

NOTES

BALANCING THE INTERESTS: A PRACTICAL APPROACH TO RESTRICTIONS ON EXPRESSIVE CONDUCT IN THE ANTI- ABORTION PROTEST CONTEXT

In 1973, the United States Supreme Court in *Roe v. Wade* held that the right to privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy.¹ Since then, abortion opponents have formed hundreds of right-to-life organizations to circumvent and reverse the decision.² Initially, the anti-abortionists conducted peaceful protests, consisting of silent marches, sign carrying, and prayer readings.³ More recently, however, the protestors have taken to "direct action" protest tactics, allegedly because of their frustration with the inefficiency of the political system.⁴ Anti-abortion advocates have become increasingly vocal, confrontational and violent. Protest tactics now include mass picketing, harassment of patients, doctors, and staff at gynecological clinics and their homes, trespassing, obstruction of clinics, and even arson and bombing.⁵

The most militant of the anti-abortion protestors are the abortion blockaders. These blockaders, who most commonly operate under the auspices of "Operation Rescue," attempt to stop abortion and end its legalization through demonstrations that they term

¹ 410 U.S. 113, 152-53 (1973). Although the Supreme Court noted that the Constitution does not explicitly mention any right of privacy, the Court recognized that a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution. *Id.* at 152. The Court stated that the roots of this right are contained in the first, fourth, fifth, and ninth amendments; in the penumbras of the Bill of Rights; and in the concept of liberty guaranteed by the first section of the fourteenth amendment. *Id.*

² Note, *Bering v. Share: Accommodating Abortion and the First Amendment*, 38 CASE W. RES. L. REV. 698, 699 (1988).

³ See *id.* at 701.

⁴ See *id.* at 701-02.

⁵ See *id.* at 702.

"rescues."⁶ At a "rescue," the demonstrators intentionally trespass on the gynecological clinic's premises for the purpose of blockading the clinic's entrances and exits, thereby effectively closing the clinic.⁷

In response, women's rights advocates and gynecological clinics across the nation have filed lawsuits seeking injunctions to prevent such disruptive conduct.⁸ Faced with a growing number of these lawsuits, particularly within the past two years, courts have been forced to sculpt injunctions and consider regulations aimed at preserving the right to an abortion without unduly infringing upon the first amendment rights of the protestors. Courts have consistently held that the first amendment does not afford anti-abortion protestors the right to block off buildings as a means of expression.⁹ In deciding cases involving expressive activity short of such blockades, however, these courts have differed as to the permissible scope of such activity and in recognizing the interests implicated by such conduct.¹⁰

This note analyzes several recent cases dealing with abortion protests, and critically examines both the restrictions on expressive

⁶ See *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 584 (4th Cir. 1990), *cert. granted sub nom.*, *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

Since the beginnings of Operation Rescue in 1987, the organization has given impetus to a rescue movement that has continued to increase in magnitude despite the numerous lawsuits, trials, fines, and instances of imprisonment. See Connors, *Operation Rescue*, AMERICA, Apr. 29, 1989, at 400, 402. By 1989, there had been over 250 "rescues" across the United States and Canada, with at least 30,000 U.S. and Canadian citizens risking arrest; of these, 20,000 had actually been arrested. *Id.* As John Cavanaugh-O'Keefe, who is identified by some in the movement as "the father of rescue," said in 1989, "I think there will be tremendous numbers who will risk jail in the coming year." Wills, "Save the Babies", TIME, May 1, 1989, at 26, 28. He further asserted that "[t]his civil rights movement is larger, in terms of sheer numbers of supporters and of those who have gone to jail all over the nation, than the civil rights movement of the 60s. We're now ready to fill the jails." *Id.*

⁷ *National Org. for Women*, 726 F. Supp. at 1488.

⁸ See Sherman, *Courts Deal Blockaders Big Set Backs*, NAT'L L.J., Nov. 13, 1989, at 30, col. 1.

⁹ See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *New York States Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1364 (2nd Cir. 1989); *Bering v. Share*, 106 Wash. 2d 212, 232, 721 P.2d 918, 930 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). As the United States Supreme Court stated in *Cox*, "[a] group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." 379 U.S. at 555.

¹⁰ See, e.g., *Eanes v. State*, 318 Md. 436, 440, 569 A.2d 604, 606 (1990) (upholding statute prohibiting loud and unseemly noises); *Thompson v. Police Dep't*, 145 Misc. 2d 417, 418, 546 N.Y.S.2d 945, 946 (N.Y. Sup. Ct. 1989) (upholding injunction prohibiting protestors from moving along sidewalk directly in front of clinic); *O.B.G.Y.N. Ass'ns v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 894, 407 N.Y.S.2d 903, 905 (N.Y. App. Div. 1978) (modifying injunction to prohibit picketing that disturbs or endangers the health or safety of clinic patients).

conduct that the courts have fashioned, and the governmental interests on which the courts have based these restrictions. Section I examines the evolution of rights to protest under the first amendment as interpreted by the United States Supreme Court.¹¹ This section also discusses the right to abortion as defined by the Court, and addresses the legal responses to the abortion conflict that have attempted to preserve the rights of all parties involved.¹² Section II considers the constitutional requirements placed upon restrictions on expressive conduct and examines the courts' application of these standards when considering regulations and fashioning injunctions in the anti-abortion protest context.¹³ Section III scrutinizes the application of these standards to three recent anti-abortion protest cases and notes the ways in which courts are attempting to reconcile the conflicting rights that these cases implicate.¹⁴ Section IV analyzes the governmental interests on which courts have based their injunctions and concludes that those stated interests avoid addressing the actual conflict of rights involved.¹⁵ Finally, this section proposes that courts adopt a significant governmental interest, that of protecting clinics from conduct that hinders medical treatment, as the basis upon which to fashion injunctions that restrict expressive activity in the anti-abortion context.¹⁶

I. CONSTITUTIONAL ROOTS OF RIGHTS IMPLICATED BY ANTI-ABORTION PROTEST

A. *Protest and the First Amendment*

As guaranteed by the first amendment,¹⁷ the right to freedom of speech lies at the core of our democratic government.¹⁸ The

¹¹ See *infra* notes 17-54 and accompanying text.

¹² See *infra* notes 55-80 and accompanying text.

¹³ See *infra* notes 81-279 and accompanying text.

¹⁴ See *infra* notes 280-348 and accompanying text.

¹⁵ See *infra* notes 349-64 and accompanying text.

¹⁶ See *infra* notes 365-83 and accompanying text.

¹⁷ The first amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

¹⁸ See *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (citing *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937)). The Court stated:

It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.

United States Supreme Court has recognized the importance of this right within the framework of our government and has often asserted a commitment to the principle that "debate on public issues should be uninhibited, robust and wide-open."¹⁹ The Court, however, has not always recognized picketing as protected by the first amendment guarantee of free speech.²⁰

In the early 1900s, when considering the legality of protests that arose from disputes between labor unions and employers, the Court challenged the involved pickets as "unlawful conspiracies" due to the resulting coercion of employees.²¹ In the 1911 case of *Gompers v. Bucks Stove & Range Co.*, for example, the Court held unlawful a picket involved in a labor dispute.²² It reasoned that the coercive force that the protestors derived from their sheer numbers carried the picketing beyond the protection of the first amendment.²³

Recognizing the distinction between violent and peaceful protests, the Court in 1940 upheld first amendment protection of picketing as peaceful protest in *Thornhill v. Alabama*.²⁴ In *Thornhill*, the defendant participated in a picket line near the place of business of his former employer. He was subsequently convicted of violating an Alabama statute that made it unlawful to loiter or picket near a premise or place of business with the intent to induce others not to deal with the targeted business.²⁵ The defendant argued that the statute was unconstitutional because it deprived him of his first amendment rights to freedom of assembly, freedom of speech, and the right to petition for redress.²⁶ The United States Supreme Court

The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Id.

¹⁹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); see also *Terminiello*, 337 U.S. at 4.

²⁰ See Note, *Constitutional Law—Abortion Protest—First Amendment Speech Rights Outweigh Privacy Rights of Women Seeking Abortions*, 20 CUMB. L. REV. 183, 184 (1989).

²¹ See *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 439 (1911); see also *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 258–59 (1917); Note, *supra* note 20, at 184.

²² 221 U.S. at 439.

²³ *Id.* The Court stated, "In the case of an unlawful conspiracy, the agreement to act in concert . . . gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have." *Id.*

²⁴ 310 U.S. 88, 103, 105 (1940).

²⁵ *Thornhill*, 310 U.S. at 91–92.

²⁶ *Id.* at 92–93.

held that the statute was unconstitutional because it precluded every practicable, effective means by which the defendant and other protestors might be able to educate the public on their views.²⁷ In deciding that freedom of speech could only be restricted if it threatened substantial harm to individuals, their property, or their privacy, the *Thornhill* Court granted first amendment protection to the conduct associated with "dissemination of information," which the court defined to include peaceful picketing.²⁸

Since *Thornhill*, the United States Supreme Court has continued to recognize that picketing is protected by the first amendment.²⁹ In the 1981 case of *NAACP v. Claiborne Hardware Co.*, the Court recognized that this constitutional protection extended even to expressive conduct that is "offensive" or "coercive."³⁰ In *Claiborne Hardware*, members and supporters of the National Association for the Advancement of Colored People (NAACP) boycotted white merchants in an attempt to secure compliance by both civic and business leaders with a list of demands for equality and racial justice.³¹ The protestors supported the boycott largely through speeches and non-violent picketing, though related acts of violence occurred.³² The merchants filed an action in the Mississippi Chancery Court for injunctive relief against the NAACP, another organization, and 146 individual defendants.³³

The Chancery Court rejected the defendants' claim that their conduct was protected by the first amendment.³⁴ The chancellor, noting that secondary boycotts were unlawful under both United States and Mississippi law, stated that illegal conduct and communication are not protected by the constitutional provisions relating to freedom of speech.³⁵ The Chancery Court consequently imposed damages on 130 defendants and issued a permanent injunction enjoining the petitioners, among other things, from "persuading" any person to boycott the merchants' businesses, from using demeaning and obscene language to address people who refused to participate in the boycott, and from "picketing or patrolling" the

²⁷ *Id.* at 104-05.

²⁸ *See id.* at 105-06; *see also* Note, *supra* note 20, at 185.

²⁹ *See, e.g.,* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972).

³⁰ 458 U.S. 886, 911 (1982) (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

³¹ *Id.* at 907.

³² *Id.*

³³ *Id.* at 889-90.

³⁴ *Id.* at 892 n.10.

³⁵ *Id.*

premises of any of the merchants.³⁶ Based on the Chancery Court's findings that fear of reprisals by the petitioners caused some black citizens to withhold their patronage from the respondents' businesses, the Supreme Court of Mississippi held that the entire boycott was unlawful and let the injunction stand.³⁷ The defendant boycotters then petitioned the United States Supreme Court for certiorari, which was granted.³⁸

Noting that freedom of speech necessarily includes the opportunity to persuade others to action, not merely to describe facts, the Court reversed the Supreme Court of Mississippi, reasoning that speech does not lose its protected character simply because it may embarrass or coerce others into action.³⁹ The Court held that the nonviolent aspects of petitioners activities were protected by the first amendment.⁴⁰

Claiborne Hardware illustrates the modern United States Supreme Court's reluctance to inhibit certain expressive conduct, including speeches and nonviolent picketing.⁴¹ This reluctance is consistent with the Court's acknowledgment of the importance of preserving the freedom of expression as a cornerstone of our democratic society.⁴² Yet, despite its conceded importance, freedom of speech has nonetheless never been held to be absolute; the first amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.⁴³ Courts, as well as state and federal governments, may restrict expression in certain circumstances; however, cognizant of the United States Supreme Court's oft-stated recognition that the first amendment was designed to secure "the widest possible dissemination of information," these courts are required to justify every instance of abridgment.⁴⁴

³⁶ *Id.* at 893.

³⁷ *Id.* at 895-96 n.18. Although affirming the Chancery Court's basic finding of liability, the Mississippi Supreme Court dismissed the cases against 38 of the 146 individual defendants for lack of proof. *Id.*

³⁸ *Id.* at 896.

³⁹ *Id.* at 910, 934. The United States Supreme Court remanded the case for further proceedings. *Id.* at 934.

⁴⁰ *Id.* at 915.

⁴¹ See, e.g., *id.* at 913; *United States v. Grace*, 461 U.S. 171, 177, 183 (1983).

⁴² See *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

⁴³ See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1980).

⁴⁴ See *Associated Press v. United States*, 326 U.S. 1, 20 (1945); see also *Grace*, 461 U.S. at 177.

As defined by the Court, the ability of government and the courts to restrict expressive conduct permissibly is limited.⁴⁵ The Court has held that the government may enforce reasonable time, place, and manner restrictions on expression as long as they meet four requirements: first, the restrictions must be content-neutral; second, they must serve a significant governmental interest; third, they must be narrowly tailored to effect that interest; and fourth, they must leave open alternative channels of communication.⁴⁶ In addition to these four requirements, courts will scrutinize any restriction, particularly if it is a statute, to ensure that it is not unconstitutionally vague.⁴⁷

Courts have been particularly hesitant to restrict expressive conduct in "public forums."⁴⁸ The United States Supreme Court has stated that such public forums, including streets, sidewalks, parks, and other similar public places, are so historically associated with the exercise of first amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.⁴⁹ Furthermore, the Court has held that such areas do not lose their protected status simply because they abut areas not normally considered public forums.⁵⁰ Conversely, the Court has stated that an area will not be awarded the protected status of a "public forum" merely because members of the public are permitted to come and go at will.⁵¹ Because courts are hesitant to restrict expressive conduct in public forums, the designation of an area as a public forum is relevant to the protection that courts are likely to give expressive conduct taking place in that area.

⁴⁵ *Grace*, 461 U.S. at 177.

⁴⁶ *Id.*

⁴⁷ See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

⁴⁸ See, e.g., *Grace*, 461 U.S. at 177 (federal statute banning distribution of leaflets on public sidewalk in front of United States Supreme Court building held to be unconstitutional under first amendment); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976) (threat that protestors would be arrested for criminal trespass held to be constitutional because no first amendment right to protest on private property).

⁴⁹ *Hudgens*, 424 U.S. at 515 (citing *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968)).

⁵⁰ *Grace*, 461 U.S. at 180.

⁵¹ *Id.* at 177 (Supreme Court building not public forum); see also *Greer v. Spock*, 424 U.S. 828, 836 (1976) (streets and sidewalks within enclosed military reservation not public forum). The Court has stated that the first amendment has never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Id.* at 836 (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

Since 1900, the United States Supreme Court has expanded the right to free speech to encompass dissemination of information, peaceful picketing, and speech that may be considered offensive or coercive, and has granted particular protection to public forums where first amendment rights have historically been exercised.⁵² The first amendment protection of protest has played a significant role in the conflict over the right to abortion, as those on each side of the argument have relied heavily on protest as a means of expressing their beliefs. Equally significant in the abortion conflict has been the application of the standard tests for restrictions on expression, namely, that the restrictions be content-neutral, be narrowly tailored to serve a significant governmental interest, leave open alternative channels of communication, and not be unconstitutionally vague.⁵³ Despite the application of the same tests to similar fact patterns in the anti-abortion protests cases, courts have applied these tests differently, resulting in restrictions that vary widely in scope and impact.⁵⁴ To grasp fully the issues involved in these cases, however, one must consider not only the first amendment issues implicated, but also those issues concerning the right to abortion as depicted in *Roe v. Wade*.

B. Right to Abortion

In the 1973 case of *Roe v. Wade*, the United States Supreme Court asserted that the constitutional right of personal privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁵⁵ In *Roe*, the Court struck down a Texas statute criminalizing abortion as violative of this right.⁵⁶ The Court conceded that the Constitution does not explicitly mention such a

⁵² See, e.g., *Grace*, 461 U.S. at 177 (public forums); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891 (1982) (offensive or coercive speech); *Hudgens*, 424 U.S. at 515 (public forums); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (peaceful picketing); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (dissemination of information); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (peaceful picketing).

⁵³ *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

⁵⁴ See, e.g., *Eanes v. State*, 318 Md. 436, 440, 569 A.2d 604, 606 (1990) (upholding statute prohibiting loud and unseemly noises); *Thompson v. Police Dep't*, 145 Misc. 2d 417, 418, 546 N.Y.S.2d 945, 946 (N.Y. Sup. Ct. 1989) (upholding injunction prohibiting protestors from moving along sidewalk directly in front of clinic); *O.B.G.Y.N. Ass'ns v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 894, 407 N.Y.S.2d 903, 905 (N.Y. App. Div. 1978) (modifying injunction to prohibit picketing that disturbs or endangers the health or safety of clinic patients).

⁵⁵ 410 U.S. 113, 153 (1973).

⁵⁶ *Id.* at 164.

right of privacy, but stated that the history of the Court's constitutional adjudication indicates that such a right does exist under the Constitution.⁵⁷ Writing for the majority, Justice Blackmun noted that the Court has found at least the roots of the right to privacy in the first amendment, the fourth and fifth amendments, the ninth amendment, the penumbras of the Bill of Rights, and in the concept of liberty guaranteed by the fourteenth amendment.⁵⁸ The majority stated that this guarantee of personal privacy includes an individual's freedom of personal choice regarding marriage, procreation, contraception, family relationships, and child rearing and education.⁵⁹

Though the Court acknowledged the existence of this broad right to privacy, it stated that this right is not absolute and must be weighed against the significant state interests in protecting the health of pregnant women and the potentiality of human life.⁶⁰ Noting that these separate and distinct state interests become more substantial as the woman reaches term and that each interest becomes "compelling" at different points during pregnancy, the Court established guidelines for state regulation corresponding to trimester points in pregnancy.⁶¹ These trimester guidelines reflected the Court's view that although a woman's interest in having an abortion may be substantially greater than the state's interest in her health towards the beginning of the pregnancy, the state's interest grows to override the woman's interest as she reaches term.⁶²

Subsequent decisions have reinforced the fundamental nature of the right to privacy identified in *Roe*.⁶³ Some observers contend,

⁵⁷ *Id.* at 152. In his concurring opinion, Justice Stewart reinforced this premise, stating: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Id.* at 169 (Stewart, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

⁵⁸ *Id.* at 152.

