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OF BUFFER ZONES AND BROKEN BONES:
BALANCING ACCESS TO ABORTION AND ANTI-
ABORTION PROTESTORS' FIRST AMENDMENT
RIGHTS IN *SCHENCK V. PRO-CHOICE NETWORK*

Deborah A. Ellis[†] & Yolanda S. Wu^{††}

INTRODUCTION

Courts have been striving for some time to protect the safety of patients and providers at reproductive health care facilities¹ without infringing anti-abortion protestors' free speech rights.² Protecting the safety of patients at reproduc-

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¹ We use the term "reproductive health care facilities" interchangeably with "abortion clinics" because most clinics that provide abortions also provide other health care such as pap smears, prenatal care and treatment for sexually transmitted diseases. See Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 FAM. PLAN. PERSP. 246, 247 tbl. 1 (1991) (in a 1989 study of nonhospital abortion facilities, 94% provided contraceptive care, 91% provided general gynecological care, 88% provided treatment for sexually transmitted diseases, 64% provided infertility services, 60% provided HIV testing, 51% provided obstetric care, 45% provided general medical care and 24% provided non-gynecological surgery to nonabortion patients).

² The Supreme Court twice before has addressed the conflict between the First Amendment and abortion rights. Most recently, in *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, *reh'g denied*, 115 S. Ct. 23 (1994), the Court announced a new test for analyzing the constitutionality of injunctions that restrict free speech. See *infra* text accompanying notes 48-62. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a city ordinance that banned targeted picketing in residential areas. The city had passed the ordinance in response to picketing outside the residence of a doctor who performed abortions.

tive health care facilities is crucial because without access, the constitutional right to abortion will become a nullity. Although abortion has been a constitutional right for twenty-three years,³ it has become increasingly difficult for women to obtain one. A significant barrier is pervasive anti-choice violence consisting of harassment, blockades, vandalism, arson, death threats and even murder.⁴ This severe violence can prevent women from obtaining an abortion or make it much more difficult to do so. It is partly responsible for the fact that eighty-three percent of counties in the United States do not have an abortion provider.⁵

While patients and providers must be given legal protection in order that women can exercise freely their constitutional right to abortion, it is important to do so without trampling on the legitimate First Amendment rights of anti-abortion protestors. Measures to protect access to reproductive health facilities fall into two categories: court injunctions and legislative statutes or ordinances. Anti-abortion protestors⁶ have

In addition, numerous lower courts have addressed the conflict between free expression and protecting access to abortion. For a discussion of cases applying the *Madsen* standard to injunctions, see *infra* text accompanying notes 75-80. For a discussion of cases incorrectly applying the *Madsen* standard to ordinances, see *infra* text accompanying notes 81-85.

³ See *Roe v. Wade*, 410 U.S. 183 (1973). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the constitutional protection for abortion, but rejected *Roe's* trimester framework and instituted a new "undue burden" test for evaluating abortion restrictions.

⁴ This violence has continued even since the May 1994 enactment of The Freedom of Access to Clinic Entrances Act ("FACE"). Statistics gathered by the National Abortion Federation reflect that for the year 1995 and through the first seven months of 1996, abortion providers reported 43 bomb threats, 67 stalking incidents, 43 death threats, 41 vandalism incidents, 15 arsons, 2 bombings and 1 attempted murder. NAT'L ABORTION FEDERATION, INCIDENTS OF VIOLENCE AND DISRUPTION AGAINST ABORTION PROVIDERS 1, 1 (1996).

⁵ S. REP. NO. 117, 103d Cong., 1st Sess. 17 n.29 (1993); Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 FAM. PLAN. PERSP. 102, 106 (1990); see Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1991 and 1992*, 26 FAM. PLAN. PERSP. 100, 103 (1994).

⁶ For ease of reference, we use the term "anti-abortion protestor," but we do so cautiously. Although many people who oppose abortion limit themselves to peaceful protest, there are others whose goal is to stop abortions by any means necessary, and characterizing them as protestors legitimates their unlawful conduct. See S. REP. No. 117, *supra* note 5, at 11 (Operation Rescue leader, stating: "My desire would be to see abortion clinics stopped, closed . . . I would like to see them closed down . . . Yes, absolutely." "We may not get laws changed or be

brought First Amendment challenges to both. Thus, as the Second Circuit Court of Appeals recently did in *Pro-Choice Network v. Schenck*,⁷ courts have considered the constitutionality of injunctions imposing protective buffer zones around abortion clinics and prohibiting harassing conduct aimed at patients and clinic staff.⁸ Courts also have examined First Amendment challenges to laws that protect abortion rights, such as the Freedom of Access to Clinic Entrances Act ("FACE"),⁹ and to ordinances creating buffer zones or banning targeted picketing at clinic staff's residences.¹⁰

able to change people's minds . . . [b]ut if there is no one willing to conduct abortions, there are no abortions.").

⁷ 67 F.3d 377 (2d Cir. 1995) (in banc), *cert. granted*, 116 S. Ct. 1260 (1996).

⁸ See *infra* text accompanying notes 77-80.

⁹ 18 U.S.C. § 248(a) (Supp. 1996). FACE prohibits the use of force, threat of force or physical obstruction to injure, intimidate or interfere with the provision of reproductive health care services. *Id.* Anti-abortion activists have challenged FACE on the grounds, inter alia, that it is content- and viewpoint-based and that Congress lacked authority under the Commerce Clause to enact it. Every appellate court to consider the statute has upheld its constitutionality. See, e.g., *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996), *cert. denied*, 1996 U.S. LEXIS 7166 (U.S. Dec. 2, 1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), *petition for cert. filed*, No. 96-5615 (Aug. 6, 1996); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied sub nom. Skott v. United States*, 65 U.S.L.W. 3242 (Oct 7, 1996); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *American Life League v. Reno*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); *Woodall v. Reno*, 47 F.3d 656 (4th Cir.), *cert. denied*, 115 S. Ct. 2577 (1995). Two district courts have concluded that Congress did not have authority to enact FACE under the Commerce Clause or Section 5 of the Fourteenth Amendment. One district court was reversed, *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995), *rev'd*, 73 F.3d 675 (7th Cir. 1995), and the other is on appeal. *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C.), *appeal docketed*, Nos. 95-1581, 96-1582, 96-1623 (4th Cir. 1996).

¹⁰ The State of Colorado and many municipalities have enacted buffer zone laws to protect access to abortion clinics. See, e.g., COLO. REV. STAT. § 18-9-122 (1993); PHOENIX, ARIZ., CODE § 23-10.1 (1993); SANTA BARBARA, CAL., CODE § 9.99 (1993); SUNNYVALE, CAL., CODE, § 9.94 (1996); BOULDER, COLO., REV. CODE § 5-3-10 (1986 & Revised May 5, 1987); PENSACOLA, FLA., CODE § 8-1-18 (1995). For a discussion of case law analyzing the constitutionality of buffer zone ordinances, see *infra* text accompanying notes 87-88.

In addition, many states and municipalities have enacted laws that prohibit picketing of clinic staff's residences. See, e.g., ARIZ. REV. STAT. ANN. § 13-2909 (1994); ARK. CODE ANN. § 5-71-225 (Michie 1995); MINN. STAT. ANN. § 609.748(1)(c)(2) (West 1994); NEB. REV. STAT. § 28-1317(e) (1995); OHIO REV. CODE ANN. § 715.49 (Baldwin 1995); SAN JOSE, CAL., CODE § 10.09.010 (1994); White Bear, Minn., Ordinance No. 63 (May 21, 1990); FARGO, N.D., CODE §§ 10-0802 to -0804 (1993); UPPER ARLINGTON, OHIO, ORDINANCES § 517.17 (1992); BARRINGTON, R.I., ORDINANCE § 86-6 (1986); BROOKFIELD, WIS., GENERAL CODE § 9.17 (1985).

In 1994, the Supreme Court addressed First Amendment concerns in the abortion context in *Madsen v. Women's Health Center, Inc.*¹¹ The Court enunciated a new test for content-neutral injunctions that restrict speech, holding that the injunctions must "burden no more speech than necessary to serve a significant government interest."¹² The new standard is more rigorous than the traditional time, place and manner test that still applies to content-neutral statutes and ordinances that restrict speech.¹³ The Court imposed heightened scrutiny for injunctions because injunctions carry a greater risk of censorship and discriminatory application than do statutes.¹⁴ Under its new test, the Court in *Madsen* upheld some portions of the disputed injunction and invalidated other provisions.¹⁵

The Second Circuit's decision in *Schenck*¹⁶ is the first Court of Appeals decision to evaluate an injunction under the *Madsen* test. In *Schenck*, the Second Circuit, sitting in banc, applied the *Madsen* test to uphold provisions in an injunction protecting access to abortion clinics in the Western District of New York. The injunction provided, inter alia, a fifteen-foot buffer zone around clinic entrances and driveways and a fifteen-foot bubble zone around persons and vehicles entering or leaving clinics (the "buffer/bubble zone"); it permitted two so-called "sidewalk counselors" to enter the fifteen-foot zones but required them to cease further communication when requested to do so (the "cease and desist" order). The Second Circuit's analysis is particularly important in light of the Supreme

For a discussion of case law analyzing the constitutionality of residential picketing ordinances, see *infra* text accompanying notes 81-85.

For a more detailed discussion of buffer zone and residential picketing laws, see generally NOW LEGAL DEFENSE AND EDUCATION FUND, DRAWING THE LINE: A HANDBOOK FOR CREATING COMMUNITY RESIDENTIAL PICKETING AND BUFFER ZONE LAWS (1996).

¹¹ 114 S. Ct. 2516 (1994).

¹² *Id.* at 2525.

¹³ See *infra* text accompanying notes 37, 49-52 for a discussion of the legal standards that apply to speech restrictions.

¹⁴ *Madsen*, 114 S. Ct. at 2524.

¹⁵ For a more detailed discussion of the Court's analysis in *Madsen* and a comparison to *Schenck*, see *infra* text accompanying notes 48-80.

¹⁶ 67 F.3d 377 (2d Cir. 1995) (in banc), *cert. granted*, 116 S. Ct. 1260 (1996). In the two years since it was decided, most of the cases citing *Madsen* have involved anti-abortion protest at reproductive health care facilities. The *Madsen* standard does apply, however, to any injunction that restricts speech, such as in a labor dispute.

Court's grant of certiorari to hear the case in its 1996-97 term. Significantly, the Court decided to review *Schenck* less than two years after its decision in *Madsen*. Because *Schenck* was the first court of appeals decision to apply the *Madsen* standard, the Court granted certiorari in the absence of any conflict among the circuits on the application of *Madsen*.

