County of Alleghany v. ACLU, 492 U.S. 573, 590-91 (1989); the posting of the Ten Commandments on public school walls, Stone v. Graham, 449 U.S. 39, 42 (1980); erecting a creche on the front lawn of the county office building, Smith v. County of Albemarle, 895 F.2d 953, 958 (4th Cir. 1990); displaying a 16-foot high menorah in city hall park, Kaplan v. City of Burlington, 891 F.2d 1024, 1028 (2d Cir. 1989); placing a nativity scene in city-county office building, American Jewish Congress v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987); and erecting an illuminated 85-foot cross in a state park, ACLU v. Rabun County Chamber of Commerce, Inc. 698 F.2d 1098, 1111 (11th Cir. 1983). *But see* Capital Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2448 (1995) (holding that private cross placed in public plaza surrounding state house does not violate Establishment Clause).

[124] 504 U.S. 191 (1992).

timidation and fraud,"[125] the Court concluded that the state must be permitted some discretion in accommodating the competing interests at stake. Thus, Justice Blackmun ended his opinion for the Court with these words, "[g]iven the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise."[126]

The *Burson* decision has important implications for cases involving the accommodation of competing rights. The state in *Burson* was not obligated by the Constitution to prohibit political campaigning near polling places. A failure to do so would not have violated anyone's right to vote. Nonetheless, the Court recognized that the case raised a conflict between freedom of speech and the right to vote and that the state's discretionary decision to limit speech to protect the right to vote against private interference was worthy of respect.

Nor is the burden on political speech upheld in *Burson* an insignificant one. As anyone who has engaged in political leafletting can attest, there are few better places to reach and influence voters than the area surrounding a polling site. Everyone a campaign worker communicates with at that place and time is intending to vote and is thinking about the very issues the speaker is trying to address. For political campaigns with limited resources, the inability to reach voters at polling places may be a substantial burden. Despite this impact, the Court was

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[125] *Id.* at 211.

[126] *Id.* In upholding this "compromise," the Court accepted Tennessee's attempt to reconcile the right to vote with the right to engage in political discourse. Tennessee argued that the campaign-free zone protects the individual's right to vote freely and helps assure that elections are conducted with integrity and reliability. The Court agreed that these were compelling state interests. In finding that the means Tennessee employed to further its interests were narrowly tailored, the Court concluded:

> [A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud.

Id. at 206.

willing to permit communities to ban political speech within 100 feet of a poll to protect the integrity of the electoral process against disruptive influences.[127]

I do not suggest that the statutory creation of a 100 foot, protest-free, buffer zone around medical clinics providing reproductive health care is necessarily constitutional because of the Court's decision in *Burson* (although such a law as stated would be content-neutral on its face and reviewed under a multi-factor balancing test, not the strict scrutiny review applied to a ban on political speech). Not all conflicts between the exercise of rights will, or should be, resolved the same way.[128] A law prohibiting expression critical of any newspaper's editorial policy within 100 feet of the location at which the paper was published would clearly be unconstitutional. There is nothing in the nature of freedom of the press or in the way that newspapers are published that suggests that demonstrators outside a paper's editorial offices would seriously impair the paper's autonomy.

Other rights are more personal and more fragile, however, and in those cases some sort of accommodation, some sort of "constitutional compromise," between conflicting rights may be required. The accommodations the courts have accepted recognize that all rights must be exercised within a political environment grounded on freedom of speech. Thus, the way rights are exercised is grist for the mill of public debate. Courts have also recognized, however, that free speech rights in certain limited locations, such as polling places and the area surrounding courthouses, must be restricted in order to provide other rights the "breathing room" they need to be engaged in effectively.[129]

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[127] *Id.* at 211.