⁵⁹ *Id.* at 152-53 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Mayer v. Nebraska*, 262 U.S. 390, 399 (1923)).

⁶⁰ *Id.* at 154.

⁶¹ *Id.* at 162-63.

⁶² *Id.* at 163. In the first trimester, the woman's choice to have an abortion must be free of state regulation, left only to the medical judgment of her attending physician. *Id.* at 164. In the second trimester, the state may, if it chooses, regulate the abortion procedure "in ways that are reasonably related to maternal health." *Id.* Finally, in the third trimester, the state, in promoting its interest in the potentiality of human life, may regulate and even proscribe abortion, except where necessary for the preservation of the life or health of the mother. *Id.* at 164-65.

⁶³ See, e.g., *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416,

however, that the Court's recent narrowing of the *Roe* holding in the 1989 case of *Webster v. Reproductive Health Services*⁶⁴ suggests that the law concerning the right to abortion is in a state of flux.⁶⁵ In *Webster*, Chief Justice Rehnquist explained that although *stare decisis* is the cornerstone of our legal system, it has less power in constitutional cases where, with the exception of constitutional amendments, the Court is the only entity able to make necessary changes.⁶⁶ Chief Justice Rehnquist noted that the Court has not refrained from reconsidering prior constructions of the Constitution that have proven unworkable and principally unsound, and he placed the *Roe* trimester framework in that category.⁶⁷

Nonetheless, courts still recognize *Roe* as holding that the right to privacy encompasses the right to an abortion, free from governmental interference. The right of privacy apparently does not compel the government to prevent anti-abortion protestors from interfering with a woman's right to choose to terminate a pregnancy unless these protestors are aided by state action in some way.⁶⁸ Some

420 (1983) (reaffirming *Roe*); *Bellotti v. Baird*, 443 U.S. 622, 639 (1978) (discussing the need to preserve constitutional right to abortion as established in *Roe*).

⁶⁴ *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 521 (1989).

⁶⁵ See, e.g., *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1494 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 586 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

⁶⁶ *Webster*, 492 U.S. at 518.

⁶⁷ *Id.* Chief Justice Rehnquist stated that "the bounds [of] *Roe* are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." *Id.* at 519; see also *National Org. for Women*, 726 F. Supp. at 1494 n.13, wherein the district court observed that "[a]lthough the Court noted that the facts of *Webster* did not present an appropriate occasion to overturn *Roe*, its decision left *Roe* ripe for attack" (citing *Webster*, 492 U.S. at 521).

The *National Org. For Women* court provided additional examples of the narrowing of *Roe*. *Id.* at 1494 n.13. See *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (upholding a state statutory requirement that second trimester abortions be performed only in licensed clinics); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding governmental regulations withholding public funds for non-therapeutic abortions); *Beal v. Doe*, 432 U.S. 438, 447 (1977) (Social Security Act does not require funding non-therapeutic abortions as a condition of participating in state medicare program); see also *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) (upholding state regulation granting Medicaid benefits for live births but denying them for non-therapeutic abortions).

⁶⁸ See Note, *supra* note 2, at 706-07. The U.S. Department of Justice has stated that the protest activities of anti-abortion activists do not require investigation by the federal government. In response to letters from pro-choice organizations and clinics demanding an investigation by the Civil Rights Division into harassment of abortion clinics and women seeking abortions, the Department wrote:

Despite a widespread belief to the contrary, in virtually no case have the civil rights statutes been violated by anti-abortion clinic activities. The Supreme Court has held that the right to abortion is derived from the Fourteenth Amendment.

courts have contended, however, that a significant governmental interest may still arise in protecting the right to decide to terminate a pregnancy free from harassment, even in the absence of state action.⁶⁹

C. Clash Between Rights

In response to *Roe*, anti-abortion organizations historically concentrated most of their efforts in the political arena. They have proposed constitutional amendments to prohibit abortion and legislation to withdraw abortion-related cases from federal court jurisdiction.⁷⁰ These organizations have also supported legislation that would both declare that human life exists from conception and extend fourteenth amendment protections to fetuses.⁷¹ Although none of these legislative proposals have succeeded, the anti-abortion movement, however, has successfully advocated legislation restricting public funding for abortion and imposing various regulations on the performance of abortions.⁷²

Recently, however, abortion opponents have shifted their focus from legislatures to direct intervention aimed at abortion clinics, doctors, and individual women seeking abortions.⁷³ Sidewalk "counseling" and pickets at abortion clinics have greatly increased in number.⁷⁴ The protests themselves have evolved from peaceful marches to more violent and confrontational demonstrations.⁷⁵ Protestors have increasingly trespassed on the property of clinics; they have banged on clinic windows, blocked entrances and exits, lined clinic sidewalks, brandished signs with pro-life slogans and

As such it is protected against interference by the state or its officials. It is not a right protected against private interference.

Id. at 706-07 n.45 (quoting Letter from Stephen S. Trott to Lyn C. Gill, Cleveland Planned Parenthood (Aug. 28, 1985)).

⁶⁹ See, e.g., *Lewis v. Pearson Found.*, 908 F.2d 318, 321-22 (8th Cir. 1990) (personal privacy "interests would be meaningless were they to be protected only from interference by the state"); *Bering v. Share*, 106 Wash. 2d 212, 229-30, 721 P.2d 918, 928 (1986), *cert. dismissed*, 479 U.S. 1050 ("protection of [the right to privacy], even from private invasion, constitutes a compelling State interest"); see also Note, *supra* note 2, at 706.

⁷⁰ See Note, *supra* note 2, at 700 n.13.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *America's Abortion Dilemma*, NEWSWEEK, Jan. 14, 1985, at 20, 23-24. Anti-abortion and pro-choice advocates agree that failures in the political arena have led to increased use of "direct action" protest tactics by anti-abortion activists. See also Donovan, *The Holy War*, 17 FAM. PLAN. PERSP. 5, 7, 8 (1985).

⁷⁴ Note, *supra* note 2, at 701.

⁷⁵ See Donovan, *supra* note 73, at 6.

bloody dolls, shouted at patients and called them murderers.⁷⁶ They have posed as patients to gain entrance to facilities, only to spray paint waiting rooms, drop stink bombs, or chain themselves to examining tables.⁷⁷ Clinics have also increasingly become the targets of arson and bombings.⁷⁸ Moreover, clinic patients, staff, and doctors are often subjected to picketing and harassing phone calls at their homes; some have even had their families' lives threatened.⁷⁹

While increasing numbers of women are seeking to exercise their right to abortion and the pro-choice movement has galvanized in reaction to the threat to *Roe*, right to life organizations have greatly expanded their number.⁸⁰ The increasing number of resulting lawsuits, centering on the conflict between the right to abortion and the right to protest, has forced courts to engage in a delicate balancing of constitutional rights.

II. LEGAL RESPONSES AND CORRESPONDING CONSTITUTIONAL REQUIREMENTS FOR RESTRICTIONS ON FREE SPEECH

In the anti-abortion protest cases two constitutional rights are in conflict: one right is rooted in the free speech and assembly

⁷⁶ *Id.*; see also *America's Abortion Dilemma*, *supra* note 73, at 23. A recent study noted that anti-abortion harassment is seldom limited to one type of harassing activity, and that the abortion providers who experience harassment are on average subject to five different types of anti-abortion activity directed at the facility, its staff and patients. Forrest, *The Harassment of U.S. Abortion Providers*, 19 FAM. PLAN. PERSP. 10, 10-11 (1987). Among the various forms of anti-abortion harassment that clinics are subject to, the study listed: picketing, bomb threats, literature distributed inside facility, physical contact with or blocking of patients by picketers, mass scheduling of no-show appointments, demonstrations loud enough to be heard in patient areas, invasion of facility by demonstrators, vandalism, jamming of telephone lines, death threats, tracing of patients' license plates, and picketing of staff members' homes. *Id.* at 10.

⁷⁷ See Donovan, *supra* note 73, at 6.

⁷⁸ In *Planned Parenthood v. Project Jericho*, for example, the court noted that the abortion clinic filing suit in that case had moved to a temporary site when its facilities were destroyed by a firebomb. 52 Ohio St. 3d 56, 57, 556 N.E.2d 157, 160 (1990). A pipe bomb was found in the temporary facilities a year later. *Id.*

In reporting on the case of Curtis Beseda, a pro-life advocate who was charged with setting fire to an abortion clinic on four separate occasions, finally forcing it out of business, *The National Law Journal* noted a nationwide increase in abortion-clinic arson and bombings. See Lewis, *A Violent Protest to Protect Unborn Lives*, NAT'L L.J., Nov. 26, 1984, at 6, col. 1.

⁷⁹ *Id.*; see also *America's Abortion Dilemma*, *supra* note 73, at 23; Forrest, *supra* note 76, at 10.

⁸⁰ See generally Lacayo, *Whose Life Is It?*, TIME, May 1, 1989, at 20-21; Wills, *supra* note 6, at 27-28; Connors, *supra* note 6, at 402. Approximately 30% of all pregnancies, excluding stillbirths and miscarriages, end in abortions in the United States. Lacayo, at 21. The number of abortions in the United States each year has leveled off at around 1.6 million, up from 744,600 in 1973 when *Roe* was handed down. *Id.* One-fifth of American women above the age of 15 have had an abortion. *Id.*

clause of the first amendment; the other stems from a "penumbra" of rights contained in the Constitution. It has been particularly problematic for courts to rule on the validity of restrictive statutes and to sculpt injunctive relief that preserves both of these rights to the greatest extent possible.⁸¹ Trial courts have been presented with this dilemma under a variety of claims. Abortion clinics and prospective patients have brought suits on claims of trespass, nuisance, invasion of privacy, conspiracy, and intentional infliction of emotional distress, as well as recent actions charging violations of the Civil Rights Conspiracy Act,⁸² seeking to have the protestors re-

⁸¹ See, e.g., *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 791 (5th Cir. 1989).

⁸² The Civil Rights Conspiracy Act, 42 U.S.C. § 1985(3) (1989), requires four essential elements to state a cause of action:

- (i) a conspiracy;
- (ii) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;
- (iii) an act in furtherance of the conspiracy;
- (iv) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Id.; see *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1492 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 584 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991) (citing *Griffen v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

Abortion clinics have brought several cases against abortion protestors charging violations of this statute. See, e.g., *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 319 (8th Cir. 1990); *Mississippi Women's Medical Clinic*, 866 F.2d at 791; *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1344 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Portland Feminist Women's Health Center v. Advocates For Life*, 712 F. Supp. 165, 166 (D. Or. 1988); *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931, 932 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *National Org. for Women*, 726 F. Supp. at 1490; *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168, 1169 (C.D. Cal. 1989); *Cousins v. Terry*, 721 F. Supp. 426, 428 (N.D.N.Y. 1989); *Roe v. Operation Rescue*, 710 F. Supp. 577, 580 (E.D. Pa. 1989).

In order to succeed on a section 1985(3) claim, a plaintiff must establish the existence of a class-based discriminatory animus. See *National Org. for Women*, 726 F. Supp. at 1492; see also *Lewis*, 908 F.2d at 318, 324. Despite the lack of uniformity on the issue, the majority of courts have concluded that a gender-based animus satisfies the conspiracy requirement of the Civil Rights Act and that women seeking abortions constitute a class under the statute. See, e.g., *Lewis*, 908 F.2d at 324-25; *National Org. for Women*, 726 F. Supp. at 1492-93; *Portland Feminist Women's Health Center*, 712 F. Supp. at 169; *Operation Rescue*, 710 F. Supp. at 581; *New York State Nat'l Org. for Women*, 704 F. Supp. at 1259. But see, e.g., *Abortion Abolition Soc'y*, 811 F.2d at 937 (patients, doctors, abortion clinics and their staffs do not form a protected class under section 1985(3)); *National Abortion Fed'n*, 721 F. Supp. at 1170 (same).

Once plaintiffs are able to allege sufficiently a class-based discriminatory animus, they must then allege interference with a right protected by § 1985(3). *New York State Nat'l Org. for Women*, 704 F. Supp. at 1258. Although some courts have recognized that the right to privacy necessitates protection from even private interference, most courts have required the plaintiff to show state action to make out a claim under the Civil Rights Act on the basis of

strained from blocking their doors and harassing clients. Once a plaintiff successfully manages to state and establish a cause of action entitling him or her to relief against the anti-abortion protestor, the defendant protestors defend their activities by asserting their rights to free speech and assembly, thus triggering the conflict of rights.⁸³ Courts are also forced to confront this conflict when anti-abortion protestors challenge the validity of local ordinances restricting their rights to protest. Again, courts must balance the conflicting interests of the protestors, the abortion patients and the local government in evaluating the challenged ordinance.

In attempting to preserve the interests of abortion patients in exercising their right to abortion, the interests of abortion clinics in being able to provide their services, and the interests of the government in preventing harm to its citizens, courts must also be cognizant of the protestors' interest in expressing their views on abortion. As previously noted, the ability of government and the courts to restrict expressive conduct permissibly is limited, particularly in public forums.⁸⁴ They may enforce reasonable time, place, and manner restrictions as long as these restrictions are content-neutral, serve a significant governmental interest, are narrowly tailored to effect that interest, leave open alternative channels of communication, and, particularly concerning statutory restrictions, are not unconstitutionally vague.⁸⁵

this right. See *id.*; *Operation Rescue*, 710 F. Supp. at 582. But see *Lewis*, 908 F.2d at 322 (state action not required for claim of interference with right to privacy). Cases brought under the civil rights conspiracy statute have generally been resolved on the claim of a deprivation of another right, one that is easier to support. In *National Org. for Women*, for example, the court declined to consider the plaintiff's claim based on a fundamental right to abortion where an independent basis for relief existed in the deprivation of a right to travel. See 726 F. Supp. at 1494. The court stated, "[c]ourts should avoid constitutional questions where other grounds are available and dispositive of the issues presented." *Id.*

Courts have decided the majority of these cases on the basis of the deprivation of the constitutional right to interstate travel, which is entitled to protection under the statute from even private interference. See, e.g., *New York State Nat'l Org. for Women*, 886 F.2d at 1361; *National Org. for Women*, 726 F. Supp. at 1493; *Cousins*, 721 F. Supp. at 429; *Operation Rescue*, 710 F. Supp. at 582.

⁸³ See, e.g., *Planned Parenthood v. Operation Rescue*, 406 Mass. 701, 705, 550 N.E.2d 1361, 1364 (1990); *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 56, 59, 556 N.E.2d 157, 161 (1990).

⁸⁴ See *United States v. Grace*, 461 U.S. 171, 177 (1983).

⁸⁵ *Id.*; *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

A. Content-Neutrality

The first of these requirements, "content-neutrality," restricts expression without regard to its content.⁸⁶ Laws prohibiting noisy speeches near schools and hospitals, banning billboards in residential communities, or forbidding the distribution of leaflets in public places are examples of content-neutral restrictions.⁸⁷ The ordinance upheld by the United States Supreme Court in the 1949 case of *Kovacs v. Cooper* is another example of a content-neutral restriction of expression.⁸⁸ In *Kovacs*, a New Jersey ordinance prohibited the use on public streets of "sound truck[s]" or other instruments that emit "loud and raucous noises" while attached to vehicles on public streets.⁸⁹ Such a prohibition restricted communication without regard to the message conveyed.

Similarly, in the 1984 case of *Clark v. Community For Creative Non-Violence*, the Supreme Court upheld a National Park Service content-neutral regulation as constitutional.⁹⁰ The regulation prohibited camping in certain parks, including Lafayette Park and the Mall, which adjoin national memorials in Washington, D.C.⁹¹ Demonstrators who had been barred from sleeping in these parks in connection with a demonstration intended to call attention to the plight of the homeless brought suit to enjoin the application of the regulations to their demonstration, claiming that the restrictions, as applied to them, violated the first amendment.⁹² In upholding the constitutionality of the camping prohibition, the Court scrutinized the regulation and found it to be content-neutral in that its application was not triggered by a disagreement with the message presented.⁹³

In contrast to content-neutral restrictions, restrictions of speech based on the subject matter of the speech, the identity of the audience or speaker, or the viewpoint being expressed are "content-based." Some commentators contend that such restrictions distort the free exchange of ideas.⁹⁴ Such restrictions, therefore, are pre-

⁸⁶ See Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81 (1978).

⁸⁷ See Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-90 (1983).

⁸⁸ 336 U.S. 77, 78 (1949).

⁸⁹ *Id.* at 78.

⁹⁰ 468 U.S. 288, 295 (1984).

⁹¹ *Id.* at 289-90.

⁹² *Id.* at 292.

⁹³ *Id.* at 295.

⁹⁴ Note, *Abortion, Protest, and Constitutional Protection*, 62 WASH. L. REV. 311, 312 (1987);

sumed to be unconstitutional and are carefully scrutinized by the courts to ensure that the government is not intentionally suppressing a particular point of view that it finds offensive.⁹⁵ The Supreme Court has, nonetheless, permitted content-based restrictions where they fall within certain narrow categorical exceptions to first amendment protection or where they further a compelling governmental interest, and are narrowly drawn to achieve that end.⁹⁶ As long as either of these requirements is met, courts may hold restrictions constitutional even if they directly limit oral or written expression.⁹⁷

The 1972 case of *Police Department v. Mosley* exemplifies the United States Supreme Court's heightened focus of content-based

see also Barnes, *Regulations of Speech Intended to Affect Behavior*, 63 DEN. U.L. REV. 37, 47 (1985).