Part One of this Article describes the district court opinions in *Schenck*, which pre-date *Madsen*, and then discusses the *Madsen* opinion and its impact on the case law. Part Two then addresses the Second Circuit panel decision and in banc opinions in *Schenck*, which applied the *Madsen* standard. The in banc *Schenck* decision, with its five separate opinions, is the most thoroughly reasoned decision analyzing free speech in the abortion context since *Madsen*. The in banc opinions flesh out some of the issues left open in *Madsen* and also raise new concerns. Part Three analyzes two of these issues. First, we examine what sort of factual record is necessary to support an injunction. We propose that although a detailed factual record is necessary for a speech-restrictive injunction, the failure of a prior injunction should not be a prerequisite because such a requirement would unduly hamper the district judge's discretion to remedy violations of law. Second, we explore the captive audience doctrine as a further support for speech-restrictive injunctions where medical patients seeking to exercise a constitutionally protected right cannot practically escape unwanted harassing or obstructive conduct. This Article concludes that Judge Oakes's majority opinion best protects women seeking reproductive health care while preserving free expression rights.

I. LEGAL DEVELOPMENTS IN *PRO-CHOICE NETWORK V. SCHENCK*

A. *The District Court Temporary Restraining Order and Preliminary Injunction Decisions*

The *Schenck* case was brought in September 1990 by several plaintiffs: Pro-Choice Network of Western New York, a not-for-profit corporation aimed at maintaining safe and legal access to family planning and abortion services; and clinics and doctors located in western New York that offered family plan-

ning and gynecological services, including abortions. Plaintiffs sued Operation Rescue, Project Rescue Western New York and Project Life of Rochester, as well as fifty individuals, in order to enjoin a "blockade" of a reproductive health facility to take place four days later.¹⁷ District Judge Richard J. Arcara of the Western District of New York issued a temporary restraining order ("TRO") enjoining the defendants from "trespassing on, sitting in, blocking, impeding or obstructing access to"¹⁸ any reproductive health facility in the Western District of New York, "including demonstrating within 15 feet of any person seeking access to or leaving such facilities,"¹⁹ and from "physically abusing or tortiously harassing"²⁰ any patients or clinic workers at those facilities.²¹ The TRO exempted "sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people,"²² and also stated that once a person indicates that she does not wish to be counseled, the protestors must "cease and desist" from "counseling."²³ The defendants complied with the TRO by refraining from blockading, yet still demonstrated on the announced day. The court, with the defendants' consent, ordered that the TRO remain in effect until it decided the plaintiffs' motion to convert the TRO into a preliminary injunction.²⁴ During the one and a half years that the motion was pending, plaintiffs experienced repeated violations of the TRO²⁵ and filed motions for

¹⁷ The plaintiffs asserted one federal cause of action, conspiracy to infringe on the constitutional rights of women seeking abortion under 42 U.S.C. § 1985(3) (1984), and six state law claims: (1) violation of N.Y. CIV. RIGHTS LAW § 40-c (McKinney 1992) and N.Y. EXEC. LAW § 296 (McKinney 1993); (2) tortious interference with business; (3) trespass; (4) intentional infliction of emotional harm; (5) tortious harassment; and (6) false imprisonment. *Schenck*, 67 F.3d at 381-82.

¹⁸ *Pro-Choice Network v. Project Rescue*, Civ. 90 No. 1004A, ¶ 1(a) (W.D.N.Y. Sept. 27, 1990) [hereinafter *TRO*].

¹⁹ *Id.*

²⁰ *Id.* ¶ 1(b).

²¹ *Id.*

²² *Id.*

²³ *TRO*, ¶ 1(b). The TRO also enjoined the defendants from "making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee" and from "attempting, or inducing, encouraging, directing, aiding, or abetting" others to engage in prohibited conduct. *Id.*

²⁴ *Pro Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1423 (W.D.N.Y. 1992).

²⁵ Numerous witnesses testified to blocking, obstructing and harassment by anti-choice protestors that occurred despite the TRO. See Joint Appendix to Second

civil contempt against six individuals. After conducting trials on these contempt charges, the court found that all six individuals had violated the TRO.²⁶ The contempt violations included conduct such as blocking and obstructing clinic entrances, impeding cars and patients trying to enter the clinic and stalking patients as they approached the clinic.²⁷

On February 14, 1992, Judge Arcara granted the plaintiffs' motion and converted the TRO into a preliminary injunction.²⁸ In issuing the preliminary injunction, the court relied on a hearing held from March 6, 1991, to April 1, 1991, as well as hearings on five of the contempt motions held intermittently from February 1991 through January 1992. Because the defendants stipulated that the court could enjoin physical blockades, the district court's decision granting the preliminary injunction focused on "constructive blockades," which involved "demonstrating and picketing around the entrances of the clinics,"²⁹ and on "sidewalk counseling," which involved protestors approaching patients and attempting to dissuade them from having abortions.³⁰

In its order granting the injunction the district court made extensive findings of fact. It found that constructive blockades

Circuit In Banc Rehearing, 67 F.3d 377 (2d Cir. 1995) (in banc), *cert. granted*, 116 S. Ct. 1260 (1996) (the testimony of patient escorts Deborah Warnes, Elizabeth Sholes, health care counselor Susan Ward, and Marilyn Buckham, Executive Director of Women Services).

²⁶ See *Pro-Choice Network v. Project Rescue*, 828 F. Supp. 1018, 1028-29 (W.D.N.Y. 1993).

²⁷ *Id.*

²⁸ *Pro-Choice Network*, 799 F. Supp. 1417. The court issued the injunction pursuant to 42 U.S.C. § 1985(3) (1984) and two pendent state law claims under N.Y. CIV. RIGHTS LAW § 40-c (McKinney 1992) and trespass. The court declined to address whether the injunction should issue under Pro-Choice Network's four other state law claims. Due to the pendency of appeals, the district court has refrained from making the injunction permanent.

²⁹ *Pro-Choice Network*, 799 F. Supp. at 1424.

³⁰ *Id.* During the spring of 1992, after the court issued the preliminary injunction, hundreds of anti-abortion protestors converged on Buffalo to take part in the so-called "Spring of Life." *Pro-Choice Network*, 828 F. Supp. at 1029. The "Spring of Life" blockades shut down many clinics for days and led to hundreds of arrests. See, e.g., Michael Beebe, *Arrests Profiled*, BUFFALO NEWS, May 27, 1992, at B1; Robert J. McCarthy & Phil Fairbanks, *600 Demonstrate Outside Four Clinics*, BUFFALO NEWS, Apr. 21, 1992, at A1; Gene Warner, *71 Pro-Lifers Arrested at City Clinic*, BUFFALO NEWS, Apr. 24, 1992, at A1. The protests led to criminal contempt guilty pleas by five of the blockade leaders. *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992).

resulted in patients having to run a "gauntlet of harassment and intimidation, . . . [that] demonstrators frequently and routinely congregat[e] in or near the driveway entrances . . . [made] loud and disruptive noises . . . yell[ed] at patients, patient escorts and medical staff . . . [and] crowd[ed] around people trying to enter the facilities in an intimidating and obstructive manner."³¹ The court also found that "sidewalk counseling" "often erupt[ed] into a charged encounter . . . [and that t]he 'counselors' . . . turn[ed] to harassing, badgering, intimidating and yelling at the patients and patient escorts . . . [and] continue[d] to do so even after the patients signal[ed] their desire to be left alone."³² The court stated that the harassment and intimidation caused stress and sometimes physical injury to patients and staff.³³ The protestors' conduct sometimes so intimidated and confused patients that they could not enter the clinic, thereby suffering a delay in obtaining medical care. Even if the patients were able to survive the gauntlet, they "usually enter[ed] the medical facilities visibly shaken and severely distressed."³⁴ The district court found that "stress and anxiety can cause patients to: 1) have elevated blood pressure; 2) hyperventilate; 3) require sedation; or 4) require special counseling and attention before they [can] obtain health care."³⁵ Patients may become so agitated that they either are unable to undergo the scheduled medical procedure or cannot lie still in the operating room, thereby increasing the surgical risk.³⁶

Based on these facts, the district court issued an injunction that was similar, but not identical to, the TRO. The district court applied the then-controlling time, place and manner test for content neutral speech restrictions.³⁷ That standard is

³¹ *Pro-Choice Network*, 799 F. Supp. at 1424.

³² *Id.* at 1425.

³³ *Id.* at 1427.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Pro Choice Network*, 799 F. Supp. at 1427.

³⁷ *Id.* at 1433-37. For example, in upholding a municipal noise regulation under that test, the Supreme Court held that it was a reasonable time, place and manner restriction because it was content-neutral, was narrowly tailored to serve a significant governmental interest, and left open alternative channels for communication. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *reh'g denied*, 492 U.S. 937 (1989); *United States v. Grace*, 461 U.S. 171, 177 (1983).

considered to be an "intermediate" one, midway between the rational basis test applied to government regulation of nonspeech activities³⁸ and the strict scrutiny test applied to content-based regulations, which requires that a statute be necessary to serve a compelling state interest and narrowly drawn to achieve that end.³⁹ Applying the test, the court found that the injunction was constitutional under the time, place and manner test, because it was narrowly tailored to serve the significant governmental interests of safeguarding health, public safety and balancing the constitutional rights to abortion and free speech,⁴⁰ and because it left open ample alternative channels for communication.⁴¹

The injunction renewed the TRO's prohibition of trespassing on, sitting in, blocking, impeding or obstructing access at abortion clinics.⁴² It also renewed the TRO's prohibition of demonstrating within fifteen feet of persons seeking access to or leaving clinics (the "bubble zone"), modifying it to apply also to vehicles.⁴³ The preliminary injunction added a prohibition of demonstrating within fifteen feet of clinic entrances or drive-ways (the "buffer zone").⁴⁴ In addition, the injunction refined the TRO's ban on "physically abusing or tortiously harassing" by replacing it with a prohibition of "physically abusing, grabbing, touching, pushing, shoving, or crowding."⁴⁵ Finally, the preliminary injunction renewed the exemption for two "sidewalk counselors" to enter the fifteen-foot buffer/bubble zone and clarified that the "cease and desist" provision required protestors to withdraw fifteen feet once someone indicates a desire not to be "counseled."⁴⁶ Two defendants, Reverend Paul

³⁸ See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

³⁹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁴⁰ *Pro-Choice Network*, 799 F. Supp. at 1433.

⁴¹ *Id.* at 1437 (stating that defendants "can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by").

⁴² *Id.* at 1440.

⁴³ *Id.* The court settled on a distance of 15 feet based on the fact that 15 feet is less than two car lengths and provides a safe turning radius for cars. Transcript of Proceedings at 36, *Pro-Choice Network v. Project Rescue*, No. 90 Civ. 1004A (W.D.N.Y. Sept. 27, 1990).

⁴⁴ *Pro-Choice Network*, 799 F. Supp. at 1440.

⁴⁵ *Id.*

⁴⁶ *Id.* The injunction also refined the TRO's ban on excessive noise to prohibit the use of "any mechanical loudspeaker or sound amplification device or making any excessively loud sound," and renewed the TRO's aiding and abetting provision.

