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BAD NEWS, GOOD NEWS FOR THE FIRST AMENDMENT

By David F. Forte*

First, the bad news. In *Madsen v. Women's Health Center, Inc.*,[1] decided this year, Chief Justice William Rehnquist led a six member majority in affirming significant portions of a judicial injunction prohibiting anti-abortion protests on a public sidewalk in front of a Florida abortion clinic. "Court Upholds Buffer Zones Around Clinics; Abortion Foes Must Keep Distance," proclaimed the Associated Press. Judicial commentator Bruce Fein mourned that the Chief Justice "seemed to demote the free speech of pro-lifers to second-class status because the group has acquired a public reputation, whether deserved or not, for violence and physical harassment." A vigorous dissent by Justice Antonin Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, declared that the First Amendment was the victim of the majority's opinion. Justice Scalia argued that the injunction against speech and assembly on a public way was applied to one particular group simply because of its pro-life point of view.

Peeling away the layered elements of Chief Justice Rehnquist's opinion, however, reveals some good news, much more than might have been expected.

To begin with, the original injunction issued by the trial court was far more draconian than it became when the Supreme Court got through with it. The trial judge in Florida had issued a very broad injunction, based on the fact that Operation Rescue had continued to violate a earlier injunction that had prohibited it from impeding access to clinic entrances.

This second injunction, the one before Chief Justice Rehnquist, prohibited "picketing, patrolling, or demonstrating within 36 feet of the property line of the abortion clinic," even though this effectively forced demonstrators to retreat to the opposite side of the street from the clinic. It prohibited the use of bull horns or loud chanting while abortions were being performed, and forbade any sidewalk counselor from approaching a patient, even on the public way, within 300 feet of the clinic. It also forbade any signs or images that might be seen within the clinic or by persons entering the clinic, and set up a 300 foot bubble zone around the residences of clinic personnel. In short, it was an act of suppression of the pro-life point of view.

The Supreme Court was dealing with a judicial injunction purportedly designed to curb repetitive illegal conduct. Except where an injunction operates as a previous restraint on pure expression, reviewing courts have been lenient in recognizing the wide range of

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[1] 114 S.Ct 2516 (1994).

discretion a trial judge possesses in fashioning the terms of an injunction, particularly where illegal conduct has occurred. Wide-ranging injunctive relief in fashioning remedies for racial segregation, for example, are rarely modified or overturned by reviewing courts.

When the Florida Supreme Court reviewed the injunction in the *Madsen* case, they acted no differently from other courts that have evaluated such injunctions. The Florida court applied a traditional time, place, and manner test. The time, place and manner test has been customarily used whenever the state seeks to regulate expressive conduct, such as parades or demonstrations, on streets, sidewalks, or in public parks. That test states that the government can control expressive conduct in a public forum if "the restriction is content neutral, is narrowly tailored to serve a significant governmental interest and leaves open alternative channels of communication."

The time, place, and manner test, as interpreted by the Florida Supreme Court, did not leave the pro-lifers much room. The injunction was directed at conduct, not content, the court said. It protected the significant governmental interest of assuring access to lawful medical care, and Operation Rescue had ample means of alternative expression. They could always take their signs and their bodies across the street.

But the traditional time, place, and manner test was not enough for Chief Justice Rehnquist. Over the objections of Justice John Paul Stevens (who wanted virtually no scrutiny when it comes to injunctions), and the ridicule of Justice Scalia, the Chief Justice formulated a much stricter test: to be valid, an injunction that limits expressive conduct can "burden no more speech than is necessary to serve a significant government interest." It was a major departure from previous Court deference to injunctions. The new test is nearly a strict scrutiny test, a test that any challenged law or injunction would have great difficulty in overcoming.

As applied to the injunction, this is what the new, almost strict scrutiny test of Chief Justice Rehnquist did. It struck down the 36 foot buffer zone around the clinic property except near the clinic entrances and its driveway. But the Chief Justice strongly suggested that even this limited 36 foot zone was necessary only because Operation Rescue had violated the earlier restraining order that had prohibited them from blocking those entrances (an act that was against the law anyway), and that evidence was shown to prove that Operation Rescue's demonstrations did in fact continue to block entrances (an issue of fact that Justice Scalia contested).

The Chief Justice also upheld the noise restrictions since they were unduly intrusive into the clinic and its functions—a standard rule of noise suppression that the Court has always upheld in other circumstances. But the most significant parts of the opinion dealt with what was not allowed.

The Court struck down the prohibition on signs and images, saying that merely because a clinic customer found such images stressful or offensive was not enough to remove

the protesters' right of free speech. Taking offense is not enough under the Constitution to veto someone's First Amendment rights in a public forum. That principle is extraordinarily significant, for pro-choice advocates have long been seeking the suppress the actual content of pro-life protests simply because they might "distress" a woman who is about to end the life of her fetus.