⁹⁵ See Stone, *supra* note 87, at 194, 196-97. Given that the distinction between content-based and content-neutral restrictions is often difficult to discern, commentators have disagreed about the wisdom and practicality of having courts rely on such distinctions to determine the level of scrutiny that the restrictions are to receive. Professor Geoffrey Stone, for example, contends that "[a]lthough the differences between content-based and content-neutral restrictions are more elusive than might be expected, and are often only differences of degree, such differences do exist, and the Court's exacting scrutiny of content-based restrictions can be explained and justified." Stone, *supra* note 86, at 115. Professor Martin Redish, on the other hand, finds it "difficult to understand why content-neutral regulations should receive any less scrutiny than other types of restriction." Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 130 (1981). He states:

The most puzzling aspect of the distinction between content-based and content-neutral restrictions is that either restriction reduces the total sum of information or opinion disseminated. That governmental regulation impedes all forms of speech, rather than only selected viewpoints or subjects, does not alter the fact that the regulation impairs the free flow of expression. Whatever the rationale one adopts for the constitutional protection of speech, the goals behind that rationale are undermined by any limitation on expression, content-based or not.

Id. at 128.

⁹⁶ See *Grace*, 461 U.S. at 177; see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁹⁷ See *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984). The categories of speech that do not receive first amendment protection include obscenity and speech that incites immediate violence. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54 (1973) (obscene materials not protected by first amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). In *Chaplinsky*, the Court excluded certain categories of speech from first amendment protection because they "are no essential part of any exposition of ideas," and because their "very utterance inflicts injury" or "tends to incite an immediate breach of the peace." *Id.* Such speech, the Court added, is "of slight social value as a step to truth." *Id.* Additionally, first amendment protection does not extend to speech that threatens national security. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). Defendant Schenck and others had been convicted under the Espionage Act of 1917 for circulating literature intended to encourage obstruction of the draft. *Id.* at 48-49. The Court held the conviction constitutional on the basis of the nature of the words, which was such "as to create a clear and present danger that they [would] bring about the substantive evils that Congress had a right to prevent." *Id.* at 52.

restrictions.⁹⁸ In *Mosley*, the Court considered the constitutionality of a Chicago ordinance that prohibited picketing or demonstrating on a public way within 150 feet of a school building while school was in session.⁹⁹ The ordinance expressly exempted peaceful labor picketing from its otherwise absolute prohibition, and was thus not content-neutral.¹⁰⁰ The Court struck down the ordinance as unconstitutional on the grounds that it made an impermissible distinction between labor picketing and other peaceful picketing.¹⁰¹ The Court reasoned that the ordinance's central problem was that it described peaceful picketing in terms of subject matter.¹⁰² Above all else, the Court stated, the first amendment prohibits government from restricting expression because of its message, its ideas, its subject matter, or its content.¹⁰³ The Court argued that the control of content undercuts the nation's commitment to the uninhibited exchange of ideas, and that therefore, "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."¹⁰⁴

In the anti-abortion protest context, courts have upheld content-neutral restrictions in a variety of forms.¹⁰⁵ In the 1989 case of *Medlin v. Palmer*, for example, the United States Court of Appeals for the Fifth Circuit upheld the constitutionality of an ordinance that prohibited the use of hand-held amplifiers within 150 feet of any school or medical facility.¹⁰⁶ After being threatened with arrest for violation of this ordinance, an anti-abortion activist brought suit challenging the restriction, contending, among other things, that the ordinance was not content-neutral.¹⁰⁷ The protestor argued that it was actually content-based and tailored so as to prevent anti-abortion activists from expressing their moral and religious views to patients of abortion clinics. The court rejected this argument,

⁹⁸ 408 U.S. 92 (1972).

⁹⁹ *Id.* at 92-93.

¹⁰⁰ *Id.* at 93.

¹⁰¹ *Id.* at 94.

¹⁰² *Id.* at 95.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 96.

¹⁰⁵ See, e.g., *Medlin v. Palmer*, 874 F.2d 1085, 1086 (5th Cir. 1989) (ordinance prohibiting use of hand-held amplifiers near medical clinics); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988) (injunction prohibiting noise interfering with abortion clinic's provision of medical services); *Thompson v. Police Dep't.*, 145 Misc. 2d 417, 420, 546 N.Y.S.2d 945, 947 (1989) (police barricade positioned in front of abortion clinic entrance behind which all protestors were directed to stand).

¹⁰⁶ 874 F.2d 1085, 1086 (5th Cir. 1989).

¹⁰⁷ *Id.* at 1090.

stating that the ordinance made no reference whatsoever to the content of speech, but instead, merely prohibited amplified speech within 150 feet of certain facilities without regard for what was being said. The court stressed that the ordinance was tailored so as to protect the aged, the ill, and school children from the nuisance of loudspeaker noise "regardless of what message issues from the loudspeaker."¹⁰⁸ Based on this reasoning, the court found the ordinance to be content-neutral.

Similarly, in the 1988 case of *Portland Feminist Women's Health Center v. Advocates for Life*, the United States Court of Appeals for the Ninth Circuit found an ordinance enjoining protestors from obstructing passage to an abortion clinic and from producing noise substantially interfering with the clinic's provision of medical services to be content-neutral.¹⁰⁹ The court stated that the injunction did not refer to the specific viewpoints asserted by the demonstrators, but focused exclusively on the location and manner of their expression. Noting that the injunction protected the clinic from loudness and physical intimidation and not from content of speech, the court concluded that the injunction was a content-neutral restriction of expression.¹¹⁰

In the 1978 case of *O.B.G.Y.N. Associations v. Birthright of Brooklyn and Queens, Inc.*, on the other hand, the Supreme Court, Appellate Division, of New York struck down a provision of an injunction issued by a lower court because it was content-based.¹¹¹ Although the court upheld provisions prohibiting chanting, shouting, and picketing that would incite riot in the vicinity of an abortion clinic, the court deleted a provision enjoining the use of such words as "murder," and "kill" on placards.¹¹² The court noted that the first amendment means that government has no power to restrict expression on the basis of content.¹¹³ The court further noted that the initially enjoined words were not "fighting words," which are beyond first amendment protection.¹¹⁴ Rather, the court stated that the message that the defendants sought to communicate, an ex-

¹⁰⁸ *Id.*

¹⁰⁹ 859 F.2d 681, 686 (9th Cir. 1988). For text of the injunction, see *infra* note 173.

¹¹⁰ *Portland Feminist Women's Health Center*, 859 F.2d at 686. For additional discussion of this case, see *infra* notes 172-77 and accompanying text.

¹¹¹ 64 A.D.2d 894, 895, 407 N.Y.S.2d 903, 906 (1978).

¹¹² *Id.* at 894-95, 407 N.Y.S.2d at 905-06.

¹¹³ *Id.* at 895, 407 N.Y.S.2d at 906.

¹¹⁴ *Id.*

pression of their views on an important public issue, was entitled to the greatest constitutional protection.¹¹⁵ In deleting the content-based restriction, the court reasoned that "[i]nherent in suppressing the use of particular words—even if provocative or controversial—is the grave risk of inhibiting the expression of ideas."¹¹⁶

These cases show that in order to constitute a permissible restriction on expression according to the tests set out by the Supreme Court, the restriction must be content-neutral. Content-neutral restrictions are those that limit expression without regard to the message conveyed. Content-based restrictions, on the other hand, are presumed unconstitutional and are scrutinized to ensure that the government is not intentionally suppressing a viewpoint it finds offensive.

B. Significant State and Governmental Interests

The second requirement necessary to uphold a restriction on free speech is that it "serve a significant governmental interest." The United States Supreme Court has recognized several significant government and state interests in cases restricting protest, including, among others, interests in keeping streets and sidewalks free of obstruction, preserving the normal activity of particular areas, protecting medical environments from disruptive conduct, protecting residential privacy, and protecting people from unwelcome noise.¹¹⁷ Courts have cited each of these interests, in addition to an interest in preserving the right to abortion, in considering restrictions on expression in the anti-abortion protest context.¹¹⁸

¹¹⁵ *Id.* at 895–96, 407 N.Y.S.2d at 906.

¹¹⁶ *Id.* at 896, 407 N.Y.S.2d at 906.

¹¹⁷ See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (interest in protecting residential privacy); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649–50 (1981) (interest in protecting safety and convenience of persons using public forum); *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 791 (1979) (Burger, C.J., concurring) (interest in preventing conduct infringing upon medical care); *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (interest in preserving normal activity of school); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (interest in regulating use of streets for safety of people).

¹¹⁸ See, e.g., *Frisby*, 487 U.S. 474, 484 (1988) (interest in residential privacy); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989) (interest in maintaining safety, controlling traffic on the streets and sidewalks of an urban environment), *cert. denied*, 110 S. Ct. 2206 (1990); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988) (interest in protecting medical clinic from disruptive conduct); *Bering v. Share*, 106 Wash. 2d 212, 229–30, 721 P.2d 918, 929 (1986) (interest in protecting right to privacy), *cert. dismissed*, 479 U.S. 1050 (1987).

1. Keeping Streets and Sidewalks Free From Obstruction

A number of United States Supreme Court cases recognize that the state has a substantial interest in keeping community streets and sidewalks open and available for movement of people and property.¹¹⁹ In the 1968 case of *Cameron v. Johnson*, for example, the Court upheld a statute that prohibited picketing that obstructed or unreasonably interfered with entrances and exits of public buildings, including courthouses, and with traffic on the streets or sidewalks adjoining those buildings.¹²⁰ In *Cameron*, civil rights organizations staged a large demonstration at a county courthouse to protest racial voting discrimination and to encourage Negro voter registration.¹²¹ When over fifty picketers were arrested for violating the Mississippi Anti-Picketing Law, they filed suit in the District Court for the Southern District of Mississippi, seeking a judgment declaring the statute to be invalid for overbreadth and vagueness, and an injunction restraining state officials from enforcing the statute.¹²² After the three-judge court initially dismissed the complaint, concluding that the case did not compel the granting of such extraordinary relief, the Supreme Court vacated the dismissal and remanded the case for reconsideration.¹²³ On remand, the three-judge court conducted an evidentiary hearing and again dismissed, this time with prejudice.¹²⁴

The Supreme Court noted probable jurisdiction and affirmed the district court's decision.¹²⁵ The Court upheld the finding that the statute was neither so broad nor so vague as to be unconstitutional, basing its decision on the fact that the statute advanced important state interests and proscribed only conduct that obstructed sidewalks, streets, and entrances to public buildings.¹²⁶ The Court asserted that the regulation of conduct that had such an

¹¹⁹ See *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Cox*, 312 U.S. at 574; *Schneider v. State*, 308 U.S. 147, 160 (1939). The Court in *Schneider* noted that "[m]unicipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for the movement of people and property, the primary purpose to which streets are dedicated." *Schneider*, 308 U.S. at 160.

¹²⁰ 390 U.S. 611, 622 (1968).

¹²¹ *Id.* at 613-14.

¹²² *Id.* at 612-13.

¹²³ *Id.* at 613.

¹²⁴ *Id.*

¹²⁵ *Id.* at 614.

¹²⁶ *Id.* at 617, 622.

obstructive effect did not abridge constitutional liberty "since such activity bears no necessary relationship to the freedom to . . . distribute information or opinion."¹²⁷ The Court indicated that obstructive conduct, such as that which unreasonably interfered with ingress and egress to the courthouse, was not entitled to constitutional protection. The fact that free speech was intermingled with such conduct did not change its unprotected status.¹²⁸

Similarly, in 1981, in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, the Supreme Court, in upholding a restriction on expressive conduct, recognized a state's significant interest in maintaining "the orderly movement" of a crowd at a large state fair.¹²⁹ In *Heffron*, a Krishna religious organization filed suit to enjoin enforcement of a rule prohibiting the sale or distribution of any merchandise, including printed or written material, at the fair outside of specified locations. It contended that the rule violated its first amendment rights.¹³⁰ The Minnesota Supreme Court had reversed the trial court's finding that the rule was not an unconstitutional restriction on the Krishnas, stating that the state's justifications for the rule were inadequate to warrant the restriction and could have been served by means less restrictive of the Krishnas' first amendment rights.¹³¹

Granting the state officials' petition for certiorari, the United States Supreme Court reversed the Minnesota Supreme Court's holding of unconstitutionality.¹³² The Court began by recognizing a state's interest in protecting the "safety and convenience" of persons using a public forum as a valid government objective.¹³³ The Court suggested further that consideration of a forum's special attributes is relevant to the constitutionality of a regulation restricting free speech because the significance of the governmental interest must be scrutinized in light of the nature and function of the forum involved.¹³⁴ Analyzing these attributes, the Court upheld the restriction, reasoning that the flow of crowds and demands of safety

¹²⁷ *Id.* at 617 (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

¹²⁸ *Id.* at 617.

¹²⁹ 452 U.S. 640, 650-51 (1981).

¹³⁰ *Id.* at 643-44. The rule did not prevent organization members "from walking about the fairgrounds and communicating the organization's views with fair patrons in face-to-face discussions." *Id.*

¹³¹ *Id.* at 645-46.

¹³² *Id.* at 656.

¹³³ *Id.* at 650.

¹³⁴ *Id.* at 650-51.

were so pressing in the context of the fair that they validated the significant governmental interest.¹³⁵

In the abortion protest context, courts have upheld restrictions on expressive activity on the basis of a governmental interest in "keeping community streets and sidewalks open and available for movement of people and property."¹³⁶ In the 1989 case of *Thompson v. Police Department*, for example, the New York Supreme Court upheld a use of a police barricade reasoning that it advanced such an interest.¹³⁷ In *Thompson*, an abortion protestor sought to enjoin the New York City Police Department from placing a single police barricade, behind which all demonstrators were directed to stand, in front of an abortion clinic entrance.¹³⁸ The protestor claimed that the barricade unconstitutionally limited her first amendment right to free speech and peaceable assembly because it prevented her from moving along the sidewalk directly in front of the clinic and speaking to women to dissuade them from having abortions. The New York Supreme Court upheld the use of the barricade eight feet from the entrance of the clinic on the basis that it reasonably advanced a substantial state interest in "keeping the sidewalk uncongested and avoiding the potential for violence."¹³⁹

Similarly, in the 1989 case of *New York State National Organization for Women v. Terry*, the United States Court of Appeals for the Second Circuit upheld an injunction that prohibited abortion protestors from trespassing on the premises of specified abortion clinics, from obstructing ingress to or egress from these clinics, and from tortiously harassing or physically abusing people entering or leaving these facilities.¹⁴⁰ The court reasoned that the injunction effectuated significant governmental interests in protecting public safety by managing traffic on busy urban streets and sidewalks.¹⁴¹

These cases demonstrate that some courts recognize the state interest in keeping community streets and sidewalks open and available for movement of people and property as a valid governmental interest for the purposes of restricting free speech. The recognition of this interest apparently stems from the relatively great value these courts have assigned to the ability of states to protect the safety and

¹³⁵ *Id.* at 651.

¹³⁶ *Id.*

¹³⁷ 145 Misc. 2d at 418, 546 N.Y.S.2d at 946.

¹³⁸ *Id.*

¹³⁹ *Id.* at 421, 422, 546 N.Y.S.2d at 947, 948.

¹⁴⁰ 886 F.2d 1339, 1363 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

¹⁴¹ *Id.* at 1345-46 n.1.

convenience of individuals using public forums and the relatively low value courts have assigned obstructive conduct.

2. Preserving the Normal Activity of Particular Areas

The United States Supreme Court has also recognized a significant governmental interest in preserving the normal activity of particular areas. In considering the reasonableness of a restriction, the Court has scrutinized the nature of a place, the pattern of its normal activities, and whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.¹⁴²

In the 1965 case of *Cox v. Louisiana*, for example, the Supreme Court upheld a statute that regulated disruptive speech near a courthouse.¹⁴³ In that case, Cox led a civil rights demonstration of about 2,000 students at a courthouse to protest discrimination and the previous day's arrest of twenty-three fellow students.¹⁴⁴ At the demonstration, students sang and carried signs in an area near the courthouse that police officials had apparently set aside for their protest.¹⁴⁵ After Cox encouraged the demonstrators to sit in at lunch counters that would not serve meals to blacks, the police ordered them to break up.¹⁴⁶ When the demonstrators refused, the police dispersed them with tear gas.¹⁴⁷ The next day, Cox was arrested and charged with four offenses, including picketing before a courthouse.¹⁴⁸ When the Louisiana Supreme Court upheld his conviction, Cox appealed to the United States Supreme Court, contending the statute was unconstitutional on its face and as applied to him.¹⁴⁹

Though the Court reversed his conviction on the grounds that the police officials had led him to believe that he was not in violation of the statute, the Court held that the statute itself was constitutional.¹⁵⁰ The Court indicated that, because of the special nature of the place, persons could be constitutionally prohibited from pick-

¹⁴² See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *N.Y. State Nat'l Org. for Women*, 886 F.2d at 1363.

¹⁴³ *Cox v. Louisiana (Cox II)*, 379 U.S. 559, 564 (1965).

¹⁴⁴ *Id.* at 560. The facts were set out in the companion case, *Cox v. Louisiana (Cox I)*, 379 U.S. 536, 538-40 (1965).

¹⁴⁵ *Cox I*, 379 U.S. at 540-41.

¹⁴⁶ *Id.* at 542-43.

¹⁴⁷ *Id.* at 543-44.

¹⁴⁸ *Id.* at 538, 544.

¹⁴⁹ *Cox v. Louisiana (Cox II)*, 379 U.S. 559, 560 (1965).