Schenck and Dwight Saunders, appealed Judge Arcara's decision granting the preliminary injunction to the Second Circuit.⁴⁷ They also are the respondents in the Supreme Court case.

B. *The Impact of the United States Supreme Court Decision in Madsen v. Women's Health Center, Inc.*

After the *Schenck* appeal was argued but before the Second Circuit issued its original panel decision, the U.S. Supreme Court decided *Madsen v. Women's Health Center, Inc.*,⁴⁸ which changed the constitutional standard for evaluating content-neutral injunctions that restrict speech. Previously, injunctions had been measured under the time, place and manner test used for content neutral speech restrictions. The new standard announced in *Madsen*—that an injunction “must not burden any more speech than necessary to serve a significant government interest”⁴⁹—is assertedly more rigorous than the time, place and manner test.⁵⁰ The difference in the wording of the test is slight. Both tests require a significant government interest. The time, place and manner test requires that the restriction be “narrowly tailored,” while the *Madsen* test requires that it “burden no more speech than necessary.”⁵¹ However the test is labelled, it is clear that under the *Madsen* injunction standard each provision must be justified by specific facts in the record.⁵²

Id. at 1440-41.

⁴⁷ That appeal was consolidated with another appeal filed by all defendants from the district court's decision refusing to vacate the preliminary injunction. *Pro-Choice Network v. Project Rescue*, 828 F. Supp. 1018 (W.D.N.Y. 1993).

⁴⁸ 114 S. Ct. 2516 (1994).

⁴⁹ *Id.* at 2524 (citing *Carey v. Brown*, 447 U.S. 455 (1980)).

⁵⁰ *See id.* (“standard time, place, and manner analysis is not sufficiently rigorous”).

⁵¹ Justice Scalia characterized the majority's new standard as “intermediate-intermediate scrutiny,” and complained that the difference between the time, place and manner test and the *Madsen* test “is frankly too subtle for me to describe.” *Id.* at 2537.

⁵² It is worth noting that recently the Court has been adopting “intermediate” tests that emphasize the importance of facts and are less outcome-determinative than previous tests. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (adopting “undue burden” test for abortion restrictions). Common to these tests is that the outcome is not determined by the test, as it historically has been with strict scrutiny, for example, which almost always invalidates a challenged restric-

Madsen was a challenge to an injunction prohibiting certain activities outside a Florida reproductive health services clinic and the residences of clinic staff. After anti-abortion protestors ignored an injunction restraining them from interfering with public access to the clinic, the court amended the injunction better to protect clinic access and ensure the safety of patients, potential patients and staff of the clinic. The Florida Supreme Court upheld the amended injunction in *Madsen* against the protestors' claims that it violated their First Amendment right to freedom of speech.⁵³ The U.S. Supreme Court then granted certiorari to resolve a conflict between the Florida Supreme Court's decision and a decision by the Eleventh Circuit Court of Appeals regarding a separate challenge to the same injunction.⁵⁴ The Supreme Court affirmed in part and reversed in part the Florida Court's decision.⁵⁵ Specifically, the Court first held that the injunction was content-neutral even though it applied only to the conduct of anti-abortion protestors.⁵⁶ The Court noted that the injunction regulated only anti-abortion protestors' behavior because only they had engaged in unlawful conduct.⁵⁷

The Court then enunciated its new test for evaluating the constitutionality of content-neutral injunctions, stating that injunctions "must burden no more speech than necessary to serve a significant government interest."⁵⁸ In deciding that a more rigorous test was appropriate for injunctions than the

tion. *But see* *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding content-based buffer zone around polling places under strict scrutiny).

⁵³ *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664 (Fla. 1993).

⁵⁴ *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).

⁵⁵ Chief Justice Rehnquist delivered the opinion in *Madsen* and was joined by Justices Blackmun, O'Connor, Souter and Ginsberg. Justice Stevens joined parts of the opinion and filed a separate opinion concurring in part and dissenting in part. Justice Stevens argued for a more lenient standard regarding First Amendment scrutiny of injunctions and would have upheld the Florida court's amended injunction. Justice Souter filed a separate concurring opinion. Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part. In the dissenting opinion, in which Justices Kennedy and Thomas joined, Justice Scalia argued that speech-restricting injunctions deserve the same strict level of scrutiny as is given to content-based statutes. Justice Scalia dissented from each part of the majority opinion that upheld provisions of the injunction.

⁵⁶ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524 (1994).

⁵⁷ *Id.*

⁵⁸ *Id.* at 2525.

time, place and manner test used for statutes, the Court elaborated on the difference between injunctions and statutes.⁶⁹ It noted that ordinances are enacted by the legislature for the "promotion of particular societal interests," while injunctions are "remedies imposed for violations (or threatened violations) of a legislative or judicial decree."⁶⁰ Because of this difference, injunctions "carry greater risks of censorship and discriminatory application . . ."⁶¹ However, the Court also observed that injunctions have an advantage over statutes "in that they can be tailored by a trial judge to afford more precise relief . . ."⁶²

In applying its new test, the Court stated that the injunction at issue satisfied five significant governmental interests: protecting women's freedom to seek medical services in connection with a pregnancy; ensuring public safety and order; facilitating the orderly flow of street traffic outside clinics; protecting property rights; and promoting medical privacy of patients in a clinic.⁶³ Subsequent courts interpreting *Madsen*, including the opinions in *Schenck*,⁶⁴ have relied on the same state

⁶⁹ *Id.* at 2524-25; see Amicus Curiae Brief of The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") (filed in support of neither party in *Madsen*) (discussing difference between general legislation and judge-created injunctions and presenting analysis later reflected in the *Madsen* decision), *Madsen* (No. 93-880).

⁶⁰ *Madsen*, 114 S. Ct. at 2524.

⁶¹ *Id.*

⁶² *Id.* In formulating its new standard, the *Madsen* Court took the middle road between Justice Stevens, who advocated for a more lenient standard for injunctions, and Justice Scalia, who argued for a strict scrutiny standard. Noting similar differences between injunctions and statutes as did the majority, Justice Stevens nonetheless concluded that injunctions should be subjected to a less rigorous standard than legislation. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part); see Amicus Curiae Brief of the NOW Legal Defense and Education Fund, *Madsen* (No. 93-880). Justice Stevens reasoned that because an injunction applies only to those who have engaged in illegal activity and, as a result, must prevent future recurrences of illegal activity, the injunction may be more restrictive of repeat violators than a law would be on the community at large. *Madsen*, 114 S. Ct. at 2531 (Stevens, J., concurring in part and dissenting in part). On the other end of the spectrum, Justice Scalia asserted that all speech-restricting injunctions should be subjected to strict scrutiny. *Id.* at 2538 (Scalia, J., concurring in part and dissenting in part). It is procedurally more difficult to challenge injunctions than statutes, and individual judges "chagrined by prior disobedience" may reach too far in restricting speech, Scalia reasoned. *Id.* at 2539 (Scalia, J., concurring in part and dissenting in part).

⁶³ *Madsen*, 114 S. Ct. at 2526.

⁶⁴ See *infra* text accompanying notes 97, 141. Subsequent to *Madsen*, some

interests, often emphasizing one or another.⁶⁵ Using its new test, the Court then looked to whether each aspect of the Florida injunction burdened more speech than necessary in accomplishing these interests. Two aspects of the *Madsen* injunction are particularly pertinent for *Schenck*: the thirty-six foot buffer zone, which the Court upheld in part, and the 300-foot "no-approach" zone, which the Court invalidated.⁶⁵ Although the

courts, including the Second Circuit in *Pro-Choice Network v. Schenck*, 67 F.3d 377, 389 (2d Cir. 1995) (in banc), *cert. granted*, 116 S. Ct. 1260 (1996), have described the Court in *Madsen* as having identified only three government interests. In doing so, those courts have collapsed three different interests into the one of "public safety." *See id.* at 387. *But see id.* at 398 (Jacobs, J., concurring) (the *Madsen* Court "invoked broader state interests in public safety and the right to travel"). This Article identifies five interests in the belief that the interests on which the *Madsen* Court relied in promoting the free flow of traffic and protecting property rights are related to, but distinct from, public safety.

⁶⁵ *See, e.g., National Org. for Women v. Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994) (injunction serves significant governmental interests "virtually identical to those in *Madsen*"); *United States v. Dinwiddie*, 885 F. Supp. 1286, 1295 (W.D. Mo. 1995) (failure to grant injunction would "jeopardize the lives and safety of persons receiving and engaging in reproductive health services"), *aff'd in part, remanded in part*, 76 F.3d 913 (8th Cir. 1996), *petition for cert. filed*, No. 96-5615 (U.S. Aug. 6, 1996); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402, 410 (Cal. 1995) (buffer zone necessary to protect patient safety and health as well as to protect access), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 6, 1995) (No. 95-576); *Feminist Women's Health Ctr. v. Blythe*, 39 Cal. Rptr. 2d 189, 199 (Cal. Ct. App. 1995) (buffer zone serves state interests of protecting property rights of clinic, health and safety of patients, and privacy rights of patients), *cert. denied*, 116 S. Ct. 514 (1995).

⁶⁶ The Court upheld the injunction's noise restrictions during surgical hours and invalidated a restriction against images observable inside the clinic. *Madsen*, 114 S. Ct. at 2528-29. The noise restriction prohibited singing, chanting, whistling, shouting, using bullhorns, auto horns or other sounds within earshot of patients inside the clinic during surgical hours. *Id.* at 2528. Patients and their families need a restful atmosphere, the Court stated, and medical facilities should not be forced to undertake extraordinary efforts to provide such an environment. *Id.* Noting that it previously had upheld similar noise restrictions in areas around schools, the Court held that the limited noise restrictions imposed by the injunction satisfied its new test and burdened no more speech than necessary to ensure the well-being of clinic patients. *Id.*

The Court invalidated the prohibition on images observable to patients inside the clinic, holding that such a "blanket ban" burdens more speech than necessary to protect clinic patients and their families. *Id.* at 2529. The Court reasoned that it is easier for clinics to close their curtains than it is for a patient to stop up her ears. *Id.*

Although the Court also struck down a provision that created a 300-foot protective zone around the residences of clinic staff, because the particular facts presented in *Madsen* did not justify the creation of the 300-foot zone, the Court upheld the right of courts generally to grant injunctions protecting the residences of

Court had not previously considered provisions like the "no approach" zone, it had upheld statutes mandating buffer zones.⁶⁷

The *Madsen* Court upheld the use of the thirty-six foot buffer zone only around areas of clinic property used for access to and from the facility and for automobile traffic, and struck down the zone around all other parts of clinic property.⁶⁸ The Court relied in part on a videotape showing anti-abortion activists impeding clinic access and blocking automobile traffic near the clinic driveway.⁶⁹ The Court also noted that the state court seemed to have "few other options" than to impose the buffer zone, that protestors could still be seen and heard from beyond the zone, and that the failure of earlier narrower injunctions without a buffer zone could be taken into consideration in adjudicating the constitutionality of the broader injunction at issue.⁷⁰ The Court concluded: "On balance, we hold that the thirty-six foot buffer zone around the clinic entrance and driveway burdens no more speech than necessary to accomplish the governmental interest at stake."⁷¹ The Court struck down the provision imposing a 300-foot "no approach" zone, which prohibited protestors within 300 feet of the clinic from approaching any person who was seeking clinic services unless that person indicated a desire to communicate.⁷² The Court reasoned that the provision burdened more speech than necessary because it prohibited all uninvited approaches, even peaceful ones.⁷³ The Court noted that "citizens must tolerate

those who provide reproductive health services. *Id.* at 2529-30. Reaffirming its decision in *Frisby v. Schultz*, 487 U.S. 474, 484 (1988), 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." *Madsen*, 114 S. Ct. at 2530.