[128] Under the authority of *Burson*, the Fifth Circuit upheld a Louisiana statute proscribing electoral campaign activity within 600 feet of a polling place on election day. *See* Schirmer v. Edwards, 2 F.3d 117, 119 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994). The court distinguished cases such as Daily Herald Co. v. Munro, 838 F.2d 380, 389 (9th Cir. 1988), which struck down more limited restrictions on exit polling around polling areas on the grounds that "there is no evidence of widespread voter harassment or intimidation by exit pollers." *Id.* at 122.

[129] *See, e.g., Burson*, 504 U.S. at 210 (explaining that Tennessee did not violate Constitution by deciding that "last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible"); Cox v. Louisiana, 379 U.S. 559, 562 (1964) (noting "that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create").

The argument in favor of allowing states to provide protest-free buffer zones around clinics providing abortion services builds on this foundation. The resulting distress and delay that protestors outside of clinics cause is not only problematic in its own right because of its impact on the health of women patients. It is also a matter of concern because it burdens the exercise of a constitutional right. When the Court evaluates the constitutionality of restrictions on expression in the area surrounding medical clinics providing abortion services, it should take into account the fact that there are two rights at issue in these cases. While states are not constitutionally obligated to protect the exercise of rights against private interference, it is difficult to understand why a state's decision to protect the exercise of rights against private abuse is not worthy of substantial respect. To apply free speech doctrine in these cases without regard to the impact of anti-abortion expression on the exercise of abortion rights implicitly denies that the interest asserted by women in choosing to have an abortion is important enough to have the status of a right. But under current doctrine, there is a fundamental right to have an abortion. Free speech doctrine, and the Court, ought not to ignore that fact, however difficult it may be to evaluate the attempt by states to accommodate these conflicting interests.[130]

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[130] It may be argued that a court's unwillingness to uphold restrictions on speech to accommodate the exercise of the right to have an abortion does not ignore the constitutional protection provided to reproductive autonomy, but rather recognizes the limitations of that guarantee. Under the plurality decision in *Planned Parenthood v. Casey*, only those regulations of abortion services that "unduly burden" a woman's choice to have an abortion violate a woman's privacy and autonomy rights. 505 U.S. 833, 856-57 (1992). Since the Court does not recognize the delay associated with a 24-hour waiting period requirement, or the stress related to a minor having to obtain parental consent or the approval of a judge before having an abortion, as undue burdens, *id.* at 885-86, 899, the trauma and delay resulting from expressive activity outside of family planning clinics would also not unduly burden the right to have an abortion. *See* Brownstein & Hankins, *Pruning* Pruneyard, *supra* note 31, at 1180-90.

There are two possible responses to this argument. First, no one argues that a state's unwillingness to prohibit expressive activity outside of a clinic violates the constitutional rights of women seeking to have an abortion at the picketed facility. The issue is whether the state has a legitimate and important interest in prohibiting private expressive activity that burdens women who seek to have an abortion. It is possible that private interference can be recognized as burdensome to the exercise of a right and proscribed even if the state could impose a similar burden on the exercise of the right without violating the Constitution. Thus, a state might legitimately refuse to allow residential picketing in front of

someone's home without violating the First Amendment. Nonetheless, if the state permits such picketing to occur, the government could prohibit private interference with a residential picket line on the grounds that it is protecting freedom of speech.

Second, while the right to have an abortion may only be infringed by "undue burdens," expressive activity is not absolutely protected against abridgement either. Indeed, if speech is restricted by a content-neutral law, the standard of review the Court applies in evaluating the constitutionality of the regulation has many of the attributes of an "undue burden" standard. *See* Alan E. Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 923 (1994) (arguing that way courts review speech restrictions is similar to "undue burden" standard applied in *Planned Parenthood v. Casey* in that content-neutral regulations "must be evaluated as to their effect to determine if they 'unduly constrict the flow of information and ideas'") (citations omitted).

Accordingly, in the conflict between freedom of speech and the right to have an abortion, both rights stand on an equal footing in the sense that neither right is protected against regulations that have neither the purpose nor the effect of unduly burdening the exercise of the right.