¹⁵⁰ *Id.* at 564, 575.

eting in or near a courthouse with an intent to obstruct the administration of justice.¹⁵¹ The Court pointed to a legitimate state interest in protecting its judicial system from the pressures created by courthouse picketing.¹⁵²

Similarly, the Court has upheld ordinances prohibiting expressive conduct disturbing the peace and good order of the school environment.¹⁵³ In the 1972 case of *Grayned v. Rockford*, the Court upheld an antinoise ordinance that prohibited conduct tending to disrupt classwork, reasoning that the city had a significant interest in having an undisrupted school session.¹⁵⁴ The case centered on a demonstration in front of a high school at which approximately 200 people marched around the school building to protest perceived inequality within the school.¹⁵⁵ The protest could allegedly be heard within the building, distracting hundreds of students from their school activities, and generally disrupting school procedure. The police arrested forty of the protestors, including Richard Grayned, who was tried and convicted of violating a Rockford antinoise ordinance.¹⁵⁶ Grayned appealed his conviction directly to the Supreme Court of Illinois, challenging the constitutionality of the ordinance. After the Supreme Court of Illinois held that the ordinance was constitutional on its face, the United States Supreme Court noted probable jurisdiction and affirmed the lower court's decision.¹⁵⁷

In addressing the issue of whether the ordinance unconstitutionally restricted expressive conduct, the Court stated that the crucial question was whether the manner of restricted expression was incompatible with the normal activity of the school.¹⁵⁸ On the basis that the ordinance did not unnecessarily restrict expression, but prohibited only conduct that disrupted normal school activity, the Court upheld the ordinance.¹⁵⁹

¹⁵¹ *Id.* at 562.

¹⁵² *Id.*

¹⁵³ *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 120 (1972).

¹⁵⁴ *Id.* at 119-20.

¹⁵⁵ *Id.* at 105.

¹⁵⁶ *Id.* at 106.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 116.

¹⁵⁹ *Id.* at 121. The Court reconciled its holding with the 1969 case of *Tinker v. Des Moines Independent Community School District*, in which the Court had held that the school district could not punish students for wearing black arm bands to school in protest of the Vietnam war. 393 U.S. 503, 514 (1969). The Court in *Grayned* stated that *Tinker* did not stand for the proposition that anyone had "an absolute right to use all parts of a school building or its immediate environs for his unlimited expressive purposes." *Grayned*, 408 U.S. at 117-18.

In these cases, the Court has recognized a significant governmental interest in preserving the normal activity of particular areas. In determining the applicability of such an interest, courts may therefore consider the nature of the place and the pattern of its normal activity, and whether the manner of expression to be restricted is basically incompatible with the normal activity of the place at a particular time. The recognition of such an interest implies that the activities undertaken in certain areas are of such a special nature that even the right to free speech should not be allowed to interfere with them.

3. Protecting Clinical Facilities From Conduct That Disrupts the Provision of Medical Care

Related to the state interest in preserving the normal activities of particular areas is the recognition of a governmental interest in protecting medical facilities from disruptive conduct.¹⁶⁰ The Supreme Court has acknowledged that expressive conduct may be prohibited when outweighed by the interests of providing an environment conducive to health care.¹⁶¹ In *NLRB v. Baptist Hospital, Inc.*, for example, the Court upheld hospital restrictions on expression designed to protect patients from upsetting speech.¹⁶² In *Baptist Hospital*, the hospital had instituted a rule that prohibited solicitation by its employees at all times in any area of the hospital that was accessible to the public.¹⁶³ The scope of this ban included the lobby, gift shop and cafeteria on the first floor of the hospital as well as the corridors and sitting rooms on the other floors, which housed either patients' rooms or operating and therapy rooms.¹⁶⁴ The Court, stressing the need to maintain a tranquil atmosphere within hospitals, stated that, with respect to the corridors and sitting rooms,

¹⁶⁰ See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 791 (1979) (Burger, C.J., concurring); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978); *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988); *O.B.G.Y.N. Ass'ns v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 895, 407 N.Y.S.2d 903, 906 (N.Y.App. Div. 2d 1978).

Other courts, dealing with clinic blockade cases, have upheld a governmental interest in preserving the right, common to all members of the general public, of access to medical care. See, e.g., *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 381 (D.Conn. 1989) (right to medical services); *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1261-62 (S.D.N.Y. 1989) (right to access to medical care).

¹⁶¹ See *Baptist Hosp.*, 442 U.S. at 785-86.

¹⁶² *Id.* at 790.

¹⁶³ *Id.* at 775.

¹⁶⁴ *Id.* at 775-76.

the hospital had justified its prohibition of solicitation as "necessary to avoid disruption of health-care operations or disturbance of patients."¹⁶⁵ The Court, however, struck down the portion of the prohibition that related to solicitation in the cafeteria, gift shop and lobby, areas maintained primarily for the accommodation of visitors and not for patient care.¹⁶⁶ The Court indicated that the hospital had failed to show that the ban in these areas was necessary to maintaining a tranquil hospital environment conducive to successful patient care.¹⁶⁷ In a concurring opinion, Chief Justice Burger reinforced the special nature of hospitals and asserted that interference with its primary objective of patient care should not be tolerated.¹⁶⁸ Thus, the Supreme Court recognized a significant governmental interest in protecting the environment of medical facilities.

In the 1985 case of *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, a Pennsylvania district court, on remand from the United States Supreme Court, examined the potential harm to women seeking abortions caused by harassment at the hands of pro-life demonstrators.¹⁶⁹ The court found that the verbal harassment of women entering and leaving clinics increased their feelings of anxiety and exacerbated any emotional problems associated with the abortion decision and procedure.¹⁷⁰ Furthermore, the court found that the heightened anxiety could adversely affect the medical procedure itself. In supporting its find-

¹⁶⁵ *Id.* at 790, 781.

¹⁶⁶ *Id.* at 786.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 791 (Burger, C.J., concurring). Chief Justice Burger stated:

I would think no "evidence" is needed to establish the proposition that the primary mission of every hospital is care and concern for the patients and that everything which tends to interfere with that objective cannot be tolerated. A religious choir singing in a hospital chapel may well be desirable but if that interferes with patient care, it cannot be allowed.

Id. The Court has also addressed the special nature of the medical clinic environment in *Beth Israel Hosp.*, which dealt with the same issues:

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, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sickbed.

437 U.S. at 509 (Blackmun, J., concurring).

¹⁶⁹ 613 F. Supp. 656, 666 (D.C. Pa. 1985).

¹⁷⁰ *Id.*

ing, the court acknowledged a declaration by the Pennsylvania Department of Health in 1980 that patient care might suffer as a result of the harassment of physicians and abortion clinics. Asserting a significant interest in preventing such harm to women seeking abortions, which it considered a particularized medical service, the court issued an injunction against enforcement of a disclosure requirement of a Pennsylvania Abortion Control Act.¹⁷¹

The interest in preventing disruptive and potentially harmful conduct at medical clinics was asserted again in the 1988 case of *Portland Feminist Women's Health Center v. Advocates For Life*, which revolved around pro-life demonstrations at an abortion clinic.¹⁷² There, the United States Court of Appeals for the Ninth Circuit upheld a place and manner injunction, with a slight modification, on the basis of a significant governmental interest "in protecting the ability of [a] clinic to provide medical services free from interference that may endanger the health and safety of its patients."¹⁷³ The trial court had sculpted the initial injunction after finding that the demonstrators often crowded around the entrance of the clinic, threatening patients and staff, sometimes inches from their faces, as they entered and exited the clinic; that they grabbed and pushed people wishing to enter the clinic in an attempt to impede passage;

¹⁷¹ *Id.* at 672. Provisions of the Pennsylvania Abortion Control Act would have authorized public disclosure of information that abortion providers had to file with the state. Such information included the names and addresses of abortion facilities, the number of abortions performed, and the trimesters in which they were performed. *Id.* at 659.

¹⁷² 859 F.2d 681, 686 (9th Cir. 1988).

¹⁷³ *Id.* at 686. The district court's injunction, which was slightly modified by the Court of Appeals (*see supra* note 120 and accompanying text), stated:

IT IS HEREBY ORDERED that defendants, their agents, servants, employees, and all persons, groups, and organizations acting in concert with one or more of the defendants are hereby enjoined from committing any of the following acts:

1. obstructing the free and direct passage of any person in or out of the Portland Feminist Women's Health Center (the Center);

2. demonstrating or distributing literature on the Foster Road sidewalk in front of the Center in a rectangular zone that extends from the Center's front door to the curb and twelve and one-half feet on either side of a line from the middle of the Center's door to the curb;

3. shouting, screaming, chanting, or yelling during on-site demonstrations;

4. producing noise by any other means which substantially interferes with the provision of medical services within the Center, including counseling;

5. trespassing on Center property;

6. damaging the property of the Center, its employees or clients; and

7. interfering with the Center's receipt of public utility services.

This Order shall remain in effect until further order of the court.

Id. at 684.

and that they chanted, shouted, and screamed from the sidewalk alongside the clinic in a manner intended to be and, in fact, was heard inside the clinic, where medical procedures were performed.¹⁷⁴ The trial court had further found that the noise and intimidation of the demonstrations hindered the provision of medical care in the clinic, upset the clients, and increased the risk of medical complications and injuries.¹⁷⁵

Examining the provisions of the district court's injunction, the Court of Appeals held that the creation of a "free zone" extending twelve-and-a-half feet to the right and the left of the front door and from the front door to the curb was narrowly tailored "to address threats, intimidation, and assault of clinic personnel and clients that impede the safe provision of medical care."¹⁷⁶ In modifying the injunction's provision that prohibited shouting, screaming, chanting, yelling, and producing noise, the appellate court sought to restrict only that conduct that substantially interfered with the provision of medical services.¹⁷⁷ The court recognized the important governmental interest in preserving a clinic environment conducive to medical services, and essentially upheld, with some modification, a narrowly tailored injunction to effectuate that interest.

In the 1989 case of *Medlin v. Palmer*, the Court of Appeals for the Fifth Circuit asserted a similar governmental interest when it upheld a Dallas city ordinance prohibiting the use of amplified sound near certain medical and educational facilities.¹⁷⁸ In *Medlin*, three abortion protestors filed suit against the city after being ar-

¹⁷⁴ *Id.* at 683.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 686.

¹⁷⁷ *Id.* at 686-87. Carefully considering the nexus between the stated governmental interest and the trial court's tailoring of the injunction, the appellate court stated:

Chanting, shouting, screaming, or yelling, may be an expressive, albeit unpleasant, form of behavior. If it causes no disruption of clinic operations, such expression would not materially affect the interest at stake here. On the other hand, if the conduct rises to a volume that obstructs the provision of services in the Center, it may be enjoined.

Id. at 686-87. The Court of Appeals modified the district court's injunction in the following manner. It deleted provisions 3 and 4, see *supra* note 173 for the full text, and inserted the following provision which prohibited protestors from:

3. shouting, screaming, chanting, yelling, or producing noise by any other means, in a volume that substantially interferes with the provision of medical services within the Center, including counseling;

Id. at 687. The remainder of the injunction was not contested. *Id.*

¹⁷⁸ 874 F.2d 1085, 1086, 1090 (5th Cir. 1989).

rested for using bullhorns outside abortion clinics in violation of the ordinance, claiming that it unconstitutionally violated their first amendment rights.¹⁷⁹ After finding that the ordinance had satisfied the other requisites of restrictions on free speech in that it was content-neutral and left available ample alternative channels of communication, the appellate court stated that the ordinance, in this context, was also tailored to serve a legitimate governmental interest in protecting patients of medical clinics from the intrusion of noise generated by pro-life activists.¹⁸⁰ The court, in finding the ordinance constitutional, asserted a state interest in protecting clinical environments in order to enable them to be conducive to medical treatment and convalescence.¹⁸¹

Similarly, in the 1989 case of *State v. Migliorino*, the Supreme Court of Wisconsin upheld the constitutionality of a state statute that prohibited people from entering medical facilities under circumstances tending to disturb the peace.¹⁸² *Migliorino* involved two separate cases of criminal trespass of medical facilities that had been consolidated for resolution of the issue of constitutionality.¹⁸³ In the first case, defendants had been arrested for violation of the statute after they entered an abortion clinic without permission and began disturbing people in the waiting room by talking to them and distributing literature.¹⁸⁴

In the companion case, defendants had been arrested after they entered a building that housed an abortion clinic and disrupted the clinic's operations; some protestors had blocked entry to the facility's treatment rooms, while others handcuffed themselves to furniture.¹⁸⁵ In upholding the constitutionality of the statute, the court examined the purposes of medical facilities and the circum-

¹⁷⁹ *Id.* at 1087-88.

¹⁸⁰ *Id.* at 1090.

¹⁸¹ *Id.*

¹⁸² 150 Wis. 2d 513, 530, 442 N.W.2d 36, 43, *cert. denied sub nom.* Haines v. Wisconsin, 110 S. Ct. 565 (1989). Section 943.145 of the Wisconsin Statutes provides in relevant part: 943.145 Criminal trespass to a medical facility. (1) In this section, "medical facility" means a hospital under s. 50.33(2) or a clinic or office that is used by a physician licensed under ch. 448 and that is subject to rules promulgated by the medical examining board for the clinic or office that are in effect on November 20, 1985. (2) Whoever intentionally enters a medical facility without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class B misdemeanor. Wis. STAT. ANN. § 943.145 (1990).

¹⁸³ *Migliorino*, 150 Wis. 2d at 516, 442 N.W.2d at 37.

¹⁸⁴ *Id.* at 518-19, 442 N.W.2d at 38.

¹⁸⁵ *Id.* at 520-21, 442 N.W.2d at 39.

stances surrounding them.¹⁸⁶ The court noted that any medical consultation, treatment, or procedure was a personal and private activity, which created substantial apprehension and tension under even the most optimum circumstances. Given the considerations attendant to medical treatment, the court stated that no patient should be subjected to conduct tending to disrupt the peace. Because the statute prohibited such conduct, the court asserted that it furthered significant state interests in privacy, health, property, and security, and upheld the statute.¹⁸⁷ Thus, both the *Migliorino* and the *Medlin* courts, in upholding the constitutionality of restrictions on expressive conduct, recognized a state interest in protecting clinics from conduct tending to disrupt its operations and posing a threat of harm to its patients.

In *O.B.G.Y.N. Associations v. Birthright of Brooklyn and Queens, Inc.*, a 1978 case, the Supreme Court, Appellate Division of New York, recognized a similar governmental interest when it modified a lower court injunction aimed at controlling protestors' disruptive demonstrations in front of an abortion facility.¹⁸⁸ The protestors; the trial court found, had demonstrated and picketed around the clinic on several occasions, chanting, distributing messages and carrying signs claiming abortion to be murder.¹⁸⁹ The trial court also found that the protestors had blocked ingress to and egress from the clinic and had surrounded patients and other visitors to the facility. As a result of the protestors' actions, the trial court found, many patients had entered the premises crying and visibly upset, causing delays and rescheduling of appointments to the detriment of the health and welfare of the patients.¹⁹⁰

Based on these findings, the trial court issued an injunction prohibiting the protestors from engaging in any type of picketing that would incite disorderly conduct or riots.¹⁹¹ On appeal, the Appellate Division held that parts of the initial injunction were "vague and overbroad" and retailored it so as to address the central governmental interest implicated by the demonstrations: the interest in proscribing conduct that hinders the practice of medicine at a clinic, and thereby adversely affects the health and welfare of its

¹⁸⁶ *Id.* at 528, 442 N.W.2d at 42.

¹⁸⁷ *Id.*

¹⁸⁸ 64 A.D.2d 894, 895-96, 407 N.Y.S.2d 903, 905-06 (N.Y. App. Div. 2d 1978).

¹⁸⁹ *Id.* at 894, 407 N.Y.S.2d at 905.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

patients.¹⁹² The court clearly placed a premium on the expressive rights of the protestors and attempted not to prohibit protected activity, but acknowledged that certain excesses in the protestors' conduct endangered the health of the clinic patients and therefore had to be proscribed. Accordingly, the appellate court modified the trial court's injunction to enjoin the protestors "... from any type of picketing which would incite riot, ... from barring any person from entering or exiting [the clinic] and ... from making any excessive loud sound which disturbs, injures, or endangers the health or safety of any patient of the medical clinic."¹⁹³

Thus, in addition to significant governmental interests in keeping streets and sidewalks open and available for passage and in preserving the normal activities of certain places, courts have recognized a significant governmental interest in protecting clinical facilities from conduct which disrupts the provision of medical care. As with the interest in preserving the normal activities of such areas as schools and courthouses, the recognition of this interest implies that the importance of the activity undertaken within medical clinics, the provision of patient care, outweighs the first amendment interests at stake. Courts recognizing this interest in the anti-abortion context acknowledge the importance of the implicated first amendment interests, but assert that the protection afforded to expressive conduct does not extend to that conduct which poses a potential risk of harm to clinic patients.

4. Protecting Unwilling Listeners From Intrusion Into the Privacy of Their Homes

A fourth governmental interest that the United States Supreme Court has recognized is that of protecting unwilling listeners from intrusions into the privacy of their homes.¹⁹⁴ The Court's willingness to curtail speech that intrudes into the privacy of the home derives from a traditional interest in preserving the sanctity of the home.¹⁹⁵ In the 1988 case of *Frisby v. Schultz*, the Court upheld a significant governmental interest in protecting residential privacy as a basis for

¹⁹² *Id.* at 895, 407 N.Y.S.2d at 905.

¹⁹³ *Id.* at 894, 407 N.Y.S.2d at 905.

¹⁹⁴ *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (picketing outside home); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (offensive radio broadcasts); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) (unsolicited offensive mail); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (sound trucks).