⁶⁷ See, e.g., *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding 100-foot buffer zone around voting sites); *Boos v. Barry*, 485 U.S. 312 (1988) (upholding prohibition on three or more people congregating within 500 feet of foreign embassies); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding prohibition of picketing within 100 feet of courthouse).

⁶⁸ *Madsen*, 114 S. Ct. at 2530.

⁶⁹ *Id.* at 2527.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2530.

⁷³ *Madsen*, 114 S. Ct. at 2530.

insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.⁷⁴

Because *Madsen* was decided only two years ago, its impact on injunctions in general remains unclear.⁷⁵ It is clear, however, that the *Madsen* standard requires courts to undertake a careful examination of the facts supporting each injunction provision. For example, as discussed more fully below, the Court upheld the parts of the thirty-six foot buffer zone around the clinic's driveway and entrances, but struck down the zone where it reached to private property on the back and side of the clinic, because there had been no showing that "petitioners' activities on the private property ha[d] obstructed access to the clinic."⁷⁶ Thus far, the *Madsen* standard has not caused a large number of courts to strike down speech-restrictive injunctions around reproductive health care facilities that previously were justified under the time, place and manner test. When courts have reexamined pre-*Madsen* injunctions in light of the new standard, some have made minor modifications to the injunctions,⁷⁷ while others have found it unnecessary to alter

⁷⁴ *Id.* at 2529 (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)). Judge Winter's decision in the Second Circuit in banc rehearing of *Schenck* stands in tension with this statement in *Madsen*, in that Judge Winter advocates restricting speech targeted at certain locations that cannot easily be avoided. See *Pro-Choice Network v. Schenck*, 67 F.3d 377, 395 (2d Cir. 1995) (in banc), *cert. granted*, 116 S. Ct. 1260 (1996) (Winter, J., concurring in the result); *infra* text accompanying notes 123-137.

⁷⁵ Courts analyzing injunctions in other contexts have not engaged in an extensive analysis in applying *Madsen*. See, e.g., *In re Andrus*, 189 B.R. 413 (Bankr. N.D. Ill. 1995) (applying *Madsen* to speech restrictive injunction in bankruptcy discharge order); *People v. Acuna*, 40 Cal. Rptr. 2d 589 (Cal. Ct. App. 1995) (applying *Madsen* to injunction based on public nuisance law regulating gang activity); *Richardson v. City of Rutland*, No. C.N.A. 95-094, 1995 WL 672645, at *4 (Vt. Nov. 3, 1995) (applying *Madsen* to injunction in zoning context).

⁷⁶ *Madsen*, 114 S. Ct. at 2528.

⁷⁷ See, e.g., *National Org. for Women v. Operation Rescue*, 37 F.3d 646, 654-58 (D.C. Cir. 1994) (finding that all aspects of injunction pass muster under *Madsen*, except that the terms "inducing" and "encouraging" are too vague, and thus directing district court to replace them with the term "inciting"); *Women's Choice of Bergen County v. Doe*, No. A-5102-94T1, slip op. at 3-9 (N.J. Super. Ct. App. Div. Apr. 25, 1996) (finding that injunction's buffer zone complies with *Madsen* but modifying injunction in light of *Madsen* to allow two "sidewalk counselors" into the zone and requiring them to cease and desist when asked to do so, and to apply noise provision only to sounds interfering with the provision of medical services); *Lawson v. Murray*, 649 A.2d 1253 (N.J. 1994) (modifying residential picketing

the injunctions.⁷⁸ As discussed below, in finding that neither the fifteen-foot buffer/bubble zone nor the cease and desist provision burden more speech than necessary, the Second Circuit in banc decision in *Schenck*⁷⁹ falls into the latter category.⁸⁰

While *Madsen's* effect on injunction cases remains unsettled, it already has had a dramatic and perhaps unexpected effect on cases involving speech-restricting ordinances, particularly in the residential picketing context. For example, the Sixth and the Eighth Circuit Courts of Appeals relied on *Madsen* to strike down legislative prohibitions of residential picketing.⁸¹ Notwithstanding the fact that six years before *Madsen* the Supreme Court upheld a residential picketing ordi-

injunction in light of *Madsen* by reducing 300-foot buffer zone to 100 feet, restricting the number of picketers, frequency and duration of picketing, and requiring police notification), *cert. denied*, 115 S. Ct. 2264 (1995); *Horizon Health Ctr. v. Felicissimo*, 659 A.2d 1387, 1390-91 (N.J. Super. Ct. App. Div. 1995) (modifying injunction to allow four rather than two "sidewalk counselors," to allow two "sidewalk counselors" into 36-foot buffer zone, and adding cease and desist provision), *cert. denied*, 667 A.2d 191 (N.J. 1995).

⁷⁸ See, e.g., *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402, 408-12 (Cal. 1995) (buffer zone requiring anti-abortion protestors to conduct protests across the street, approximately 60 feet from clinic, passes muster under *Madsen*), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 6, 1995) (No. 95-576); *Feminist Women's Health Ctr. v. Blythe*, 39 Cal. Rptr. 2d 189, 201 (Cal. Ct. App.) ("speech free" zone, consisting of 20 feet on either side of clinic door, passes *Madsen* test), *cert. denied*, 116 S. Ct. 514 (1995).

⁷⁹ 67 F.3d 377 (2d Cir. 1995) (in banc), *cert. granted*, 116 S. Ct. 1260 (1996).

⁸⁰ Since *Madsen*, other courts also have upheld injunctions providing buffer zones around clinics. See, e.g., *Wisconsin v. Baumann*, 532 N.W.2d 144 (Wis. Ct. App. 1995) (upheld permanent injunction creating 25-foot buffer zone). In addition, other courts since *Madsen* have granted injunctions under FACE, creating buffer zones against only one or two defendants. See *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (upholding permanent injunction ordering Dinwiddie to stay 500 feet away from any facility that provides reproductive health services, with exception for legitimate personal activity), *petition for cert. filed*, No. 96-5616 (U.S. Aug. 6, 1996); *United States v. Lindgren*, 883 F. Supp. 1321 (S.D.N.D. 1995) (granting preliminary injunction ordering defendant, Brennan, to stay 100 feet away from the clinic, the clinic employees, and the employees' homes).

⁸¹ See *Kirkeby v. Furness*, 52 F.3d 772, 774-75 (8th Cir. 1995) (striking down prohibition of "targeted residential picketing" within 200 feet of residential dwellings in light of *Madsen*), *appeal after remand*, 92 F.3d 655 (8th Cir. 1996); *Vittitov v. City of Upper Arlington*, 43 F.3d 1100, 1104-07 (6th Cir.) (striking down city ordinance's ban on "picketing before or about" residences or dwellings on grounds that it was "inconsistent" with *Madsen*), *cert. denied*, 115 S. Ct. 2276 (1995).

nance in *Frisby v. Schultz*,⁸² the Sixth and Eighth Circuits found that, in striking down the injunction provision prohibiting picketing, demonstrating or using sound amplification within 300 feet of the clinic staff's residences,⁸³ *Madsen* changed the legal landscape on residential picketing.⁸⁴ Although the Eighth Circuit specifically acknowledged that "*Madsen* did not involve an ordinance, but an injunction, which the Supreme Court explicitly judged under a stricter standard,"⁸⁵ it nevertheless followed the Sixth Circuit in blurring the distinction between ordinances and injunctions in order to strike down the ordinance at issue. In a subsequent case, however, another panel of the Eighth Circuit Court of Appeals took a different approach from the panel in *Kirkeby*, and correctly applied the time, place and manner test to uphold a residential ordinance.⁸⁶ While some courts, including the Ninth Circuit Court of Appeals, have correctly refused to apply *Madsen* to ordinances,⁸⁷ other courts have erroneously applied *Madsen's*

⁸² 487 U.S. 474 (1988).

⁸³ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529-30 (1994).

⁸⁴ "*Madsen* . . . makes it clear that any linear extension beyond the area 'solely in front of a particular residence' is at best suspect, if not prohibited outright." *Vittitow*, 43 F.3d at 1105; see *Kirkeby*, 52 F.3d at 775 (*Vittitow* court's reading of *Madsen* was "not obviously wrong and, indeed, has much to recommend it"); cf. *Veneklase v. City of Fargo*, No. 95-1515, 116 U.S. App. LEXIS 3680, at *9-10 (8th Cir. Mar. 6, 1996). The Court in *Madsen* distinguished *Frisby* in two ways. First, it found the 300-foot zone at issue larger than the "zone" in *Frisby*, although rather than specifying a specific distance, the ordinance at issue in *Frisby* prohibited picketing "before or about the residence or dwelling of any individual." *Frisby*, 487 U.S. at 477. Second, the Court noted that, unlike the ordinance in *Frisby*, the provision at issue "would ban 'general marching through residential neighborhoods, or even walking a route in front of an entire block of houses.'" *Madsen*, 114 S. Ct. at 2529 (quoting *Frisby*, 487 U.S. at 483); see *Vittitow*, 43 F.3d at 1111 (Martin, J., dissenting) (criticizing *Madsen* for characterizing *Frisby* as providing a "zone").

⁸⁵ *Kirkeby*, 52 F.3d at 775.

⁸⁶ *Douglas v. Brownell*, 88 F.3d 1511, 1519-20 (8th Cir. 1996).