Equally importantly, the Court voided the requirement that no sidewalk counselor could approach a clinic patient within 300 feet of the clinic. Anecdotal reports indicate that perhaps thousands of pregnancies have come to term and children born because of face to face conversations between sidewalk counselors and potential clinic customers. And, following the Supreme Court's precedents dealing with residential picketing, the Chief Justice also struck down the 300 foot bubble zone around the residences of clinic personnel, except for undue noise.

In a powerfully written dissent, Justice Scalia stated that this injunction suppressed the speech of peaceful pro-life demonstrators within the 36 foot bubble zone merely because they supported the ideological position of Operation Rescue, but not its methods. Unlike other free speech cases where the Court carefully reviews the facts to assure there has been no suppression of a particular point of view, here, Justice Scalia argued, such a review was cursory. Scalia also had little patience for the time, place and manner test, but he wanted a full fledged strict scrutiny test to be applied, not the quasi-strict scrutiny test that the Chief Justice applied. Scalia pointed out that injunctions were far more susceptible of abuse than general statutes. The judge is focussing on a singly group and its actions, and he is emotionally involved in a case where that group has questioned his authority. Such self-interested actions should have little deference accorded them.

Chief Justice Rehnquist impatiently answered Scalia by suggesting that the evidence of bias by the trial judge against the pro-life position was incomplete and did not necessarily tell the whole story. Significantly, Justice David Souter, who joined the Chief Justice in the majority, went out of his way to say that he was satisfied that the trial judge was not discriminating against peaceful pro-lifers merely because of their viewpoint. Souter strongly implied that he would strike down any injunction that singled out persons because of their viewpoints and not because of their illegal conduct.

Scalia's points remain telling. He was also penetrating in observing that whenever the Supreme Court confronts an issue having to do with abortion, its normal judicial synapses seem to go awry. Yet, even though Chief Justice Rehnquist did not go as far as Scalia urged, when all is said and done, the protections for pro-life demonstrators subject to injunctions are far greater than they were before the decision.

Since *Madsen* was decided, lower courts have taken Chief Justice Rehnquist's message to heart.

In San Jose, abortion rights partisans, thinking that the Florida injunction was going to be upheld, passed an ordinance that barred protestors from approaching within 300 feet of a doctor's house and 36 feet from abortion clinics. They apparently did not realize that such ordinances are subject to even greater scrutiny than injunctions. In any event, a county judge had no trouble in striking down both parts of the ordinance as unconstitutional, basing his decision on the Chief Justice's reasoning in Madsen.[2]

Pro-choice activists got a greater shock in September. The United States Court of Appeals for the Second Circuit threw out major parts of an injunction that limited abortion protests around clinics in Buffalo.[3] One may recall that Buffalo was one of the most contentious sites where Operation Rescue was active, and a site where it might be thought that injunctions would have the best chance of being approved. But the appeals court, by a 2-1 margin, struck down a 15 foot bubble zone, on the grounds that Operation Rescue had shown compliance with an earlier temporary restraining order that forbade blocking clinic entrances. The group had actually demonstrated legally and peacefully following the restraining order and the Court of Appeals concluded that any further restriction was unnecessary to protect the government's significant interests. The injunction had also contained a cease and desist order whereby up to two sidewalk counselors could approach a clinic patient, but had to stop talking to the patient if she in any way indicated she did not want to continue the conversation. The appeals court struck that restriction down on the same ground as in *Madsen*. Free speech in a public forum cannot be vetoed by those who merely find the message offensive. Other elements of the injunction were upheld, including noise suppression, forbidding any person from crowding or touching, and requiring Operation Rescue to instruct its followers to obey the injunction. But the central free speech rights of pro-lifers remained intact.

The mixed legacy of *Madsen* and other cases dealing with abortion and the First Amendment is now becoming clear.

With the passage of the Freedom of Access to Clinic Entrances Act (F.A.C.E.),and the Supreme Court's decision in *NOW v. Scheidler*,[4] pro-life activists who engage in civil disobedience will suffer far greater legal disabilities than have been placed upon other protest movements in American history. But following *Madsen*, pro-life demonstrators can now take advantage of protections not previously articulated by the Court. So long as they

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[2] Mark Walsh, Judge Tosses Out San Jose Buffer Zone for Picketers, The Recorder, August 5, 1994, available on LEXIS, Legnew Library, Curnws File.

[3] *Pro-choice Network of Western New York v. Rev. Paul Schenk*, 1994 U.S. App. LEXIS 24244 (2d Cir. 1994).

[4] 114 S. Ct. 798 (1994).

do not engage in repetitive illegalities, pro-life demonstrators can count on strong First Amendment guarantees.

Absent harassment, sidewalk counselors cannot be restrained from approaching or speaking to clinic clients. Signs, even those that show graphic descriptions of aborted fetuses, cannot be suppressed merely because they may offend. So long as pedestrians can pass along the public sidewalk, pro-life picketers do not even have to march. They can stand wherever they want to. Finally, should clinic "defenders" themselves act to harass and intimidate the peaceful and legal enjoyment of First Amendment rights by pro-life demonstrators, their actions too could possibly be restrained by a court injunction.