¹⁹⁵ *See Frisby*, 487 U.S. at 484; *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Gregory v. Chicago*, 394 U.S. 111, 125 (1969).

restrictions on expression.¹⁹⁶ In *Frisby*, two individuals opposed to abortion wished to express their views by picketing on a public street outside the residence of a doctor who performed abortions at two clinics in neighboring towns.¹⁹⁷ When the Town Board enacted an ordinance restricting all picketing near the residence or dwelling of any individual in the town, the individuals brought suit in United States District Court for the Eastern District of Wisconsin, seeking a preliminary injunction to forbid enforcement of the ordinance.¹⁹⁸ After the district court granted appellee's motion for preliminary injunction on the grounds that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision.¹⁹⁹

The United States Supreme Court reversed the Seventh Circuit's decision and upheld the validity of the town ordinance.²⁰⁰ Identifying residential privacy as a significant governmental interest, the Court held that the ordinance was narrowly tailored to prohibit the "appropriately targeted evil" of picketing a particular household.²⁰¹ In upholding as significant the interest in protecting residential privacy from intrusive expression, the Court discussed the traditional interest in preserving the sanctity of the home in conjunction with the interest in protecting unwilling listeners.²⁰² The Court noted that its prior decisions often have recognized the unique nature of the home.²⁰³ In addition, the Court stated that

¹⁹⁶ 487 U.S. at 484.

¹⁹⁷ *Id.* at 476.

¹⁹⁸ *Id.* at 477.

¹⁹⁹ *Id.* at 478. See *Schultz v. Frisby*, 807 F.2d 1339, 1340 (7th Cir. 1986) (affirmed by a divided panel); 818 F.2d 1284, 1284 (1987) (vacated and reheard en banc); 822 F.2d 642, 642 (1987) (reaffirmed by an equally divided vote).

²⁰⁰ *Frisby*, 487 U.S. at 488.

²⁰¹ *Id.* at 484.

²⁰² *Id.* The Court noted that the ordinance itself stated that the primary purpose of the ban was to protect and preserve the home through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." The Town Board, the Court noted, believed that a ban was necessary based on its determination that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants." The Court stated that the town ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel." *Id.* at 477.

²⁰³ *Id.* at 484. The Court stated that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Id.* (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). The Court also recognized

individuals may exclude unwanted speech from their own home and that the government may protect this freedom.²⁰⁴

Thus, in *Frisby*, an anti-abortion protest case, the Court recognized the significant governmental interest of protecting unwilling listeners from intrusions into the privacy of their homes. The Court's willingness to curtail speech that intrudes into the privacy of the home derived from a traditional interest in preserving the sanctity of the home. Implicit in its reasoning is the Court's belief that while the first amendment affords protestors the opportunity to reach their target audience, it does not entitle them to a captive audience nor does it override the right of individuals to exclude unwanted speech from their home.

5. Preserving the Right to Abortion

Recent cases addressing abortion protest have also considered the applicability of a fifth governmental interest, that of preserving the right to abortion as a valid basis for restrictions on expression.²⁰⁵ In 1986, in *Bering v. Share*, the Washington Supreme Court upheld a trial court's injunction, with slight modification, based on the state's interest in protecting the right to privacy afforded women in *Roe*.²⁰⁶ After recognizing *Roe*'s right to abortion, the court noted

that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Id.* at 484 (quoting *Carey*, 447 U.S. at 471).

²⁰⁴ *Id.* at 485; see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949).

Although the *Frisby* Court concentrated on the interest in protecting the sanctity of the home, its analysis also considered a governmental interest in protecting "captive" audiences: "The first amendment permits the government to prohibit offensive speech as intrusive when the 'captive audience' cannot avoid the objectionable speech." *Frisby*, 487 U.S. at 487. *But see Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 541-42 (1980) (insertion of controversial policy message in public utility bill not intrusive because customers could simply throw objectionable material away).

²⁰⁵ See *Lewis v. Pearson Found.*, 908 F.2d 318, 322 (8th Cir. 1990); see also *Bering v. Share*, 106 Wash. 2d 212, 229-30, 721 P.2d 918, 929 (1986), *cert. dismissed*, 479 U.S. 1050 (1987).

²⁰⁶ 106 Wash. 2d at 229-30, 721 P.2d at 928-29. The trial court had issued an injunction prohibiting picketers from:

- (1) picketing, demonstrating, or "counseling" at the [clinic], except along the public sidewalk [to the side of the clinic];
- (2) threatening, assaulting, intimidating or coercing anyone entering or leaving the [clinic];
- (3) interfering with ingress or egress at the building or parking lots to the south or southeast of the premises;
- (4) trespassing on the premises;
- (5) engaging in any unlawful activity directed at respondent physicians or their patients;
- (6) referring, in oral state-

that the ability of a woman to exercise this right depends upon relatively free access to the services of a licensed physician and upon the willingness and ability of the physician to provide these services.²⁰⁷ The court was concerned about the potential coercive impact of the picketers upon women seeking an abortion and their physicians.²⁰⁸ The court noted that the picketing in question could be expected to impinge upon a woman's constitutional right of privacy in two ways. First, due to the coercive impact of the protesters, women seeking abortions might be so affected as to forgo their rights or to seek to exercise them elsewhere under the care of a physician not of their choosing; further, the court noted that such protests might inflict severe psychological damage upon women seeking to exercise their right to abortion. Second, women would be denied the opportunity to effectuate their right if continual harassment caused physicians to refuse to perform legal abortions for women. The court then noted its own historical commitment to personal privacy and held that protection of the right to abortion, even from private invasion, constitutes a compelling state interest justifying a reasonable restriction on picketing.²⁰⁹

In the 1990 case of *Lewis v. Pearson Foundation, Inc.*, the United States Court of Appeals for the Eighth Circuit also recognized a governmental interest in protecting the right to abortion, even from private interference.²¹⁰ The Court of Appeals in *Lewis* reversed the district court's dismissal of the case and remanded it for further proceedings, holding that a conspiracy to prevent abortion was actionable under a civil rights conspiracy statute without requiring a showing of state action.²¹¹ In this case, the plaintiff Lewis was late in her first trimester of pregnancy and wanted an abortion.²¹² She sought services at a clinic, the "AAA Pregnancy Problem Center," whose advertisement was in the Yellow Pages directory under

ments while at the picket site, to physicians or patients, staff, or clients as "murdering" or "murderers", "killing" or "killers"; or to children or babies as being "killed" or "murdered" by anyone in the [clinic].

Id. at 219, 721 P.2d at 923-24. The Supreme Court of Washington remanded the case to the trial court only to narrow the ban on the proscribed language, so that it would apply only to instances when children were present at the picket site. *Id.* at 245-46, 721 P.2d at 937-38.

²⁰⁷ *Id.* at 227-28, 721 P.2d at 927-28.

²⁰⁸ *Id.* at 228, 721 P.2d at 928.

²⁰⁹ *Id.* at 229-30, 721 P.2d at 929.

²¹⁰ 908 F.2d 318, 322 (8th Cir. 1990).

²¹¹ *Id.* at 322, 326.

²¹² *Id.* at 319.

"Abortion Information and Services." When she discovered that the Center was a "mock" abortion clinic, run by persons opposed to abortion, she brought an action in the United States District Court for the District of Missouri. She alleged that she was injured by a private conspiracy in which the staff of the Center visited a "lacerating psychological attack" upon her in an attempt to prevent her and others like her from carrying out the decision to have an abortion.²¹³ The district court dismissed the case, finding that Lewis had not shown that the defendants possessed the class-based, invidiously discriminatory animus required by the civil rights conspiracy statute.²¹⁴

The Court of Appeals, reversing the trial court's decision, began its analysis by recognizing the continuing viability of *Roe v. Wade*.²¹⁵ In discussing whether the right to abortion illuminated in *Roe* necessitated an allegation of state interference under the civil rights conspiracy statute, the court noted the United States Supreme Court's recognition of the fundamental nature of the right.²¹⁶ The

²¹³ *Id.* at 318-19. When Lewis called the Center asking about an abortion, a staff member at the Center assured her they would "help her all they could," and invited her to come in and take a free pregnancy test. *Id.* at 319. When she arrived for her appointment, she was directed to produce a urine sample for a pregnancy test. Lewis was then ushered into a room where a staff member activated a slide presentation. "The color slides depicted scenes which were said to illustrate the abortion process. These included pictures of dismembered fetuses and abortions being performed by means of crude-appearing instruments. The slide show also contained intermittent family scenes." *Id.*

After viewing the slides, Lewis alleged she confronted the staff member with her feelings of anger, anxiety, and distress. After the staff member suggested she rely on her religious faith, Lewis insisted that she still wanted an abortion. The staff member finally offered to arrange an appointment with a respectable doctor, and, after leaving the room, returned with a note indicating that Lewis had an appointment with a doctor at St. John's Mercy Medical Center. *Id.*

When Lewis arrived at the hospital on the specified day, she discovered it was a Roman Catholic institution and that its doctors did not perform abortions. She obtained an abortion elsewhere one week later. About a month later, the staff member from AAA called Lewis, stating that she had called to find out when the baby was due and to check whether "everything was alright" with Lewis. Lewis asserted that this call upset her greatly, as did the harassment she experienced at the hands of the center. *Id.*

²¹⁴ *Id.* The district court held that although section 1985(3) supports actions against private conspiracies, Lewis had not sufficiently alleged that the defendants possessed the requisite class-based, invidiously discriminatory animus. *Id.*

²¹⁵ *Id.* at 326, 320.

²¹⁶ *Id.* at 321-22. The court noted the proclamation of the United States Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists*:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make this choice freely is fundamental.

court found support for the *Roe* decision in the existence of personal privacy interests and freedom of personal choice in marriage and family life in the first, fourth, fifth, ninth, and fourteenth amendments, and noted that "[b]y their nature, these interests would be meaningless were they to be protected only from interference by the state."²¹⁷ Consequently, the court held that the civil rights conspiracy statute did not require state action where a plaintiff's claim is rooted in the fundamental right to choose announced in *Roe*.²¹⁸ The court then remanded the case to the district court for a trial under the conspiracy statute.²¹⁹

In sum, *Lewis* reaffirmed the right to abortion and extended the protection of a federal civil rights conspiracy statute to people whose right to choose is subject to private interference.²²⁰ Both *Bering* and *Lewis* rely on a significant governmental interest in protecting the right to abortion, even from private interference. They conclude that this interest is sufficient to uphold restrictions on expression if the other requirements are met.

In order for a restriction on expressive conduct to pass constitutional scrutiny, it must promote a significant governmental or state interest. The above cases demonstrate that the United States Supreme Court has recognized several such interests, including interests in keeping streets and sidewalks free from obstruction, preserving the normal activity of particular areas, protecting medical clinics from disruptive conduct, and preserving residential privacy. Courts have cited each of these interests in addition to an interest in preserving the right to abortion, in considering restrictions on expression in the anti-abortion protest context.

C. Narrowly Tailored

In addition to being content-neutral and serving a significant governmental interest, a constitutional restriction upon free ex-

Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Id. (quoting *Thornburgh*, 476 U.S. 772 (1986)).

²¹⁷ *Id.* at 322.

²¹⁸ *Id.* The court further upheld the claim, however, on the basis that the complaint also included an allegation that the Attorney General, a state actor, actively participated in the conspiracy to deprive the plaintiff of the equal protection of the law. *Id.* at 323. The court also held that state action is not required under section 1985(3) if the rights at issue give rise to a private right of action under state law; therefore the right under state law to be free from intentional infliction of emotional distress constituted an independent basis for the action under the statute. *Id.*

²¹⁹ *Id.* at 326.

²²⁰ *Id.* at 322.

pression, whether it is in a statute, ordinance or an injunction, must also be narrowly drawn so as to serve the state's legitimate interests without unnecessarily interfering with first amendment freedoms.²²¹ Thus, although an injunction barring all speech might constitute an unconstitutional prior restraint, a reasonable restriction narrowly tailored to serve a significant governmental interest does not violate the first amendment.²²² To determine whether the necessary nexus exists, a court must compare the identified state or governmental interest with the terms and effect of the injunctive relief.²²³ In the context of abortion protest, a statute, ordinance, or injunction will be considered "overbroad" if it prohibits the privileged exercise of first amendment rights, as well as illegal activity, indicating that the restriction is not sufficiently narrowly tailored to further a significant state interest.

In *Bering v. Share*, for example, the Washington Supreme Court stated, with respect to the state's interest in maintaining ingress and egress, that its injunction prohibiting all picketing on the sidewalk in front of the abortion clinic, was arguably broader than necessary, thereby prohibiting peaceful picketing that did not impede ingress or egress.²²⁴ Focusing upon the state's interest in protecting a woman's constitutional right to privacy from the coercive impact of picketers in front of the clinic, however, the court held that the injunction was tailored as narrowly as possible to effect that interest.²²⁵

In the 1982 case of *Parkmed Co. v. Pro-life Counselling, Inc.*, the trial court found that the demonstrations of anti-abortion protestors substantially interfered with the normal functioning of a health care facility and enjoined the anti-abortion picketers from blocking the ingress and egress to the premises, from physically abusing and harassing people, and from disrupting the normal activities of the clinic.²²⁶ It further enjoined the protestors from demonstrating or picketing on the steps and plaza area of the clinic. On appeal, the New York Supreme Court, Appellate Division, struck down this

²²¹ See *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). When considering whether a particular statute, ordinance, or injunction is too broad, the United States Supreme Court has stated that a "clear and precise enactment may . . . be overbroad if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

²²² *Bering v. Share*, 106 Wash. 2d 212, 230, 721 P.2d 918, 929 (1986), *cert. dismissed*, 479 U.S. 1050 (1987).

²²³ *Id.*

²²⁴ *Id.* at 232, 721 P.2d at 929.

²²⁵ *Id.*, 721 P.2d at 930.

²²⁶ 91 A.D.2d 551, 552, 457 N.Y.S.2d 27, 29 (N.Y. App. Div. 1982).

latter portion of the injunction on the ground that it was overly broad and unnecessarily restricted peaceful picketing and demonstrating.²²⁷ The appellate court further indicated that the deletion of the provision forbidding all demonstrations at the clinic would more narrowly tailor the injunction in such a way as to continue to advance the significant governmental interest in restricting disruptive conduct without overly restricting peaceable protest.²²⁸

Thus, in order to restrict free expression, a court must tailor its restriction in such a way as to demonstrate a nexus between the stated governmental interest and the effect of the injunction. The narrow tailoring requirement helps ensure that the restriction does not proscribe constitutionally protected activity unnecessarily. For example, an injunction based solely on an interest in keeping sidewalks open for passage would not be narrowly tailored sufficiently if it also restricted the level of noise generated by protestors. This requirement also reinforces the importance of the governmental interest asserted by the court. It indicates that courts will view as overbroad restrictions that go beyond promoting the stated interest in order to achieve other unexpressed goals.

D. *Alternative Means of Communication*

The fourth requirement that a restriction or injunction must meet in order to be constitutional concerns the first amendment's protection of the right of every citizen to "reach the minds of willing listeners and to do so there must be opportunity to win their attention."²²⁹ Under this requirement, a valid injunction restricting demonstrations in a particular place must clearly leave alternative means of expressing the protected speech despite the effects of the injunction.²³⁰ Although the first amendment does not afford protestors the right to a captive audience,²³¹ it does guarantee them the opportunity to win the attention of passersby and engage them in

²²⁷ *Id.*

²²⁸ *Id.* at 551, 553, 457 N.Y.S.2d at 28, 29-30.

²²⁹ *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

²³⁰ *Heffron*, 452 U.S. at 654.

²³¹ See *Bering v. Share*, 106 Wash. 2d 212, 232, 721 P.2d 918, 930 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). The United States Supreme Court has plainly stated that the first amendment does not afford demonstrators "the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

conversation if they so desire.²³² Courts must therefore ensure that restrictions on expressive conduct allow for such opportunities.²³³

In the 1949 case of *Kovacs v. Cooper*, for example, the United States Supreme Court scrutinized an ordinance that prohibited the use of "sound truck[s]" on public streets to ensure that the ordinance provided citizens with ample alternative means of communication.²³⁴ The Court began its analysis by noting that the first amendment guarantees every citizen the opportunity to win the attention and reach the minds of willing listeners.²³⁵ The Court, however, stated that the right of free speech does not assure people the opportunity to win the attention of listeners through objectionably amplified sound any more than it affords individuals the unlimited opportunity to address crowds on the streets.²³⁶ The Court contended that it would be harsh and arbitrary to enforce the first amendment without regard to the rights of the other citizens affected.²³⁷ The defendant's justification that he could reach people more easily and cheaply by sound trucks was insufficient to grant constitutional protection to what the legislature had reasonably classified as a nuisance, the Court stated, when alternative means of publicity were available.²³⁸ The Court noted that although the ordinance prohibited sound trucks from broadcasting in a loud and raucous manner on the streets, it did not restrict the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, or by "dodgers."²³⁹ Given the alternative means of communication that the ordinance did not restrict and the interest in protecting citizens from the nuisance caused by sound trucks, the Court upheld the constitutionality of the ordinance.²⁴⁰

Similarly, in the 1981 case of *Heffron v. International Society for Krishna Consciousness, Inc.*,²⁴¹ the Supreme Court analyzed a restriction on expressive conduct to ensure that it provided ample alternative forums of communication.²⁴² In *Heffron*, a Krishna religious

²³² *Bering*, 106 Wash. 2d at 232, 721 P.2d at 930.

²³³ *Heffron*, 452 U.S. at 654.

²³⁴ 336 U.S. 77, 78 (1949).

²³⁵ *Id.* at 87.

²³⁶ *Id.* at 87-88.

²³⁷ *Id.* at 88.

²³⁸ *Id.* at 88-89.

²³⁹ *Id.* at 89.

²⁴⁰ *Id.*

²⁴¹ See *supra* notes 129-35 and accompanying text for a discussion of this case in the context of the recognition of a state interest in maintaining the orderly movement of crowds.