⁸⁷ See *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995) (rejecting argument that *Madsen* standard applies to buffer zone ordinance and correctly applying time, place, manner test to uphold challenged provisions), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 4, 1996) (No. 95-1415); *City of San Jose v. Superior Court of Santa Clara County*, 38 Cal. Rptr. 2d 205 (Cal. Ct. App. 1995) (recognizing that *Madsen* test does not apply to city ordinance prohibiting picketing within 300 feet of any residence), *cert. denied sub nom. Thompson v. City of San Jose*, 116 S. Ct. 340 (1995); *Conroy v. City of Pensacola*, No. 95-257-CA-01, slip opinion at 3-4 (Fla. Cir. Ct. Apr. 11, 1995) (refusing to enjoin eight-foot buffer zone because city ordinance is a valid time, place and manner restriction, and protestors

injunction test for ordinances, thus obscuring the previously clear test for ordinances. The Supreme Court may clarify this issue in *Schenck* or, if it decides to review the Ninth Circuit decision upholding an ordinance, in *Sabelko v. City of Phoenix*.⁸⁸

C. *The Original Second Circuit Panel Schenck Decision*

In September 1994, the Second Circuit issued a 2-1 panel decision in *Schenck*, upholding all aspects of the injunction except for the fifteen-foot buffer/bubble zone and the cease and desist order.⁸⁹ Rather than applying the time, place and manner standard used by the district court, the Second Circuit applied the new *Madsen* test, because *Madsen* had been decided in July 1994, after the *Schenck* appeal had been briefed and argued. In an opinion written by Judge Meskill and joined by Judge Altimari, the court determined that the fifteen-foot buffer zone around clinic entrances and driveways, the fifteen-foot bubble zone around people and vehicles and the "cease and desist" provision burdened more speech than necessary under the *Madsen* analysis.⁹⁰ The court upheld all of the other injunction provisions.⁹¹ Judge Oakes dissented in part, voting to uphold the entire injunction.⁹²

D. *The Second Circuit In Banc Schenck Decision*

The Second Circuit heard *Schenck* in banc, limiting consideration to the issues of the fifteen-foot buffer/bubble zone and the cease and desist provision, the same issues before the Supreme Court. On September 28, 1995, the Second Circuit held,

can still be seen and heard).

⁸⁸ 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 4, 1996) (No. 95-1415). A petition for certiorari is also pending in a case which upheld a state law that provided for a 100-foot buffer zone and an eight-foot bubble zone under the *Madsen* test. *Hill v. City of Lakewood*, No. 94CA0856, 1995 WL 411983 (Colo. Ct. App. July 13, 1995), *cert. denied*, No. 95SC593 (Colo. Feb. 26, 1996), *petition for cert. filed sub nom.* *Hill v. Colorado*, 64 U.S.L.W. 3808 (U.S. May 24, 1996) (No. 95-1905).

⁸⁹ *Pro-Choice Network v. Schenck*, 67 F.3d 359 (2d Cir. 1994).

⁹⁰ *Id.* at 371-72.

⁹¹ *Id.* at 374.

⁹² *Id.*

by a 13-2 vote, that those two provisions were constitutional under *Madsen*.⁹³ The decision consists of five separate opinions. Judge Oakes wrote the decision labeled the majority opinion, which was joined by eight other judges.⁹⁴ Judge Winter wrote a "concurring" opinion that garnered nine votes,⁹⁵ including six of the judges who joined the Oakes opinion.⁹⁶ Judge Jacobs, joined by Judge Mahoney, concurred separately; each also joined the Winter opinion. Judges Meskill and Altimari, who had comprised the panel majority striking down the provisions, each wrote a separate dissenting opinion.

1. Judge Oakes's Opinion

The Oakes opinion applied *Madsen* in a straightforward manner, finding state interests that were similar to those the Court found significant,⁹⁷ and analyzing the fifteen-foot buffer/bubble zone and the cease and desist provision in light of the Supreme Court's treatment of the thirty-six foot buffer zone and the 300-foot "no approach" zones in *Madsen*. Judge Oakes upheld the fifteen-foot buffer/bubble zone because he agreed with the district court that it was supported by the governmental interest in ensuring access to clinics as well as the safe performance of abortions.⁹⁸

In analyzing whether the buffer zone burdened more speech than necessary under the *Madsen* standard, Judge Oakes compared the *Schenck* buffer zone to the one upheld in *Madsen*, finding it to be both more and less restrictive. The *Madsen* zone was more restrictive than the buffer zone in

⁹³ *Pro-Choice Network v. Schenk*, 67 F.3d 377 (2d Cir. 1995) (in banc), cert. granted, 116 S. Ct. 1260 (1996).

⁹⁴ Judge Oakes's opinion was joined by Judges Newman, Kearse, Miner, Walker, Leval, Calabresi, Cabranes and Parker.

⁹⁵ Judge Winter's opinion was joined by Judges Newman, Kearse, Mahoney, McLaughlin, Jacobs, Walker, Leval, Calabresi and Cabranes.

⁹⁶ Even though Judge Oakes's opinion is the majority, it was in fact joined by one less judge than Judge Winter's concurring opinion. Judge Oakes's opinion is considered the majority opinion because it mustered a majority before Judge Winter's concurring opinion did so. See Letter from George Lange III, Clerk of the United States Court of Appeals for the Second Circuit, July 2, 1996. Rather than using the terms "majority" or "concurrence," we will refer to the opinions as the "Oakes" opinion and the "Winter" opinion, respectively.

⁹⁷ *Schenck*, 67 F.3d at 387.

⁹⁸ *Id.* at 389.

Schenck because it extended thirty-six feet and did not allow any protestors within it, while the *Schenck* zone was only fifteen feet and allowed for two sidewalk counselors to enter the zone.⁹⁹ The *Madsen* zone was otherwise less restrictive, however, because it did not move with the protestors, whereas the *Schenck* injunction provided for a fifteen-foot moving bubble zone protecting persons or vehicles approaching or leaving the clinic.¹⁰⁰ Judge Oakes concluded that the buffer/bubble zone in *Schenck* was justified by the factual record, analogizing it to the “arguably more restrictive buffer zone [imposed in *Madsen*] on the basis of a record comparable to that considered by the district court in this case.”¹⁰¹

Rejecting the argument made by the defendants and in Judge Meskill’s dissent that the buffer/bubble zone was not necessary because the interests served by it were already met through the provisions of the injunction banning obstruction, Judge Oakes emphasized the need to protect patients entering or leaving a medical facility. Judge Oakes stated: “[I]n crafting the injunction, the Court has been guided by the paramount need to maintain an atmosphere conducive to the health care functions of plaintiffs’ facilities.”¹⁰² Medical safety also justifies protecting those leaving the clinic who “may consequently be in a medically vulnerable state.”¹⁰³ Relying on the district court’s finding that “defendants’ noisy, disruptive, invasive, threatening and intimidating activities”¹⁰⁴ had severe medical repercussions, Judge Oakes found that the buffer zone was necessary to ensure “medical safety,”¹⁰⁵ because other provi-

⁹⁹ *Id.* at 388.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Judge Oakes did not find persuasive the “dissent’s recitation of distinctions between the record in the instant case and in *Madsen*.” *Id.* He also rejected the argument that the court could not impose a broader injunction because the protestors had “generally complied” with the TRO: “[N]othing in *Madsen* states, or even implies, that a TRO must fail before a broader injunction may be imposed.” *Id.* at 389. Rather, the failure of a prior injunction is one factor that a court may consider. *Id.*; see *infra* text accompany notes 168-178. Interestingly, Judge Oakes did not explicitly take note of the numerous post-TRO violations in *Schenck*, including the five contempts.

¹⁰² *Schenck*, 67 F.3d at 389 (quoting *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1433 (W.D.N.Y. 1992)).

¹⁰³ *Id.*

¹⁰⁴ *Pro-Choice Network*, 799 F. Supp. at 1434.

¹⁰⁵ *Id.*

sions in the injunction, such as the prohibitions against obstruction, were not sufficient to "maintain an atmosphere conducive to the health care functions of the plaintiff's facilities."¹⁰⁶

Like the Court in *Madsen*,¹⁰⁷ Judge Oakes considered the other ways that protestors could communicate. He noted that because the buffer/bubble zone was only fifteen feet wide, defendants could "still picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by,"¹⁰⁸ and within the zone the two sidewalk counselors could "engage in individualized, face-to-face communication with persons entering the clinics."¹⁰⁹ Judge Oakes concluded that the buffer/bubble zone provision "ensure[d] that the injunction does not hamper Project Rescue's message, only its intimidating method of demonstration."¹¹⁰ Thus, even though the district court had issued the provision before *Madsen*, Judge Oakes found that the zone did not burden more speech than necessary under the new standard.¹¹¹

In upholding the cease and desist provision, Judge Oakes compared it to the 300-foot "no approach" zone struck down in *Madsen*.¹¹² Judge Oakes found that the cease and desist was significantly less restrictive than the "categorical 'no-uninvited-approach'" zone in *Madsen*.¹¹³ Under the *Madsen* provision, even a patient who would like to hear the protestors' message would not be able to do so unless she affirmatively sought it out.¹¹⁴ In contrast, *Schenck's* cease and desist provision,

¹⁰⁶ *Id.*

¹⁰⁷ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2527 (1994). In *Madsen*, the Court noted that protestors would be only ten to twelve feet away from cars entering or leaving the clinic and that protestors "standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots." *Id.*

¹⁰⁸ *Pro-Choice Network v. Schenck*, 67 F.3d 359, 389 (2d Cir. 1994).

¹⁰⁹ *Id.* In dissent, Judge Meskill criticized Judge Oakes on the ground that consideration of alternative channels of communication "is not controlling" under *Madsen, id.* at 403, notwithstanding the fact that the *Madsen* Court stated that the protestors there could be seen and heard from beyond the buffer zone. *Madsen*, 114 S. Ct. at 2527.

¹¹⁰ *Schenck*, 67 F.3d at 389.

¹¹¹ *Id.* at 390.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

which Judge Oakes termed the "walk away" provision,¹¹⁵ is far more protective of speech because it allows protestors to approach patients and simply gives the patients the right to ask them to retreat.¹¹⁶ A protestor can continue to communicate from a distance of fifteen feet.¹¹⁷ A protestor also can approach the next person to attempt "counseling," hand out leaflets or otherwise communicate.¹¹⁸

Judge Oakes agreed with the district court that those entering the clinic are a "captive audience," similar to residents in a home targeted by picketing.¹¹⁹ Here, the fact that patients enter the clinic to obtain needed medical services creates a captive audience, as *Madsen* recognized.¹²⁰ The "walk-away" provision satisfies *Madsen* because it "provide[s] a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators."¹²¹ Thus, Judge Oakes concluded that the cease and desist order does not burden more speech than necessary and is constitutional under *Madsen*.¹²²

2. Judge Winter's Opinion

Judge Winter concurred in the judgment to uphold both the fifteen-foot buffer/bubble zone and the cease and desist provision. He wrote separately, however, in order to expand on a principle that he claimed Judge Oakes actually relied on without acknowledging it.¹²³ Judge Winter maintained that the First Amendment does not protect any "coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs."¹²⁴ According to Judge

¹¹⁵ *Schenck*, 67 F.3d at 391.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 390-91.

¹¹⁸ *Id.* at 391.

¹¹⁹ *Id.* at 392; see *Frisby v. Schultz*, 487 U.S. 474 (1988).

¹²⁰ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994) ("targeted picketing of a hospital or clinic threatens not only the psychological but the physical well-being of the patient held 'captive' by medical circumstance"); see *infra* notes 158-159 and accompanying text.

¹²¹ *Schenck*, 67 F.3d at 391-92; see Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?*, 67 NW. U. L. REV. 153 (1972).

¹²² *Schenck*, 67 F.3d at 392-93.

¹²³ *Id.* at 394.

¹²⁴ *Id.*

Winter, the First Amendment's "marketplace of ideas" must acknowledge the right of audience members to "be left free to make up their own minds":

[T]here is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot fairly be described as an attempt at peaceful persuasion The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.¹²⁵

Although he recognized that strong language, even epithets, must be tolerated in general, Judge Winter distinguished between speech directed at the general public and speech targeting individuals at "location[s] that they can avoid only at a cost."¹²⁶ Judge Winter clarified, however, that his limiting principle is not restricted to situations involving a public forum or a captive audience: "My point is that coercive or obstructionist conduct is not protected by the First Amendment in any forum and regardless of the nature of the audience."¹²⁷

Applying this principle, Judge Winter upheld the fifteen-foot buffer/bubble zone. He noted that here, the anti-abortion protests were not directed at the general public, but rather, at individuals who were clinic patients or staff and at locations where these individuals had to pass in order to go about their business.¹²⁸ Although he agreed with the dissent that the record in *Madsen* revealed a greater history of disruption than in *Schenck*,¹²⁹ Judge Winter did not consider that factor to be dispositive because his principle did not require an extensive record and because a "15-foot buffer zone is not a significant infringement upon speech."¹³⁰ Judge Winter also upheld the cease and desist provision, because the record reflected that some "sidewalk counselors" had "resorted to bullying,"¹³¹ and the provision simply required them to adhere to the modest fifteen-foot zone.¹³² Judge Winter also rejected the argument

¹²⁵ *Id.* at 396.

¹²⁶ *Id.*

¹²⁷ *Schenck*, 67 F.3d at 397.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 398.

¹³² *Schenck*, 67 F.3d at 398.

that the court could not impose a more specific zone or the cease and desist order because the protestors "generally (but not entirely)" complied with the TRO.¹³³

Judge Winter's articulation of the right of individuals to go about their business free from "coercive or obstructionist conduct that intimidates"¹³⁴ can be characterized as an additional state interest to those set forth in *Madsen*.¹³⁵ More precisely, however, it is a way to take certain conduct, with its expressive elements, outside of the First Amendment altogether.¹³⁶ Although Judge Winter acknowledged that the other interests identified in *Madsen* also are significant, he emphasized that his principle alone is sufficient for an injunction: "[C]oercion or obstruction does not gain First Amendment protection simply because no one is physically injured, traffic moves, and private property is not invaded."¹³⁷

3. Judge Jacobs's Opinion

Judge Jacobs wrote a separate concurring opinion because he believed that Judge Oakes's opinion framed the government interests "so narrowly . . . as to be message specific," applying only to "the regulation of anti-abortion protest."¹³⁸ In particular, Judge Jacobs took issue with describing the governmental interests "in terms of vulnerable and agitated patients,"¹³⁹ which may be too narrow and function to "squelch only one side of a single controversy."¹⁴⁰ Like the Supreme Court in *Madsen*, Judge Jacobs invoked the broader governmental interest in protecting public safety, traffic flow and property rights.¹⁴¹

¹³³ *Id.* at 398 n.1.

¹³⁴ *Id.* at 394.

¹³⁵ See *id.* at 396-97 (Winter, J., concurring) (in addition to "protecting targets of protest from coercive or obstructionist conduct . . . [the] state has other interests").

¹³⁶ See *id.* at 397 (Winter, J., concurring).

¹³⁷ *Schenck*, 67 F.3d at 397.

¹³⁸ *Id.* at 398.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 398-99; see *infra* text accompanying notes 138-139. Judge Jacobs mischaracterized Judge Oakes's opinion, which, in fact, did invoke other governmental interests.

Although the interests identified by Judge Oakes parallel the *Madsen* interests,¹⁴² Judge Jacobs characterized Judge Oakes's opinion as relying on only two government interests: protecting "vulnerable and agitated patients seeking a potentially dangerous medical procedure in the tranquil precincts of a clinic"; and "preserving abortion rights."¹⁴³ Judge Jacobs pointed out that the *Madsen* opinion also cited interests in public safety and the right to travel.¹⁴⁴ Judge Jacobs' criticism is misplaced. It is true that Judge Oakes elaborated on the need to protect medical safety,¹⁴⁵ as have other courts subsequent to *Madsen*.¹⁴⁶ A state interest in preserving tranquility for medical patients, however, is not message specific to anti-abortion protest but instead is a traditional reason for limiting expression, as exemplified by ordinances prohibiting noise around hospitals.¹⁴⁷

4. Judge Meskill's Opinion

Judges Meskill and Altimari, who comprised the majority in the original panel, each wrote dissents to the in banc opinion. Judge Meskill's fundamental disagreement with the Oakes opinion is that it "ignores" or "misstates" the record.¹⁴⁸ He

¹⁴² As noted above, Judge Oakes also identified and relied on state interests in "public safety" and "rights to travel." *Schenck*, 67 F.3d at 387.

¹⁴³ *Id.* at 398. Judge Jacobs opined that reliance on these interests was particularly tenuous in justifying the "floating bubble" of *Schenck*. *Id.* at 399.

¹⁴⁴ *Id.* at 398.

¹⁴⁵ *Id.* In *Madsen*, the Court did not engage in a lengthy discussion of any of the articulated state interests, but simply recited the interests relied on by the Florida Supreme Court and concluded that "the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994).

¹⁴⁶ *See, e.g.*, *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402, 410 (Cal. 1995) (buffer zone necessary to protect patients' safety and health as well as to protect access), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct 6, 1995) (No. 95-576); *Feminist Women's Health Ctr. v. Blythe*, 39 Cal. Rptr. 2d 189, 199 (Cal. Ct. App. 1995) ("face-to-face confrontation between the protestors and the patients or staff members increases the health risks to patients"), *cert. denied*, 116 S. Ct. 514 (1995); *Options v. Lawson*, 670 A.2d 1081, 1085 (N.J. Super. Ct. App. Div. 1996) ("courts may impose injunctive restrictions to protect health and patient safety in appropriate circumstances").

¹⁴⁷ *See, e.g.*, *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989) (upholding ordinance banning hand-held amplifier within 150 feet of medical facility).

¹⁴⁸ He made the same criticism of Judge Winter's opinion. *Schenck*, 67 F.3d at 400, 408.

criticized Judge Oakes for reciting the rigorous *Madsen* test without actually applying it and disagreed with Judge Oakes's deference to the district court because, pre-dating *Madsen*, it had applied the more lenient time, place and manner test.¹⁴⁹

Judge Meskill voted to strike down the fifteen-foot bubble/buffer zone because he considered the factual record here to be less persuasive than the record in *Madsen*, and thus not sufficient to justify the restrictions.¹⁵⁰ In addition, Judge Meskill found that the buffer/bubble zone provision duplicated other provisions in the injunction,¹⁵¹ and noted that the protestors had largely complied with the TRO.¹⁵² Finally, Judge Meskill asserted that alternative channels of communication are not dispositive under *Madsen*,¹⁵³ notwithstanding *Madsen's* statement that the protestors could be seen and heard outside of the zone.¹⁵⁴

Even though he acknowledged that the "no approach" provision was "more restrictive,"¹⁵⁵ Judge Meskill argued that *Madsen's* invalidation of the 300-foot "no approach" zone should govern the cease and desist provision.¹⁵⁶ Judge Meskill found both *Madsen's* "no approach" and *Schenck's* cease and desist provisions "problematic in that they conferred on potential counselees the right to control the ability of the sidewalk counselors to engage in otherwise protected expressive speech in a public forum."¹⁵⁷ Judge Meskill criticized Judge Oakes for applying the captive audience doctrine to uphold the cease and desist provision on the grounds that patients entering clinics are not truly "captive."¹⁵⁸ According to Judge Meskill, patients are not powerless to avoid sidewalk counseling because they can escape "simply by continuing to walk towards and entering the clinic."¹⁵⁹ Judge Meskill also

¹⁴⁹ *Id.* at 399-400.

¹⁵⁰ *Id.* at 400-01.

¹⁵¹ *Id.* at 401.

¹⁵² *Id.* at 402-03.

¹⁵³ *Schenck*, 67 F.3d at 403.

¹⁵⁴ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2527 (1994).

¹⁵⁵ *Schenck*, 67 F.3d at 404.

¹⁵⁶ *Id.* at 404-05.

¹⁵⁷ *Id.* at 405.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 406. Judge Meskill also refused to recognize *Madsen's* language about women "held captive by medical circumstance," *Madsen v. Women's Health Ctr.*,

argued that the cease and desist order was content- and view-point-based because it did not apply to patient escorts.¹⁶³

5. Judge Altimari's Opinion

Judge Altimari joined Judge Meskill's dissent, but also wrote separately.¹⁶¹ He was particularly troubled by the floating nature of the bubble zone¹⁶² and by the cease and desist provision.¹⁶³ He also disagreed with Judge Oakes's reliance on the captive audience doctrine, but differed from Judge Meskill in his analysis.¹⁶⁴ While Judge Altimari agreed that women seeking abortion "may be, in some sense of the word, 'captives,'"¹⁶⁵ he did not believe that the buffer/bubble zone and the cease and desist provision were necessary to protect such "captive" patients.¹⁶⁵

II. ISSUES CONFRONTED IN *SCHENCK* THAT WERE LEFT OPEN IN *MADSEN*

The various opinions in *Schenck* reflect some of the issues left open in *Madsen*, which have confronted other courts. Two issues addressed in *Schenck* that are particularly important subsequent to *Madsen* are: (1) what sort of factual record is necessary to support a speech-restrictive injunction; and (2) if and how the captive audience doctrine applies to patients at reproductive health care facilities.

Inc., 114 S. Ct. 2516, 2526 (1994), as supporting use of the captive audience doctrine here. *Schenck*, 67 F.3d at 406 n.5.

¹⁶³ *Schenck*, 67 F.3d at 407. Judge Meskill noted that the *Madsen* Court explicitly left open the question of whether the "no approach" zone was content-based. *Id.* at 407 n.7.

¹⁶¹ *Id.* at 409-11.

¹⁶² *Id.* at 410.

¹⁶³ *Id.* at 410-11.

¹⁶⁴ *Id.* at 411.

¹⁶⁵ *Schenck*, 67 F.3d at 411.