²⁴² *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981).

organization (ISKCON) had challenged the constitutionality of a rule prohibiting the sale or distribution at a state fair of any merchandise, including printed or written material, outside of specified locations.²⁴³ The Court stated that in order for the rule to be a valid restriction of expressive conduct, alternative forums for the expression of the Krishnas' protected speech must exist in spite of the rule's effects.²⁴⁴ Scrutinizing the application of the rule to ISKCON, the Court noted that the rule did not prevent ISKCON from practicing Sankritan anywhere outside the fairgrounds, did not exclude the organization from the fairgrounds or deny it the right to conduct any desired activity at some point within the forum.²⁴⁵ The Court further stated that ISKCON members were permitted to mingle with the crowd and orally propagate their views, and that the organization could have arranged for a booth, which would have enabled it to sell and distribute literature and distribute funds from that location within the fairgrounds itself.²⁴⁶

Given the limited functions of the fair and the combined area in which it operated, the Court held that the rule provided ISKCON and other organizations with an adequate means to sell and solicit on the fairgrounds.²⁴⁷ Reasoning that the rule did not unnecessarily limit the opportunity of ISKCON to win the attention of willing listeners and reach their minds, the Court upheld the rule as a reasonable restriction of expressive conduct.²⁴⁸ These cases exemplify the United States Supreme Court's insistence that restrictions on expressive conduct leave available ample alternative means of communication.

In the anti-abortion protest context, courts have uniformly held that protestors are not entitled to blockade and effectively shut down abortion clinics as a means of exercising their right to free speech.²⁴⁹ Restrictions on expression in the anti-abortion protest context, however, must also leave available alternative avenues of

²⁴³ *Id.* at 643-44. ISKCON had asserted that the rule would suppress the practice of Sankirtan, one of its religious rituals, in which members are enjoined to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. *Id.* at 645.

²⁴⁴ *Id.* at 654.

²⁴⁵ *Id.* at 654-55.

²⁴⁶ *Id.* at 655.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See, e.g., *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989); *Bering v. Share*, 106 Wash. 2d 212, 232, 721 P.2d 918, 930 (1986), *cert. dismissed*, 479 U.S. 1050 (1987).

communication.²⁵⁰ In *Bering v. Share*,²⁵¹ for example, the Washington Supreme Court expressly recognized the need for ample alternative means of communication when it analyzed the validity of an injunction prohibiting anti-abortion protestors from picketing directly in front of a medical clinic.²⁵² The court noted that the injunction did not prohibit the picketers from protesting anywhere but on the limited stretch of sidewalk in front of the clinic.²⁵³ Thus, the court stated, the picketers could still picket at a point clearly visible and reasonably close to the clinic and the people they wished to address.²⁵⁴ The court also noted that anyone who wished to talk to the picketers had only to walk the short distance to the end of the block, where the picketers were free to sidewalk counsel.²⁵⁵ The court therefore held that the injunction provided an alternative forum allowing the protestors ample opportunity for communicative activity.²⁵⁶

Similarly, in *Medlin v. Palmer*, the United States Court of Appeals for the Fifth Circuit scrutinized an ordinance that prohibited the use of any hand-held amplifier within 150 feet of an abortion facility to ensure that alternative means of communication existed.²⁵⁷ The protestors challenging the constitutionality of the ordinance alleged that the ordinance unreasonably restricted alternative methods of communication. In particular, the protestors argued that they would have been unable to reach significant portions of their desired audience without use of bullhorns because of the physical configurations of targeted clinics and adjacent sidewalks. The court stated that the ordinance did not prohibit unamplified speech, the distribution of written material, the display of signs and placards, nor any symbolic speech. Thus, the court held that although the ordinance prevented the use of amplified sound near clinics, it did not unreasonably impinge upon alternative methods of communication.²⁵⁸

²⁵⁰ See, e.g., *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 243, 256 Cal. Rptr. 194, 201 (1989); *Bering*, 106 Wash. at 232, 721 P.2d at 930.

²⁵¹ See *supra* notes 206-09 and accompanying text for a discussion of *Bering* on the governmental interest in preserving the right to abortion.

²⁵² *Bering*, 106 Wash. 2d at 232, 721 P.2d at 930.

²⁵³ *Id.*

²⁵⁴ *Id.* at 232-33, 721 P.2d at 930-31.

²⁵⁵ *Id.* at 233, 721 P.2d at 931.

²⁵⁶ *Id.*

²⁵⁷ *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989).

²⁵⁸ *Id.*

In contrast, in the 1989 case of *Chico Feminist Women's Health Center v. Scully*, a California state appellate court refused to grant an abortion clinic's motion to amend a preliminary injunction so as to bar anti-abortion protestors from the vicinity of the clinic on Saturdays, the only days on which abortions were performed.²⁵⁹ In *Chico Feminist Women's Health Center*, an abortion clinic was subject to harassment by anti-abortion picketers on Saturdays, when abortions were performed.²⁶⁰ As clients arrived at the clinic, they were forced to pass through or around the picketers in order to enter the clinic. The protestors would shout at the clients, thrust pamphlets upon them, try to stop them on the sidewalk, photograph them, and record their vehicle license plate numbers.

The clinic sought and was granted a preliminary injunction prohibiting the picketers from, among other things, photographing clients entering or leaving the clinic, obstructing passages to the clinic, recording license plates of clinic visitors, and picketing in a specified zone directly in front of the clinic.²⁶¹ A week after the injunction issued, however, a picketer recognized a client entering the clinic and called the client's sister who, in turn, telephoned the clinic and spoke to the client, urging her not to have an abortion.²⁶² As a result of this breach of client confidentiality and other alleged incidents, the clinic motioned to amend the preliminary injunction to prohibit picketing at the clinic from 8 a.m. until 5 p.m. on Saturdays. Although the trial court amended the injunction to prohibit the picketers from identifying or disclosing the identity of clinic patients, it refused to enjoin all picketing activity on Saturdays.²⁶³ The court reasoned that the modification would have unduly deprived the protestors of any means of reaching their target audience.²⁶⁴ The clinic then appealed to the California Court of Appeal to effect the Saturday ban of picketing.²⁶⁵

The appellate court held that the trial court did not abuse its discretion in refusing to bar the protestors from the vicinity of the clinic on Saturdays because the clinic had failed to show that the picketers had ample alternatives for communicating to their target

²⁵⁹ 208 Cal. App. 3d 230, 248, 256 Cal. Rptr. 194, 204 (1989).

²⁶⁰ *Id.* at 236, 256 Cal. Rptr. at 196.

²⁶¹ *Id.* at 236-38, 256 Cal. Rptr. at 196-97.

²⁶² *Id.* at 238, 256 Cal. Rptr. at 197.

²⁶³ *Id.* at 238-39, 256 Cal. Rptr. at 198.

²⁶⁴ *Id.* at 246, 256 Cal. Rptr. at 202-03.

²⁶⁵ *Id.*

audience.²⁶⁶ The court stated that ample alternative channels of communication do not exist if a speaker's target audience is altogether insulated from the speaker's message.²⁶⁷ The court pointed to the fact that abortions were only performed on Saturdays, and stated that the clinic had made no showing that the picketers had any means of reaching their target audience if they were excluded from the area of the clinic on Saturdays.

These cases show that although the first amendment does not necessarily afford protestors the right to the most effective means of communication available nor the right to a captive audience, it does guarantee them the opportunity to win the attention and reach the minds of willing listeners. Thus, restrictions on expressive conduct must leave open ample alternative means of communication. Courts will generally not invalidate restrictions on these grounds unless the restrictions insulate the target audience from the protestors' message altogether, thereby precluding the protestors' ability to win their attention.

E. *Vagueness*

Finally, in addition to the four requirements set forth above, courts, in considering possible restrictions on expression, must also ensure that the injunction or statute at issue is not unconstitutionally vague.²⁶⁸ The courts' standard for vagueness is if the injunction or statute either forbids or requires an activity in terms so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application."²⁶⁹ The purpose of the vagueness doctrine is to ensure that all people are informed as to what the State commands or forbids so they can conduct themselves in conformity with that law.²⁷⁰ The prohibition against overly vague laws protects people from voluntarily having to curtail activities that, although protected by the first amendment, may be confused with illegal activity due to an unconstitutionally vague statute.²⁷¹ When

²⁶⁶ *Id.* at 243, 256 Cal. Rptr. at 201.

²⁶⁷ *Id.* at 246, 256 Cal. Rptr. at 203.

²⁶⁸ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²⁶⁹ See *Planned Parenthood v. Operation Rescue*, 406 Mass. 701, 714, 550 N.E.2d 1361, 1369 (1990) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

²⁷⁰ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); see also *Planned Parenthood*, 406 Mass. at 714, 550 N.E.2d at 1369.

²⁷¹ See *Grayned*, 408 U.S. at 109.

making a determination of vagueness, courts must consider the statute or injunction within the factual context to which it applies.²⁷²

In the 1972 case of *Grayned v. Rockford*, the United States Supreme Court held that a town ordinance that criminalized willful noise or diversion that disturbed or tended to disturb the peace or good order of any school in session, was not unconstitutionally vague.²⁷³ The ordinance did not specify the prohibited level of disturbance, but the Court found that, given its purpose of protecting the school environment, this level was whether normal school activity had been or was about to be disrupted.²⁷⁴ The Court rejected a challenge to the vagueness of the words "noise" and "diversions" by noting the requirements of the ordinance that the "noise or diversion" be actually incompatible with normal school activity; that a demonstrated causal relationship exist between the "noise or diversion" and the disruption; and that the acts be done willfully.²⁷⁵ Given these requirements and the particularized school context, the Court held that the ordinance gave fair notice to those to whom it was directed, thus withstanding constitutional scrutiny.²⁷⁶

Therefore, so long as the restriction gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly, it should withstand constitutional scrutiny.²⁷⁷ When making this determination, courts will consider the statute or injunction within the factual context to which it applies. The prohibition of vagueness attempts to avoid the situation in which an unconstitutionally vague statute causes a person to refrain from permissible activity due to the fact that it might be confused with illegal activity.

In sum, in order to balance the two constitutionally protected rights, the right to free speech and the right to abortion, statutes and court injunctions restricting expression must meet several requirements. First, they must be content-neutral. Second, they must further a significant governmental interest. Significant governmental interests include keeping streets and sidewalks free from obstruction, preserving the normal activity of particular areas, protecting medical health environments, preserving residential privacy, and

²⁷² See *Planned Parenthood*, 406 Mass. at 715, 550 N.E.2d at 1369.

²⁷³ *Grayned*, 408 U.S. at 107-08.

²⁷⁴ *Id.* at 112.

²⁷⁵ *Id.* at 113-14.

²⁷⁶ *Id.* at 112 (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).

²⁷⁷ *Id.* at 108.

preserving the right to abortion.²⁷⁸ Third, they must be narrowly drawn. Fourth, they must provide ample alternatives for free expression. Lastly, they must not be unconstitutionally vague.²⁷⁹

III. DIFFERING APPROACHES IN RECENT ANTI-ABORTION PROTEST CASES

In recent years, a number of cases concerning abortion protests have challenged restrictions on expressive conduct and the requisite governmental interests necessary to support such restrictions.²⁸⁰ The following three 1990 cases illustrate the interplay of the constitutional requirements on restrictions of free speech within the abortion protest context.

In the 1990 case of *Eanes v. State*, Maryland's highest court, the Court of Appeals of Maryland, upheld the constitutionality of a state statute limiting the volume level of speech.²⁸¹ In doing so, the court stated that the statute satisfied the requirements for constitutional restraints on expression and that it advanced a substantial governmental interest in protecting its citizens from unwelcome noise.²⁸² The case arose from an anti-abortion demonstration that took place in front of an abortion clinic located on a congested street.²⁸³ Petitioner's primary method of demonstration was "to preach the gospel of Jesus Christ," which he did, unaided by artificial amplification for short periods of time during the day.²⁸⁴ After the police received a number of noise complaints from local resi-

²⁷⁸ See, e.g., *Frisby v. Schultz*, 489 U.S. 474, 484 (1988) (interest in residential privacy); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989) (interest in maintaining safety, controlling traffic on the streets and sidewalks of an urban environment), *cert. denied*, 110 S. Ct. 2206 (1990); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988) (interest in protecting medical clinic from disruptive conduct); *Bering v. Share*, 106 Wash. 2d 212, 229-30, 721 P.2d 918, 929 (1986) (interest in protecting right to privacy), *cert. dismissed*, 479 U.S. 1050 (1987).

²⁷⁹ See *United States v. Grace*, 461 U.S. 171, 177 (1983); *Grayned*, 408 U.S. at 108-09.

²⁸⁰ See, e.g., *Planned Parenthood v. Operation Rescue*, 406 Mass. 701, 702-03, 550 N.E.2d 1361, 1363 (1990); *Eanes v. State*, 318 Md. 436, 458, 468, 569 A.2d 604, 615, 620, *cert. denied*, 110 S. Ct. 3218 (1990); *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 56, 59-60, 556 N.E.2d 157, 161-62 (1990).

²⁸¹ 318 Md. at 458, 468, 569 A.2d at 615, 620.

²⁸² *Id.* at 449, 458, 569 A.2d at 610, 615.

²⁸³ *Id.* at 441, 569 A.2d at 606.

²⁸⁴ *Id.* The court noted that preaching on the public street was Eanes' only activity on the day in question. There was no suggestion that he made any effort to restrain physically anyone who attempted to enter the clinic or that he tried to block access to the clinic. Nor was there any contention that he threatened anyone with physical violence or that he trespassed on private property. He did not attempt to incite his listeners to violence, use profanity or obscenity, or hurl "fighting words" at his listeners. *Id.* at 441 n.2, 569 A.2d at 606 n. 2.

dents and people employed in the area, an officer informed Eanes about the complaints and warned him to reduce the volume level of his speech.²⁸⁵ After receiving further noise complaints, the officer returned to find Eanes shouting in a loud voice; he then arrested Eanes for disturbing the peace in violation of Maryland law.²⁸⁶

The Washington County District Court found Eanes guilty of disturbing the peace, as did the Circuit Court for Washington County in a *de novo* review of his conviction.²⁸⁷ Eanes appealed to the Maryland Court of Appeals, claiming that the Maryland statute unconstitutionally infringed upon his first amendment rights.²⁸⁸ The Court of Appeals affirmed the circuit court's decision, holding that it had properly balanced Eanes' first amendment rights against the substantial public interest in freedom from unwanted noise, which was protected by a narrowly drawn, content-neutral regulation.²⁸⁹ Analyzing the ordinance in light of the standards set for restrictions of speech in traditional public forums, and noting that the statute was conceded to be content-neutral and to provide ample alternative avenues of communication, the court centered its discussion on whether the ordinance was narrowly tailored to serve a substantial governmental interest.²⁹⁰

The court started its analysis by discussing the United States Supreme Court's recognition of a governmental interest in protecting its citizens from unwelcome noise.²⁹¹ The court noted a judicial concern with balancing the protestor's right of free speech with the public's right to be free from unwanted communication, particularly if the public is made a "captive audience."²⁹² The court acknowl-

²⁸⁵ *Id.* at 442, 569 A.2d at 606.

²⁸⁶ *Id.* The Maryland Code makes it unlawful for anyone to "wilfully disturb any neighborhood in [any Maryland] city, town or county by loud and unseemly noises . . ." MD. ANN. CODE art. 27, § 121 (1957).

²⁸⁷ *Eanes*, 318 Md. at 442-43, 569 A.2d at 607.

²⁸⁸ *Id.* at 443, 569 A.2d at 607.

²⁸⁹ *Id.* at 468, 569 A.2d at 620.

²⁹⁰ *Id.* at 446, 448-49, 458, 569 A.2d at 609-10, 614. The court noted that "[i]n this case even Eanes does not question that as applied to protected speech, § 121 can be read as content neutral." *Id.* at 448, 569 A.2d at 609-10.

Nothing in the statute prevents a speaker from orally addressing passersby, or from distributing literature or carrying signs expressing his or her viewpoint. *Id.* at 458, 569 A.2d at 614-15. Also, the court noted, if the speaker wishes to reach area residents or merchants, he or she could communicate with willing recipients by telephone, postal service, or in person. *Id.* at 458, 569 A.2d at 615.

²⁹¹ *Id.* at 449, 569 A.2d at 610 (citing *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2756 (1989); *Saia v. New York*, 334 U.S. 558, 562 (1948); *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir. 1980)).

²⁹² *Id.* at 451, 569 A.2d at 611. The notion of "captive audience" involves the problem

edged that the Supreme Court has permitted states to protect listeners who are "captive" to unwanted speech when that speech invades their privacy interest in an essentially intolerable manner.²⁹³ The Maryland Court of Appeals stated that, although such protection is most often extended to those within their homes, it may also be extended whenever individuals are unable to escape a "bombardment of [their] sensibilities" that threatens their privacy interests.²⁹⁴ Describing sound as one of the most intrusive means of communication, the court held that the statute was narrowly tailored to serve a substantial governmental interest because it prohibits only communication of such a volume that it unreasonably disturbs individuals whose rights to be free from such sound override the right of a speaker to address them orally.²⁹⁵

Although the majority opinion in *Eanes* extended the captive audience doctrine beyond the realm of the home, a dissenting justice strongly objected to such extension.²⁹⁶ His lengthy dissent pointed out that the holding prohibited an activity that would seem most protected by the first amendment: "[u]namplified speech, on a public sidewalk in a commercial area, about a controversial political and social topic."²⁹⁷ The dissent stressed that this speech was the defendant's only activity: there had been no evidence that he had trespassed on clinic property, threatened anyone, used obscenity or fighting words, disrupted any medical procedures, or tried to block access to the clinic.²⁹⁸ Focusing on this speech, the dissent noted the special protection historically given free speech, particularly in such public forums as sidewalks, and argued that the majority's opinion unduly narrowed protected speech to that which cannot be heard over surrounding traffic noise and that which does

of an unwilling listener or viewer who cannot readily escape from the undesired communication, or whose own rights are such that he or she should not be required to do so. *Id.* (citing Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 NW. U.L. REV. 153, 195-97 (1972)).

²⁹³ *Id.* at 452, 569 A.2d at 612 (citing Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1863 (1988)). The note analyzes a Boulder, Colorado "bubble zone ordinance" which established 100-foot buffer zone around entrances to licensed medical facilities.

²⁹⁴ *Id.* at 452-53, 569 A.2d at 612 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

²⁹⁵ *Id.* at 453, 569 A.2d at 612.

²⁹⁶ *Id.* at 472, 569 A.2d at 621 (Eldridge, J., dissenting).

²⁹⁷ *Id.* at 472-73, 569 A.2d at 622 (Eldridge, J., dissenting). According to the dissent, *Eanes* was engaged in free speech in its "most pristine and classic form." *Id.* at 472, 569 A.2d at 622 (Eldridge, J., dissenting) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

²⁹⁸ *Id.* at 472-73, 569 A.2d at 622 (Eldridge, J., dissenting).

not disturb even sensitive individuals.²⁹⁹ The dissent asserted that the majority was insensitive to free speech rights in its condemnation of noise as one of the most intrusive means of communication, overlooking the fact that sound, in the form of the spoken word, is the most basic thing protected by the first amendment.³⁰⁰ The majority's opinion, the dissent suggested, also provides a means of suppressing unpopular or unusual speech by means of complaints aimed ostensibly at limiting sound level.³⁰¹

The dissent then argued that the statute met none of the requirements validating restrictions under the first amendment.³⁰² First, it argued that the statute was not content-neutral in that it gave complainants and police authorities a weapon that they could use to suppress speech because of its content or the identity of its speaker, a weapon that would rarely be used to restrict "acceptable" speeches by prominent persons.³⁰³ Striking at the majority's reliance on a governmental interest in protecting its citizens from unwelcome noise, the dissent noted that the Supreme Court had never upheld an interest in controlling the volume of unamplified political speech, delivered at an appropriate time and place.³⁰⁴ Analyzing the cases relied upon by the majority to support this interest, the dissent pointed to the clear distinction that the Supreme Court has drawn between amplified sound and unamplified speech, asserting that these cases prohibit authorities from invoking general disorderly conduct statutes to suppress speech simply because it is noisy.³⁰⁵

The dissent conceded that the interest in protecting citizens from unwelcome noise might justify narrowly drawn time, place, and manner regulations of noise, but that no such regulations were

²⁹⁹ *Id.* at 473-74, 569 A.2d at 622 (Eldridge, J., dissenting). The dissent contended that the majority placed too much emphasis on testimony that an adult and a child were unable to sleep during the day, and that some workers nearby had difficulty concentrating on their work as a result of Eanes' protest. It emphasized the fact that the speech was not delivered in a residential neighborhood and was not delivered at a time when most people are sleeping, indicating that the scope of the first amendment should not be dependent upon the sensibilities of sensitive individuals. *Id.*

³⁰⁰ *Id.* at 476, 569 A.2d at 624 (Eldridge, J., dissenting) (citing *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989)).

³⁰¹ *Id.* at 475, 569 A.2d at 623 (Eldridge, J., dissenting). The dissent noted, "[a]nnoyance at ideas can be cloaked in annoyance at sound." *Id.* (quoting *Saia v. New York*, 334 U.S. 558, 562 (1948)).

³⁰² *Id.* at 478, 569 A.2d at 624-25 (Eldridge, J., dissenting).

³⁰³ *Id.* at 477-78, 569 A.2d at 624 (Eldridge, J., dissenting).

³⁰⁴ *Id.* at 478-79, 569 A.2d at 625 (Eldridge, J., dissenting).

³⁰⁵ *Id.* at 482, 487, 569 A.2d at 627, 629 (Eldridge, J., dissenting).

applied in this case.³⁰⁶ The statute did not contain any time or place restrictions, and the manner restriction was not narrowly drawn, but vague and overbroad.³⁰⁷ The statute, the dissent argued, lacked the objective specificity of the restrictions on sound, such as the Court found in the *Grayned* case, which had express time and place limitations, and a specific manner limitation—actual interference with operations of the school.³⁰⁸

The dissent further contended that the words "loud and unseemly" were open to such flexible interpretation that a person planning to make a speech would not know in advance whether his or her activity would be a crime, and that therefore, constitutionally protected activity could be prohibited by the statute.³⁰⁹ The dissent found unpersuasive the majority's argument that its application of the statute allowed for ample alternative avenues of communication in that it required individuals to forgo the most basic form of free speech and to choose less direct means. The dissent concluded that the majority's decision distorted basic constitutional guarantees and presented great potential danger to individuals speaking on controversial topics.³¹⁰

In another 1990 case, *Planned Parenthood v. Operation Rescue*, the Supreme Judicial Court of Massachusetts reinstated a lower court's injunction ordering anti-abortion advocates to refrain from obstructing access to specified abortion clinics.³¹¹ The case arose out of protests at the plaintiffs' clinics in which the defendant anti-abortion groups sought to stop abortions by blocking entranceways and lobbies of the clinic, thereby preventing patients and staff from entering or leaving.³¹² The plaintiffs brought a class action in the

³⁰⁶ *Id.* at 487, 569 A.2d at 629 (Eldridge, J., dissenting).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 487-88, 569 A.2d at 629 (Eldridge, J., dissenting). The dissent noted in a footnote that the court in *Portland Feminist Women's Health Center v. Advocates For Life, Inc.* had modified an injunction to forbid a volume interfering with the provision of medical care in an abortion clinic, but added once again that Eanes' speech had not been found to have interfered with medical services at the clinic. *Id.* at 488 n.7, 569 A.2d at 629 n.7 (Eldridge, J., dissenting) (citing 859 F.2d 681, 684 (9th Cir. 1988)).

³⁰⁹ *Id.* at 489, 491, 569 A.2d at 630, 631 (Eldridge, J., dissenting). The dissent also argued that the vagueness of the statute violated the basic principles of due process found in the fourteenth amendment and Article 24 of the Maryland Declaration of Rights. *Id.* at 493, 569 A.2d at 632 (Eldridge, J., dissenting).

³¹⁰ *Id.* at 492, 500, 569 A.2d at 631-32, 635-36 (Eldridge, J., dissenting).

³¹¹ 406 Mass. 701, 702-03, 550 N.E.2d 1361, 1363 (1990).

³¹² *Id.* at 703-04, 550 N.E.2d at 1363. The court noted that one demonstrator chained herself to a clinic door, and another chained himself to a toilet in a clinic. *Id.* at 704, 550 N.E.2d at 1363. Police efforts to clear the entranceways were often unsuccessful because as

trial court on behalf of themselves and those who might seek to obtain services at the plaintiffs' clinics, seeking immediate injunctive relief to prevent the protestors from blockading the clinics and from threatening, intimidating and coercing the clinics' patients and staff.³¹³

The trial court judge granted the plaintiffs' motion for a preliminary injunction.³¹⁴ The Appeals Court denied the defendant's petition seeking relief from the injunction, but on further appeal, a single justice in the Supreme Judicial Court suspended the preliminary injunction until further order of the court or final disposition of the case.³¹⁵ On appeal of the decision of the single justice to the full court, the Supreme Judicial Court, subsequently reinstated the trial court's preliminary injunction, holding that it was content-neutral, narrowly tailored to advance a significant state interest, reasonably specific, and allowed ample alternative methods of communication.³¹⁶ The court affirmed a significant state interest in protecting people from irreparable harm, which would result

police moved people away from entrances, other protestors would move in to fill the vacancy. *Id.*, 550 N.E.2d at 1364. Further, those who were removed would return to their original positions upon their release by the police. The defendants also sang and chanted during the protests and engaged in sidewalk counseling in an effort to dissuade people from attempting to enter the clinics. *Id.*

³¹³ *Id.* at 703, 550 N.E.2d at 1363. The plaintiffs charged the defendants with eight counts of illegal activity arising out of the demonstrations, including violations of the Massachusetts Civil Rights Act, intentional infliction of emotional distress, intentional interference with prospective contractual relations, invasion of privacy, false imprisonment, trespass, nuisance, and conspiracy. *Id.*

³¹⁴ *Id.* at 705, 550 N.E.2d at 1364. The preliminary injunction stated: After hearing, and after consideration of arguments of counsel and review of the affidavits and memoranda filed, the Court, finding irreparable harm and probability of success on the merits, and balancing the interests involved, hereby ORDERS that the above-named defendants, all of whom have been served, and their agents, servants, employees and those acting in concert with them are preliminarily enjoined from:

- a. trespassing on, blocking, or in any way obstructing access (either ingress or egress) to the offices or clinics of plaintiff providers of services, and
- b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from plaintiff providers, until further order of the Court.

Id. at 705 n.5, 550 N.E.2d at 1364 n.5.

³¹⁵ *Id.* at 705-06, 550 N.E.2d at 1364.

³¹⁶ *Id.* at 716-17, 550 N.E.2d at 1370-71. The injunction, the court stated, "makes no reference to the specific viewpoints espoused by the defendants or the plaintiffs." *Id.* at 716, 550 N.E.2d at 1370. Furthermore, the injunction allows the protestors "to express their views through any number of alternative methods not prohibited by the injunction, such as singing, lecturing, or peaceful picketing." *Id.* at 716-17, 550 N.E.2d at 1370.

from the denial of the right to abortion by the protestors' activities.³¹⁷

The court reasoned that the right to abortion is a substantive right recognized under both the federal and Massachusetts constitutions.³¹⁸ In addition, the court noted that the right is time-sensitive and expires only weeks after the onset of pregnancy.³¹⁹ Because the delay of the ability to exercise such a right therefore could result in its denial altogether, the court decided that the plaintiffs had satisfied their burden of showing, for the preliminary injunction, that they would suffer an irreparable loss of rights that could not be vindicated, even if they prevailed after a full hearing on the merits.³²⁰

Rejecting the contention that the injunction was unconstitutionally vague, the Supreme Judicial Court followed the standard set by the United States Court of Appeals for the Ninth Circuit, which had held that an injunction that prohibited the obstruction of the entrances to a clinic was not overly vague if the terms of the injunction are reasonably understandable and place the enjoined parties on fair notice as to the prohibited activity.³²¹ The court also held that the injunction was not overbroad because it only enjoined the defendants from engaging in conduct that was already illegal, such as trespassing and obstructing clinic entranceways.³²²

A dissenting opinion, however, argued that the plaintiffs did not have standing to assert the rights of women claiming past interference or threatened future interference with their access to abortions.³²³ The dissent further contended that by prohibiting "ob-

³¹⁷ *Id.* at 716, 550 N.E.2d at 1370.

³¹⁸ *Id.* at 707, 550 N.E.2d at 1365 (citing *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 647-48, 417 N.E.2d 387, 398 (1981)).

³¹⁹ *Planned Parenthood*, 406 Mass. at 709, 550 N.E.2d at 1366 (quoting *Bellotti v. Baird*, 443 U.S. 622, 642 (1979)).

³²⁰ *Id.* at 710, 550 N.E.2d at 1367.

³²¹ *Id.* at 715, 550 N.E.2d at 1370 (citing *Portland Feminist Women's Health Center*, 859 F.2d 681, 685 (9th Cir. 1988)). The court also stated:

In the context of this injunction, given the history of prior protests and the pending litigation between the plaintiffs and the defendants, the phrase "obstructing access" can only be construed as referring to the physical blocking of access to the clinics, either by demonstrators sitting or lying in entranceways to prevent patients or staff from entering the clinics, or by the use of inanimate objects to achieve the same purpose.

Id. at 715, 550 N.E.2d at 1369-70.

³²² *Id.*

³²³ *Id.* at 733-34, 550 N.E.2d at 1379-80 (O'Connor, J., dissenting).

structing access" in any way, the injunction is unconstitutionally vague and overbroad to the extent that it prohibits legal activity.³²⁴

In a third 1990 case, *Planned Parenthood v. Project Jericho*, the Supreme Court of Ohio also upheld a trial court injunction that prohibited anti-abortion protestors from interfering with the operation of an abortion clinic, harassing staff and patients, and blocking access to the clinic.³²⁵ The Planned Parenthood Association of Cincinnati initiated the litigation in response to demonstrations at one of its clinics, which provided counseling and medical services, including abortions, to women.³²⁶ The association had filed a complaint seeking injunctions against Project Jericho and other pro-life protestors in the trial court, alleging that these protestors disrupted the operation of the clinic, blocked access to the building, harassed and intimidated staff and patients, and created traffic problems.³²⁷ The trial court issued a preliminary injunction prohibiting the protestors both from shouting or chanting so loudly as to be heard inside the clinic and from blocking the sidewalk.³²⁸

As consideration of this injunction was pending, Planned Parenthood also filed in the trial court a motion to certify the defendants as a class and amended their complaint to request that this class be enjoined from harassing patients and staff, blocking access to the clinic, and interfering with its operations.³²⁹ In addition, tenants in the apartment building next to the clinic intervened as plaintiffs in the amended complaint, alleging that the picketers blocked access on the sidewalk in front of the buildings, threatened people entering or leaving the area, caused traffic hazards, and screamed so loudly that they could be heard inside the apartments, thereby invading the tenants' privacy and disrupting their lives.

After conducting a hearing on these new motions, the trial court found that there had been numerous violations of the initial

³²⁴ *Id.* at 721, 723, 550 N.E.2d at 1373-74 (O'Connor, J., dissenting). Justice O'Connor stated:

Surely reasonable persons, wishing to express their views about the morality of abortion and whether abortion should be legal, could not be confident that they would not violate that injunction by joining others on public ways adjacent to a clinic to picket, pray, chant, and exhort others to accept their viewpoint.

Id. at 721, 550 N.E.2d at 1373 (O'Connor, J., dissenting).

³²⁵ 52 Ohio St. 3d 56, 59-60, 556 N.E.2d 157, 161-62 (1990).

³²⁶ *Id.* at 57, 556 N.E.2d at 160.

³²⁷ *Id.* at 57-58, 556 N.E.2d at 160.

³²⁸ *Id.* at 58, 556 N.E.2d at 160.

³²⁹ *Id.*

injunction; that when the tenants had complained to the protestors about the noise, the picketers had increased their shouting; that the shouting had a menacing character that instilled fear in others; and that the "effect of the unrestrained picketing is not the peaceful presentation of a political or religious opinion, but the attempt to disrupt a medical operation by force or fear."³³⁰ Concluding that the protestors conduct constituted a nuisance that the initial injunction had not abated, the trial court modified the injunction and conditionally certified a class action.³³¹

When several defendants were subsequently charged with contempt for violation of the modified injunction, they appealed to a court of appeals.³³² The appellate court affirmed the findings of contempt, but reversed the conditional certification of a defendant class.³³³ Defendant protestors then appealed, with Planned Parenthood filing a cross-appeal, to the Ohio Supreme Court to certify the record.³³⁴

Addressing the constitutionality of the injunction, the Supreme Court of Ohio first recognized the first amendment's guarantee of the right to communicate one's views and express dissension, but asserted that these rights do not include the right to imperil public safety or to harass others in the exercise of their rights.³³⁵ The court stated that it is not necessary to disrupt the operations of a medical facility or to block access to facilities in order to express one's opinions.³³⁶ The court noted that the first amendment permits reasonable restrictions relating to time, place and manner of expression as long as they satisfy the requisite tests: they must be content-neutral, narrowly tailored to serve a significant governmental interest, and allow alternative channels of communication.³³⁷

Scrutinizing the injunction, the court held that because it was not based on the content or subject matter of speech, it met the first constitutional requirement of neutrality.³³⁸ The court then

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 58-59, 556 N.E.2d at 161.

³³³ *Id.*

³³⁴ *Id.* at 59, 556 N.E.2d at 161.

³³⁵ *Id.* (citing *United States v. Dickens*, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983); *Galella v. Onassis*, 353 F. Supp. 196, 223 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 487 F.2d 986, 999 (2d Cir. 1973)).

³³⁶ *Id.*

³³⁷ *Id.* at 59, 556 N.E.2d at 161.

³³⁸ *Id.* at 60, 556 N.E.2d at 162. The court described the injunction in the following terms:

noted that the injunction served the significant state interest in ensuring that "trade and commerce be conducted unimpeded by breaches of the peace and threats to the safety of those engaged in or patronizing a lawful business."³³⁹ Noting that the business involved was the provision of medical treatment, the court asserted that courts have uniformly recognized that restrictions on demonstrations in front of medical clinics, which meet all constitutional requirements, serve a legitimate public interest. The court then stated that the injunction was not vague or overbroad because it was specific in its terms and described the acts to be restrained in reasonable detail.³⁴⁰ Finally, the court concluded that because the injunction allowed the protestors to express their opinions, picket within reasonable limits and pass out literature; it sufficiently provided alternative channels of communication.³⁴¹ Having analyzed the injunction in light of the constitutional requirements on restrictions on expression, the court held that the injunction issued by the trial court did not violate the first amendment.³⁴²

These three recent cases illustrate some of the ways in which courts are attempting to grapple with the conflict of rights engendered by anti-abortion protest. In *Eanes v. State*, the Court of Appeals of Maryland upheld an ordinance limiting the volume of speech based on a significant state interest in protecting its citizens from unwelcome noise.³⁴³ The ordinance prohibited Eanes from expressing his unamplified opinion about a controversial political and social topic on a public sidewalk in a commercial area, even though he did not threaten anyone, did not trespass on clinic prop-

The injunction before us prohibits screaming, chanting, speaking or singing in a manner intended to reach or which had the effect of reaching patients inside the clinic at 3332 Vine Street; screaming at patients entering or leaving the clinic; blocking the driveway, entrances, or exits from the clinic or the public walkway in front of it; and mass picketing. The court limited the numbers of picketers to one stationary picket on the Louis Street sidewalk; one stationary picket on the Shields Street sidewalk and three moving pickets at designated locations. Limits were not placed on the numbers of pickets on the west side of Vine Street.