¹⁶⁵ *Id.*

A. *Necessary Factual Record to Support an Injunction that Restricts Free Speech*

One of the most vigorous disputes in *Schenck* and in other post-*Madsen* cases concerns how much evidence is needed to justify an injunction restricting speech. Specifically, courts and individual judges disagree on whether a pattern of violence needs to be established and whether an injunction that restricts speech can be entered only after a finding that a previous, less restrictive injunction has failed. The quantum of evidence is important because of fears, forcefully articulated by Justice Scalia in his *Madsen* dissent, that a speech-restrictive injunction can constitute a prior restraint.¹⁶⁷ In *Madsen*, the Supreme Court weighed in the balance the failure of a prior injunction, stating that it is a factor that "may be taken into consideration in evaluating the constitutionality of the broader order."¹⁶⁸ In *Schenck*, the Oakes opinion correctly does not consider the failure of a less restrictive injunction to be a re-

¹⁶⁷ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2541 (1994) (Scalia, J., dissenting). Justice Scalia's concerns are somewhat ameliorated by another decision issued by the Court the same day as *Madsen*. In *International Union, United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552, 2562 (1994), the Court articulated a new test for distinguishing between civil and criminal contempt of court, thus raising the standard of proof to proof beyond a reasonable doubt for certain contempt proceedings now considered criminal in nature. In that case, the Court held that proof beyond a reasonable doubt, determined through "disinterested fact-finding and even-handed adjudication," was required for the imposition of over \$52 million in contempt fines against a union for widespread violations of a complex labor injunction. In raising the standard for proving violations of certain injunctions, *Bagwell* indirectly addressed Justice Scalia's prior restraint concern. *Id.* at 2565 (Scalia, J., concurring) (discussing expansion of injunctive decrees in contemporary courts and concomitant need for criminal protections in adjudicating violations).

¹⁶⁸ 114 S. Ct. at 2527. Justices Stevens and Scalia debated this point in their concurring and dissenting opinions in *Madsen*. Justice Stevens opined that a speech-restricting injunction can include "more than 'a simple proscription against the precise conduct previously pursued'" because the trial judge must be able to prevent "recurrence of the violation and to eliminate its consequences." *Id.* at 2531 (citations omitted). Justice Scalia, on the other hand, argued that unless a pattern of violence has been established, a speech-restricting injunction constitutes an unconstitutional prior restraint. *Id.* at 2541-42. He reiterated his concern a year after *Madsen*, in a concurring opinion to a denial of certiorari in *Lawson v. Murray*, 115 S. Ct. 2264 (1995). In that case, because the injunction was granted even though there had not been any unlawful conduct, *Lawson v. Murray*, 649 A.2d 1253 (N.J. 1994), Justice Scalia concluded that it constituted an invalid prior restraint.

quirement, and points out that in issuing preliminary injunctions courts routinely rely on evidence of conduct that has ceased after the entry of a TRO.¹⁶⁹ Other courts since *Madsen* have also concluded that violating a prior injunction is not a prerequisite.¹⁷⁰ However, the dissenters in *Schenck* would make the failure of a prior, narrower injunction a precondition of a broader injunction.¹⁷¹

By not requiring a prior violation of a narrower injunction, Judge Oakes's opinion takes the best approach.¹⁷² Without some evidence of unlawful or tortious conduct, a speech-restricting injunction might constitute an invalid prior restraint.¹⁷³ But it would be unduly onerous to require the violation of a prior, less restrictive injunction, because "district courts routinely issue preliminary injunctions on the basis of activities which, following a TRO, have already ceased."¹⁷⁴ As Judge Oakes observed, it is often necessary for a court to rely on pre-TRO evidence because the entry of a TRO causes most defendants to refrain from prior unlawful conduct even though they may resume that conduct if the TRO is not converted into

¹⁶⁹ *Schenck*, 67 F.3d at 388; see *id.* at 398 n.1 (Winter, J., concurring).

¹⁷⁰ For example, in *Feminist Women's Health Ctr. v. Blythe*, the court similarly interpreted *Madsen*, concluding that "nothing in *Madsen* mandates that a less restrictive prior injunction is a necessary prerequisite. The failure of a less restrictive order is simply a factor which 'may' be considered." 39 Cal. Rptr. 2d 189, 200 (Cal. Ct. App. 1995), *cert. denied*, 116 S. Ct. 514 (1995). In that case the trial court established a "speech free zone" around a clinic despite the lack of unlawful conduct since the issuance of the temporary restraining order and preliminary injunction, noting that "[c]ompliance with a court order is not voluntary discontinuance of prohibited conduct." *Id.* at 195.

¹⁷¹ *Schenck*, 67 F.3d at 402 (Meskill, J., dissenting); *id.* at 410 (Altimari, J., dissenting). Complicating this dispute in *Schenck* are the differing views regarding the record there. See *infra* text accompanying notes 179-184.

¹⁷² Certainly, even though not required by *Madsen*, the post-TRO contempt findings, *Pro-Choice Network v. Project Rescue*, 828 F. Supp. 1018 (W.D.N.Y. 1993), and witness testimony of post-TRO violations, Joint Appendix to Second Circuit In Banc Rehearing, 67 F.3d 377 (2d Cir. 1995) (in banc), *cert. granted*, 116 S. Ct. 1260 (1996), demonstrate the prior violation of a narrower restriction in *Schenck*.

¹⁷³ In *Madsen*, the Court found that the injunction was not a prior restraint forbidden by *New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publications of the "Pentagon Papers"), because the protestors could communicate their message outside the buffer zone and because the injunction was issued because of "their prior unlawful conduct." *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524 n.2 (1994).

¹⁷⁴ *Schenck*, 67 F.3d at 388.

a preliminary injunction.¹⁷⁵ Therefore, failure of a prior injunction should not be elevated to a prerequisite. Such a prerequisite would unduly hamper the discretion of district court judges in fashioning effective injunctive relief.¹⁷⁶ Because an injunction is one step removed from a statute applicable to all and can only be ordered after a showing of a proven violation of law, it is an important tool in preserving the rule of law. Thus, the trial judge's "unique familiarity with the facts"¹⁷⁷ should be given deference. As stated in *Madsen*, contempt of a prior injunction is one factor that may be considered by the trial court,¹⁷⁸ in addition to evidence of unlawful conduct that occurred prior to the injunction.

In this dispute, Judges Oakes and Meskill presented starkly different interpretations of the record, and each accused the other of distorting the record.¹⁷⁹ Judge Meskill, in dissent, stated that the buffer zone failed the *Madsen* test because the "protestors generally obeyed the TRO,"¹⁸⁰ and the post-TRO findings of contempt are not sufficient to justify the buffer zone.¹⁸¹ Judge Meskill thus concluded that *Madsen*, which involved a "full-fledged blockade,"¹⁸² presented a much more extensive factual record. In contrast, Judge Oakes considered the facts that the plaintiffs had brought the case in order to enjoin a threatened blockade, that the blockade did not occur because of the TRO and that the district court had "described at great length the 'emotionally charged'" nature of the demonstrations.¹⁸³ Judge Oakes also stated that he found "unpersuasive the dissent's reminder that Project Rescue dem-

¹⁷⁵ *Id.*

¹⁷⁶ This result is in keeping with the *Madsen* majority's view that an advantage of injunctions over statutes is that "they can be tailored by a trial judge to afford more precise relief . . ." 114 S. Ct. at 2524.

¹⁷⁷ *Id.* at 2532 (Stevens, J., dissenting).

¹⁷⁸ *Id.* at 2527.

¹⁷⁹ See *Schenck*, 67 F.3d at 399-408 (Meskill, J., dissenting).

¹⁸⁰ *Id.* at 402.

¹⁸¹ *Id.* at 402-03. Judge Meskill also gave less weight to the five contempt findings, asserting that "only two of the five contempt violations stemmed from obstructionist behavior." *Id.* at 403.

¹⁸² *Id.* at 388. While Judge Winter did not believe that an extensive record was necessary for his principle to apply and thus for "an injunction requiring physical separation," he agreed that the record in *Madsen* was stronger. *Id.* at 396-97.

¹⁸³ *Id.*

onstrators generally complied with the TRO,¹⁸⁴ pointing out that "district courts routinely issue preliminary injunctions on the basis of activities which, following a TRO, have already ceased."¹⁸⁵ This dispute over the factual record is indicative of the importance of conducting a fact-intensive inquiry under *Madsen*.

B. Women Seeking Access to Abortion Clinics Are a Captive Audience

In *Madsen*, the Court noted in its discussion of governmental interests that patients seeking access to abortion clinics and hospitals were "held 'captive' by medical circumstance."¹⁸⁶ Although the Court in *Madsen* did not elaborate, its characterization of the patients as "captive," together with cases applying the captive audience doctrine, suggests that the doctrine provides an alternative ground for issuing the *Schenck* injunction. Indeed, both the district court and Judge Oakes relied on the captive audience doctrine to justify the cease and desist provision.¹⁸⁷ However, the doctrine supports the buffer/bubble zone as well as the cease and desist provision.¹⁸³

¹⁸⁴ *Schenck*, 67 F.3d at 388.

¹⁸⁵ *Id.*

¹⁸⁶ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994) (citing *Operation Rescue v. Womens Health Ctr., Inc.*, 626 So. 2d 664, 673 (Fla. 1993) (applying captive audience doctrine)); see *id.* at 2533 (Stevens, J., concurring in part, dissenting in part) ("the First Amendment protects the speaker's right to offer 'sidewalk counseling' to all passersby. That protection, however, does not encompass attempts to abuse an unreceptive or captive audience . . . especially one on her way to receive medical services"); *Lawson v. Murray*, 115 S. Ct. 2264, 2267-68 (1995) (Scalia, J., concurring in denial of writ of certiorari) (captive audience doctrine may provide alternative ground for injunction).

¹⁸⁷ *Schenck*, 67 F.3d at 392; *Pro-Choice Network Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1435 (1992). Although Judge Winter's concurrence might seem to be based on the captive audience doctrine, he noted that the doctrine only served to "inform" his analysis, as it applied "regardless of the nature of the audience." *Schenck*, 67 F.3d at 397.

¹⁸³ The Supreme Court has not clearly articulated whether the captive audience doctrine is an additional state interest or an exception to First Amendment principles. See generally Haiman, *supra* note 121; Anne D. Lederman, *Free Choice and the First Amendment or Would You Read This if I Held It in Your Face and Refused to Leave?*, 45 CASE W. RES. L. REV. 1287 (1995); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991); Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856 (1988).

The Supreme Court's captive audience cases attempt to balance the speaker's right to communicate against the listener's right to be left alone.¹⁸⁹ For example, in *Frisby v. Schultz*,¹⁹⁰ the Supreme Court upheld an ordinance that prohibited targeted residential picketing, noting that the abortion doctor targeted there "[wa]s figuratively, and perhaps literally, trapped within the home, and . . . [was] left with no ready means of avoiding the unwanted speech."¹⁹¹ Likewise, in *Rowan v. United States Post Office Department*,¹⁹² the Court upheld a federal statute that allowed the recipient of unwanted mail to give notice to the sender that the recipient wished to receive no further mailings, thus requiring the sender to refrain from sending future mailings to the recipient.¹⁹³

In balancing these competing rights, the Court's prior cases reveal that it applies the captive audience doctrine when: (1) a strong privacy interest is implicated;¹⁹⁴ (2) the target cannot practically avoid unwanted communication;¹⁹⁵ and (3) the restriction on speech is minimal.¹⁹⁶ Each of these factors compels the application of the captive audience doctrine in *Schenck*.