Id. at 59-60, 556 N.E.2d at 161-62.

³³⁹ *Id.* at 60, 556 N.E.2d at 162.

³⁴⁰ *Id.* at 60-61, 556 N.E.2d at 162-63.

³⁴¹ *Id.* at 60, 556 N.E.2d at 162.

³⁴² *Id.* In the rest of its decision, the court reversed the Appeals Court on the issue of the conditional class certification, finding that the trial court did not abuse its discretion in certifying the defendant class action because it met all the prerequisites of such an action. *Id.* at 68, 556 N.E.2d at 168.

³⁴³ 318 Md. 436, 449, 468, 569 A.2d 604, 610, 620, *cert. denied*, 110 S. Ct. 3218 (1990).

erty, did not block access to the facility, and was not found to have disrupted any medical procedures at the clinic.³⁴⁴

In *Planned Parenthood v. Operation Rescue*, the Supreme Judicial Court of Massachusetts reinstated an injunction prohibiting obstruction of clinics, citing the state interest in protecting its citizens, residents, and visitors from irreparable harm that would result from the denial of the substantive right to abortion, effected by the obstruction of abortion facilities.³⁴⁵ The injunction, however, only enjoined the protestors from obstructing the clinics and committing acts of force and violence against patients and staff.³⁴⁶

Finally, in *Planned Parenthood v. Project Jericho*, the Supreme Court of Ohio upheld a lower court injunction, based on the state's interest in ensuring that medical clinics be allowed to conduct their business of treating patients, unimpeded by breaches of the peace and threats to safety.³⁴⁷ The court stated that it is not necessary to block access to facilities or disrupt the operations of a medical clinic in order to express one's opinion, and prescribed only those activities that do so.³⁴⁸

These cases demonstrate the difficulty encountered by courts in balancing the conflicting rights to abortion and free expression. More importantly, however, they illustrate how courts following similar guidelines for constitutional restrictions on free speech can achieve significantly different results, depending on the state interest upon which the restriction is based.

IV. EXAMINATION OF SIGNIFICANT GOVERNMENT AND STATE INTERESTS IN THE ANTI-ABORTION PROTEST CASES

Courts addressing restrictions on anti-abortion protest must ensure that the restrictions are content-neutral, serve a governmental interest, are narrowly tailored to effect that interest, leave open alternative avenues of communication, and are not unconstitutionally vague.³⁴⁹ Because the restriction must be tailored to effect a significant governmental interest, the interest relied upon by the court will largely affect the final scope and impact of the restric-

³⁴⁴ *Id.* at 472-73, 569 A.2d at 622 (Eldridge, J., dissenting).

³⁴⁵ 406 Mass. 701, 707, 710, 716, 550 N.E.2d 1361, 1365, 1366 (1990).

³⁴⁶ *Id.* at 705 n.5, 550 N.E.2d at 1364 n.5.

³⁴⁷ 52 Ohio St. 3d 56, 60, 556 N.E.2d 157, 162 (1990).

³⁴⁸ *Id.*

³⁴⁹ See *supra* notes 86-279 and accompanying text for a discussion of these requirements.

tion.³⁵⁰ In examining the numerous cases dealing with anti-abortion protest, one sees that courts therefore follow essentially the same standards set for reasonable restrictions on expressive conduct. They arrive at restrictions, however, that often differ greatly in their focus and effect as a result of the various interests that courts have asserted.³⁵¹

Courts have been inconsistent in addressing the central interests implicated by the anti-abortion protest cases.³⁵² As a result, they have often based the restrictions on governmental interests that effectively ignore the essential conflict between the rights to abortion and free speech.³⁵³ Although some courts have astutely balanced the first amendment rights of the protestors against such compelling state interests as protecting medical facilities from disruptive and potentially harmful conduct, others have weighed the free speech rights of the protestors against such inappropriate governmental interests as keeping streets and sidewalks free of obstruction and protecting people from unwelcome noise.³⁵⁴ In so doing, courts have effectively diminished the gravity of the interests implicated by the conflict.

In addressing these conflicting constitutional rights, the first amendment considerations implicated by anti-abortion protest cannot be understated. The debate over the right to abortion encompasses issues of religious conviction, governmental interference, women's rights, rights of privacy, civil rights, and basic beliefs on life and death, and demands access to the minds of the nation. People must be given the opportunity to learn about the ramifications that may result from the assertion of this right as well as about the possible consequences of its denial. No other issue in the United States today perhaps more deserves first amendment protection. Yet, while the first amendment interests are significant, the rights implicated by women seeking abortions are equally weighty. The right to abortion, as conferred upon women in *Roe*, is a fundamentally private right³⁵⁵ which, absent governmental protection, could

³⁵⁰ See *supra* notes 117-220 and accompanying text for a discussion of interests courts have recognized.

³⁵¹ See *supra* notes 117-220 and accompanying text.

³⁵² See *supra* notes 117-220 and accompanying text.

³⁵³ See *supra* notes 119-140 and accompanying text.

³⁵⁴ See *supra* notes 117-220 and accompanying text.

³⁵⁵ See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

be denied to women by anti-abortion advocates choosing to place their own moral imperatives above the law.

Although it is true that courts should avoid constitutional questions where other grounds are available and dispositive of the issues presented,³⁵⁶ courts cannot so avoid the conflict as to do injustice to the actual interests. For example, when a court tailors an injunction to a governmental interest in keeping sidewalks open and available for movement of people and property, such an injunction only creates a place restriction that keeps the sidewalks in order. It does nothing to prevent protestors from nonetheless making noise or engaging in other conduct, which although in line with the place restriction, substantially interferes with the administration of medical care. Several courts, including the United States Supreme Court, have recognized that upsetting speech and harassment cannot be tolerated in a medical environment, as it endangers the health of the targeted patients.³⁵⁷ Promoting an interest in keeping sidewalks open and available for movement of people and property for the purposes of the abortion protest cases implies a greater concern with orderly sidewalks than with the health of the women involved. Although the interest addresses such activity as the obstruction and blockading of facilities, conduct that is already generally illegal, it does not effectively address the hazardous environment created by the protestors.

Other interests that the courts have relied upon, such as the interest in protecting listeners from unwelcome noise,³⁵⁸ unnecessarily restrict expressive conduct because they also fail to address properly the real interests involved. In *Eanes*, for example, the court upheld a statute that had the effect of prohibiting Eanes from speaking, in an unamplified voice, about a controversial political and social topic, on a public sidewalk in a commercial area, in the middle of the day.³⁵⁹ He was restricted from preaching the gospel even though there was no evidence that he disrupted the medical procedures at the clinic. By failing to state a more appropriate

³⁵⁶ See *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1494 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 584 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

³⁵⁷ See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 791 (1979) (Burger, C.J., concurring); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978); *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 613 F. Supp. 656, 666 (E.D. Pa. 1985).

³⁵⁸ See *Eanes v. State*, 318 Md. 436, 449, 569 A.2d 604, 610, *cert. denied*, 110 S.Ct. 3218 (1990).

³⁵⁹ *Id.* at 472-73, 569 A.2d at 622 (Eldridge, J., dissenting).

governmental interest, such as an interest in protecting medical facilities from disruptive conduct, the court unnecessarily restricted speech on this controversial topic. It also provided an instrument by which individuals could potentially suppress the expression of viewpoints with which they disagree under the cloak of annoyance at its volume.

The most appropriate basis for restriction on expressive conduct might ideally be the recognition of a governmental interest in protecting a woman's right to abortion.³⁶⁰ Such recognition would at least compel courts to be straightforward in their balancing of the implicated interests. The right to an abortion is a fundamentally private right that, absent governmental protection, could be denied to women by anti-abortion advocates choosing to place their own moral imperatives above the law. Most courts have held, however, that although *Roe* stands for the proposition that a woman has a right to terminate her pregnancy free from governmental interference, *Roe* does not compel governmental protection of the right from private interference.³⁶¹ There is strong reasoning, however, in the *Lewis* and *Bering* decisions, cases upholding a significant interest in protecting the right to abortion, which recognized such a privacy interest would be meaningless if it was protected only from interference by the state.³⁶² The *Planned Parenthood v. Operation Rescue* case took a similar position when it asserted a governmental interest in protecting women from the harm of private interference with the abortion right.³⁶³

These courts rest their decisions on the fundamental right to abortion as stated in *Roe*. Yet, the *Roe* decision remains in danger of being overturned. Justice Rehnquist in *Webster* asserted his belief that the *Roe* trimester framework is a constitutional construction that has proved "unsound in principle and unworkable in practice," hinting that abortion regulation might be better handled by the states themselves.³⁶⁴ Given that there is so little support for the proposition that the right to choose is protected against even private

³⁶⁰ See *supra* notes 205-220 and accompanying text for a discussion of the interest in preserving the right to abortion.

³⁶¹ See *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1358 (2d Cir. 1989); *National Org. for Women*, 726 F. Supp. at 1493 n.11; *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989).

³⁶² See *Lewis v. Pearson Found.*, 908 F.2d 318, 322 (8th Cir. 1990); *Bering v. Share*, 106 Wash. 2d 212, 229-30, 721 P.2d 918, 929 (1986), *cert. dismissed*, 479 U.S. 1050 (1987).

³⁶³ See 406 Mass. 701, 709, 710, 550 N.E.2d 1361, 1366 (1990).

³⁶⁴ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521, 518 (1989) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

interference, and further, given that the future of *Roe* remains uncertain, courts addressing the anti-abortion conflict should refrain from basing restrictions of free speech solely on the right identified in *Roe*. Until the United States Supreme Court addresses the issue of private interference with a woman's fundamental right to an abortion, thereby giving guidance to the lower courts, courts would be well advised to rely on an interest that is easier to support but remains nonetheless compelling, an interest that deals with the gravity of the interests involved, but which takes the conflict out of the abortion rhetoric and discusses it in terms of medical services.

One can understand such an interest as the obligation to protect medical facilities from conduct disrupting the proper provision of medical care. The anti-abortion protest cases have illustrated that such protests can have a potentially hazardous effect on the health of individuals seeking to exercise their right to abortion.³⁶⁵ For example, at least one court has noted that women forced to pass through a hostile crowd to enter a clinic to obtain an abortion suffer heightened anxiety and feelings of guilt that can affect the medical procedure and also cause long-term effects on their mental state.³⁶⁶

For some women who elect to undergo an abortion, a physician prescribes and inserts a pre-abortion laminaria to achieve cervical dilation.³⁶⁷ In these instances, timely removal of the laminaria is necessary to avoid infection.³⁶⁸ Anti-abortion demonstrations can endanger patients requiring this removal procedure and other necessary medical services, by delaying or denying them the opportunity to receive these services. Other incidents illustrating the hazard of clinical demonstrations include a patient having to be rushed from a clinic to a hospital for further medical care only to have the ambulance obstructed by protestors.³⁶⁹ Some sources contend that the complication rate for abortions increases by four to five percent when protestors are demonstrating outside the clinic.³⁷⁰ The significant interest in averting such harm must be upheld by the courts.

³⁶⁵ See *infra* notes 366-370 and accompanying text.

³⁶⁶ *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 613 F. Supp. 656, 668 (E.D. Pa. 1985).

³⁶⁷ *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 584 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

³⁶⁸ *Id.*

³⁶⁹ See *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 683 (9th Cir. 1988).

³⁷⁰ See *Donovan*, *supra* note 68, at 9.

In addressing abortion protest cases, courts should apply the same type of analysis as the court did in *Portland Feminist Women's Health Center*.³⁷¹ Citing an interest in "protecting the ability of [a] clinic to provide medical services free from interference that may endanger the health and safety of its patients," the court narrowly tailored its injunction to meet this interest, prohibiting only that conduct that substantially interfered with medical care.³⁷² The *Portland Feminist Women's Health Center* court also included a place restriction of a "free zone" extending twelve-and-a-half feet to the right and the left of the front door of the clinic, and from the front door to the curb, tailored "to address threats, intimidation, and assault of clinic personnel and clients that impede the safe provision of medical care."³⁷³ Even the dissent in *Eanes* appeared willing to adopt the standard set in *Portland Feminist Women's Health Center*.³⁷⁴ The dissent there disagreed with the majority's reliance on an interest in protecting individuals from unwelcome noise and implied that the only possible justification for restricting Eanes' unamplified speech would have been a showing that his speech disrupted the provision of medical services, coupled with a stated interest in preventing such disruption.³⁷⁵

The court in *Planned Parenthood v. Project Jericho* asserted a similar interest in ensuring that medical clinics be allowed to conduct their business of treating patients, unimpeded by breaches of the peace and threats to safety that serve to disrupt that business.³⁷⁶ The injunction's prohibition of noise intended to reach or that had the effect of reaching patients inside the clinic, of harassment, of obstruction of access, and of mass picketing does much to proscribe only that expressive activity that infringes upon the medical treatment of the clinic and endangers the health of the patients.³⁷⁷

Similarly, in *O.B.G.Y.N.*, where the court noted an interest in protecting clinics from expressive conduct that hinders medical treatment and thereby adversely affects the health and welfare of its patients, the court carefully balanced the competing interests,

³⁷¹ See 859 F.2d at 686.

³⁷² *Id.* at 686-87.

³⁷³ *Id.* at 686.

³⁷⁴ *Eanes v. State*, 318 Md. 436, 488 n.7, 569 A.2d 604, 629 n.7 (Eldridge, J., dissenting), cert. denied, 110 S. Ct. 3218 (1990).

³⁷⁵ *Id.*

³⁷⁶ 52 Ohio St. 3d 56, 60, 556 N.E.2d 157, 162 (1990).

³⁷⁷ *Id.*

recognizing their magnitude.³⁷⁸ The court was careful to modify the injunction so as to permit protestors to engage in their protected activity, and only to proscribe expressive conduct that endangered the health of the clinic patients.³⁷⁹

By asserting an interest already recognized in several courts, including the United States Supreme Court, courts will not only better serve that interest, but they will also be less likely to restrict expression unnecessarily, as they will not proscribe activity that does not infringe upon the clinical environment. Protestors would be able to exercise their rights to free speech up to this limit, at which point, the interests in disseminating information must be subordinated to interests in safeguarding the health of clinic patients. The interest in protecting individuals from harm justifies the restrictions of expression in ways that interests in maintaining orderly sidewalks and protecting citizens from noise, which appear aimed at preventing public inconvenience and annoyance, do not. Courts would do well to remember the foremost importance of free speech in our society and only prohibit that which has the potential of harming others. As the Court stated in *Terminiello v. Chicago*:

a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* . . . There is no room under our Constitution for a more restrictive view.³⁸⁰

There is also no room for a less restrictive view of the first amendment, for as central as free speech is to the fabric of our society, it must be restricted when it presents a danger of harm to others.

The stated interest in protecting the clinical environment from disruptive conduct is consistent with the Supreme Court's restriction

³⁷⁸ O.B.G.Y.N. Ass'ns v. Birthright of Brooklyn and Queens, Inc., 64 A.D.2d 894, 895, 407 N.Y.S.2d 903, 906 (1978).

³⁷⁹ *Id.*

³⁸⁰ 337 U.S. 1, 4 (1948) (emphasis added).

of conduct incompatible with the normal activity of schools³⁸¹ and courts.³⁸² The Supreme Court has recognized the value of environments conducive to learning and judicial administration, as well as the importance of tranquil medical environments, as stated in *NLRB v. Beth Israel Hospital*.³⁸³ It follows that the Court would therefore ascribe an even greater importance to the interest in preserving the ability of a clinic to provide medical services free from interference that may endanger the health and safety of its patients. In considering anti-abortion protests, therefore, the courts should base their restrictions of expressive conduct on the interest in protecting medical facilities from conduct that disrupts the provision of medical care.

V. CONCLUSION

The conflict of rights presented in the anti-abortion protest cases is too significant for courts to continue basing their decisions on governmental interests that essentially ignore this conflict. On one hand, the right to abortion is a fundamental right that lies at the core of the individual's right to privacy, yet the United States Supreme Court has not held that the government must protect this right from private interference. It has held, however, that states have a significant interest in protecting medical environments from interference that could adversely affect the health of patients. Abortion clinics provide medical services, and are therefore entitled to protection by courts and local ordinances.

On the other hand, the right to free speech is a right that rests at the core of our democracy. The United States Supreme Court has interpreted it to include the right to picket peacefully, and to persuade others to action in public forums. This right cannot be infringed upon unreasonably, and may be restricted only when the speech it protects interferes with a significant state or governmental interest.

Courts have diminished the substantial interests involved in the rights to abortion and free speech by not directly addressing the conflict of these rights in the anti-abortion protest context. In asserting evasive governmental interests, such as keeping sidewalks open for movement and protecting individuals from unwelcome

³⁸¹ See *Grayned v. City of Rockford*, 408 U.S. 104, 121 (1972).

³⁸² See *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).

³⁸³ See 442 U.S. 773, 791 (1979) (Burger, C.J., concurring).

noise, as a basis for restricting freedom of expression, courts have clouded the conflict, and tailored injunctions that have often failed to protect adequately the real interests of either of the parties involved. By tailoring injunctions and ruling upon ordinances based on the significant state interest in preserving the ability of a clinic to provide medical services free from interference that may endanger the health and safety of its patients, courts would be better able to balance the interests involved, and would better protect the implicated rights of the involved parties.

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