First, the privacy interest in *Schenck* is even stronger than the residential privacy interest recognized in *Frisby*. The need to protect patients about to undergo a medical procedure is paramount, regardless of what type of medical procedure is implicated. As the Supreme Court noted in *NLRB v. Baptist Hospital, Inc.*:¹⁹⁷

¹⁸⁹ *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

¹⁹⁰ 487 U.S. 474 (1988).

¹⁹¹ *Id.* at 487; see *Rowan*, 397 U.S. at 736 ("[T]he right of every person 'to be left alone' must be placed in the scales with the right of others to communicate.").

¹⁹² 397 U.S. 728 (1970).

¹⁹³ *Id.* ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere."); *id.* at 738.

¹⁹⁴ See, e.g., *Frisby*, 487 U.S. at 484 (residential privacy).

¹⁹⁵ See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (commuters ride the bus by necessity and thus are a captive audience); Haiman, *supra* note 121, at 182 (key is listener's ability "to remove himself physically from the situation in order to avoid the communication").

¹⁹⁶ See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). These three factors are derived from Strauss, *supra* note 188, at 116-21.

¹⁹⁷ 442 U.S. 773 (1979).

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.¹⁹³

Moreover, women seeking access to abortion clinics are not just seeking medical care; they are exercising their constitutionally-protected right to an abortion.¹⁹⁹ Like the householder in *Rowan*,²⁰⁰ women seeking access to abortion clinics and hospitals have a privacy interest in being free from the harassing, intimidating and threatening speech of "sidewalk counselors," while they exercise their right to an abortion.²⁰¹

The second captive audience factor also supports the speech restrictions in *Schenck* because women seeking access to hospitals and clinics have no practical means of avoiding unwanted communications. Although some argue that the doctrine can only apply in the home, physical presence in the home has not been the determinative factor in captive audience cases. Instead, the Court has focused on how difficult it is for an individual to turn away from a message. Thus, for example, in *Lehman v. City of Shaker Heights*, a plurality of the Court held that bus commuters are a captive audience and thus upheld a restriction on political advertisements placed throughout the interior of the bus.²⁰² Similarly, in *FCC v. Pacifica Foundation*, the Court relied on the captive audience doctrine to uphold a content-based ban of an afternoon radio broadcast of George Carlin's "Seven Dirty Words" comedy routine.²⁰³ Although courts and commentators often refer to *Pacifica* as a residential privacy case, the radio show was heard not in the home, but in the car while a father was driving with his young son.²⁰⁴ In *Erznoznik v. City of Jacksonville*²⁰⁵ and

¹⁸³ *Id.* at 783-84 n.12 (citation omitted).

¹⁹⁹ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁰⁰ *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 729 (1970).

²⁰¹ *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1425 (1992).

²⁰² *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); see *id.* at 307 (Douglas, J., concurring) (relying more extensively than plurality on captive audience doctrine).

²⁰³ 438 U.S. 726 (1978).

²⁰⁴ See *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) ("In his home or on the street [the unwilling listener] is practically helpless to escape this interference with

Cohen v. California,²⁰⁶ the Court ruled that the doctrine did not apply because any offended individual, as a practical matter, could turn away. In noting that patients entering an abortion clinic or hospital are "held 'captive' by medical circumstance,"²⁰⁷ *Madsen* also suggests that the captive audience doctrine applies outside the home.²⁰⁸

Indeed, it was much more difficult for patients and staff in *Schenck* to escape the defendants' verbal and physical harassment than it was for the bus commuters in *Lehman* who simply could turn away from the advertisement by reading a book or looking out the window, or the father in *Pacifica* who could turn off the car radio. Yet in both cases, the Court applied the captive audience doctrine notwithstanding the listeners' ability to avoid the speech. In *Schenck*, the audience was not able to avoid either the initial or subsequent communication both because they could not physically remove themselves unless they forewent needed medical care and because of the aural nature of the expression.²⁰⁹ It is easier to shut out visual

his privacy.") (emphasis added). That the home is not the touchstone for application of the doctrine is further illustrated by cases where the Court has rejected the captive audience doctrine inside the home. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (recipient of objectionable mailing may easily avert eyes and discard mail); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (same); *Strauss*, *supra* note 188, at 91.

²⁰⁶ 422 U.S. 205, 212 (1975) (striking down ban on drive-in movies containing nudity that are visible from the street because pedestrians can avert their eyes and thus are not a captive audience).

²⁰⁷ 403 U.S. 15, 21-22 (1971) (finding that persons in courthouse are not a captive audience because they can turn away from "Fuck the Draft" message on the back of a jacket).

²⁰⁸ *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994) (citing *Operation Rescue v. Womens Health Ctr., Inc.*, 626 So. 2d 664, 673 (Fla. 1993)).

²⁰⁹ In analogizing the patients' medical captivity to the residents' privacy in *Frisby*, the Florida Supreme Court in *Madsen* stated that the underlying reasons for the captive audience doctrine "apply with even greater force where the object of targeted picketing is the medical patient seeking treatment, rather than the home-dweller. While targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of the hospital or clinic threatens not only the psychological but the physical well-being of the patient held 'captive' by medical circumstance." *Operation Rescue*, 626 So. 2d at 673.

²⁰⁹ One commentator has pointed out that in both *Lehman* and *Pacifica*, the viewer and listener were not free to avoid the initial impact, but in both cases one was capable of shutting out, either physically or mentally, any communications beyond that. *Haiman*, *supra* note 121, at 178.

communication such as written words or silent vigils, but “[w]e cannot . . . shut out sounds so easily or quickly, and often cannot do so at all.”²¹⁰

The fact that the district court in *Schenck* explicitly found that defendants’ own conduct closed off any practical means of escape makes application of the captive audience doctrine to this case uniquely appropriate. Even when the patients signal their desire to be left alone, the “sidewalk counselors”

continue to follow right alongside them and persist in communicating their message. It is obvious, therefore, that women seeking access to plaintiffs’ facilities cannot, as a practical matter, escape defendants’ message. Defendants’ aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid receiving defendants’ message.²¹¹

In contrast, other cases where the Court has applied the doctrine have not included this additional factor. For example, the captivity of the bus passengers in *Lehman* was not caused by the candidate seeking to promote his political campaign on the bus.²¹²

Finally, the third captive audience factor also fully justifies the speech restrictions here. Both the fifteen-foot buffer/bubble zone and the cease and desist provision are minimal restrictions on speech that allow for ample alternative avenues for communication. Rather than muzzling all communication, the buffer and bubble zones merely keep the protestors a short fifteen feet away. Social science research establishes that an

²¹⁰ Haiman, *supra* note 121, at 183 (analyzing Justice Douglas’s dissent in *Public Utilities Comm’n v. Pollak*, 343 U.S. 451 (1952), and *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)).

²¹¹ *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1436 (1992); *see Pro-Choice Network v. Project Rescue*, 67 F.3d 377, 392 (1995) (relying on district court findings to conclude that women seeking access to the clinics are “captives”); *id.* at 411 (Altimari, J., dissenting) (“I do not dispute that people seeking access to clinics may be, in some sense of the word, ‘captives.’”). Judge Meskill ignored the extensive district court findings when he rejected the application of the captive audience doctrine. *Id.* at 405-06 (Meskill, J., dissenting). For example, the explicit district court findings directly contradict his assertion that patients “can escape the unwanted message simply by continuing to walk towards and entering the clinic.” *Id.* at 406 (Meskill, J., dissenting).

²¹² *See Haiman, supra* note 121, at 183 (“[T]here is a significant difference between communication which pursues its audience and that which, figuratively speaking, stands still, allowing its audience to exercise the right not to be spoken to by getting away from the source.”), 194.

eight to twelve-foot zone of personal space is necessary in order for strangers to feel comfortable communicating in public, and that violation of this zone can lead to anxiety, stress and physiological arousal.²¹³ The protestors still can chant, sing, pray, hold signs, handbills, leaflets and otherwise communicate their message from a distance of fifteen feet. The fifteen-foot zone is so small that a protestor can engage in any method of verbal and nonverbal communication with great efficacy. Indeed, at oral argument before the U.S. Supreme Court, petitioners' counsel identified only one activity—display of Biblical text—that would be ineffective from a distance of fifteen feet. Moreover, two “sidewalk counselors” can bring signs, leaflets and handbills into the fifteen-foot bubble zones. As the Second Circuit Court of Appeals correctly recognized, in allowing two “sidewalk counselors” to approach each patient, the cease and desist provision shields only unwilling listeners from speech.²¹⁴ In this sense, the cease and desist provision is more protective of speech than the restrictions upheld in *Lehman* and *Pacifica*, which restricted communications to willing as well as unwilling listeners. Thus, although the Supreme Court in *Schenck* need not reach the captive audience doctrine to uphold the disputed provisions, the doctrine provides further justification for a speech-restrictive injunction in the particular context of patients entering a medical facility to exercise a constitutional right.

²¹³ See, e.g., MARIANNE LAFRANCE & CLARA MAYO, MOVING BODIES: NONVERBAL COMMUNICATION IN SOCIAL RELATIONSHIPS 68-69, 83-91, 108-11 (1978); Edward T. Hall, *The Effects of Personal Space and Territory on Human Communication*, in NONVERBAL COMMUNICATION IN HUMAN INTERACTION 114-31 (Mark L. Knapp ed., 1978); Leslie A. Hayduk, *Personal Space: Where We Now Stand*, 94 PSYCHOL. BULL. 293 (1983); Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations*, 12 POPULATION & ENVIRON. 379 (1991). One study found that anti-abortion protestors' behavior increased patients' stress, but that clinic escorts provided an insulating buffer that moderated patients' distress. Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. SOC. & CLINICAL PSYCHOL. 404 (1994).

²¹⁴ *Pro-Choice Network*, 67 F.3d at 390-91; see *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) (“no one has a right to press even ‘good’ ideas on an unwilling recipient.”).

CONCLUSION

Court injunctions are an important tool in the ongoing struggle to safeguard access to abortion clinics. Minimal restrictions such as *Schenck's* fifteen-foot, fixed buffer zone and moving bubble zone, and the cease and desist order strike the appropriate balance between protecting access and free speech. They allow anti-choice protestors ample means of communicating their message while providing patients exercising their constitutionally protected right to abortion with safe access to medical facilities. Hopefully, the Supreme Court will recognize the wisdom of the Second Circuit's in banc ruling.

