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HEADLINE: A split on abortion protests

BYLINE: By James L. Franklin, Globe Staff

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BODY:

Protests intended to make this stronghold of the civil rights movement "the first abortion-free city in America" have resulted in more than 1,200 arrests but left many religious and civil rights leaders skeptical about the strategy and tactics of the antiabortion demonstrators.

Known as Operation Rescue, this militant antiabortion movement continues to expand. In the Boston area, Operation Rescue has planned protests for tomorrow and again for Oct. 29, as part of a coordinated 30-city effort.

In Boston, Cardinal Bernard F. Law issued a statement for publication today saying the archdiocese was not a participant in the protests and asking that both the protests and police response be peaceful and nonviolent.

The protests first targeted Atlanta this summer because it was the site of the Democratic National Convention. When the Democratic delegates went home with their prochoice platform, the antiabortion protests continued, seeking support among the city's 2,800 churches.

Led by a handful of young evangelical Protestants, Operation Rescue sought to halt abortions by the methods of direct, nonviolent protest, expecting to be welcomed because of the strong civil rights tradition of Atlanta.

"Christians wanted to keep arguing about the right to life, but in the meantime 25 million babies have been killed," said Rev. Joseph I. Foreman, regional coordinator for Operation Rescue and a minister of the Presbyterian Church in America from Philadelphia.

"We've stopped arguing about the value of life and started acting as if the unborn child has value," said Foreman in an interview in the group's unmarked offices in a modern office complex in suburban Marietta.

"The advocates of the religion of self-centeredness are in trouble," he said. "If they want to stop killing and go back to arguing, we'll leave them alone, but as long as they practice their religion, we will practice ours, which demands saving babies and their mothers."

Foreman said the group anticipated more initial support but instead the city government responded by enacting a tough antitrespassing ordinance, with \$ 500 fines, and ordering the police to get tough with demonstrators.

The tenacity of demonstrators, many of them outsiders, has attracted support, Foreman said. "A spiritual revival is going on. The jails are becoming the training ground for the prolife movement. It will be the end of the killers in America."

But questions were raised even among the city's more conservative pastors.

At giant First Baptist Church, which covers a full city block in downtown Atlanta and numbers 11,000 members, Rev. Charles Stanley issued a statement declaring that Operation Rescue was biblically unfounded.

"The law being broken . . . has nothing whatsoever to do with abortion," said the former president of the Southern Baptist Convention, the nation's largest Protestant body.

Roe v. Wade, the principal Supreme Court ruling on abortion, "neither requires abortions nor prohibits them, but makes them permissible with certain restrictions," said Stanley in a statement issued in the name of the pastors and deacons of First Baptist, a leading church in the most conservative, fundamentalist wing of their denomination.

"The women who choose to have an abortion are free moral agents responsible before Almighty God for their actions, including the exercise of the rights of their innocent, unborn child," the statement declared.

And in a judgment with much influence in the Atlanta church world, Stanley objected that the protests could lead to "anarchy and chaos" that could damage freedom to worship and "become counterproductive to the cause of Christ."

The brash, aggressive tactics of the demonstrators offended some church leaders. Bishop Earl Paulk, pastor of the 10,000-member Chapel Hill Harvester Church, said Operation Rescue came to Atlanta "with their own agenda and not one word was said to religious leaders here.

"After they came, they wanted to put us on a guilt trip, but I for one will not be forced by their accusations," said Bishop Paulk, whose church is second largest in the Atlanta area, after First Baptist of Atlanta.

The strategy of the protests violates the mission of the church, he said. "We have to minister to people who are caught in the dilemmas of life . . . I do not see the role of the church as taking to the street issues that ought to be dealt with in the pulpit."

The Catholic Archdiocese of Atlanta has supported the goals of the protest but has withheld an endorsement.

In a statement issued late last month, Archbishop Eugene A. Marino called the protests "a courageous response to injustice.

"Individuals committed to the defense of human life have every right to express their revulsion at the unrestricted slaughter of innocent children throughout our nation," Archbishop Marino said.

But he cautioned that protesters must express their outrage "only in the most loving and gentle manner, remaining scrupulously nonviolent in every way - physically, verbally and emotionally."

Because a large number of the outside protesters were Catholics, some observers see an undercurrent of anti-Catholicism in the reaction.

"We have no direct evidence of any anti-Catholicism," said Rev. Peter Dora, director of communications for the Atlanta Archdiocese, which has had four of its priests arrested in the protests. "But this is the South and the possibility always hovers in the background."

The protests also divide civil rights leaders. Hosea Williams, one of the many former associates of the late Dr. Martin Luther King Jr., to hold city office here, says: "I don't see any difference between the abortion protests and the civil rights movement."

"I have not seen a resort to violence - I have seen a resort to civil disobedience," said Williams, a city councilor and a critic of Mayor Andrew Young's handling of the protests.

"In the place where Martin Luther King Jr. was born, I don't believe what we have been doing: twisting arms, bending fingers, using pressure points behind ears - that's the way Hitler got started," said Williams.

Those aggressive police tactics upset some local leaders. Rev. Joseph E. Lowery, president of the Southern Christian Leadership Conference, said he urged the police commissioner to curb the tough tactics used in early October.

But Lowery, a United Methodist minister, says Operation Rescue can not be equated with the civil rights movement.

"There are sharp distinctions," he said. "They have not always been nonviolent, while we inflicted no harm on person or property."

Civil rights leaders are also skeptical about the protests' exclusive focus on abortion, Lowery said. "We're concerned about sacredness of life after it gets here. As far as we know, their concern is confined to prenatal."

 The words in this tract are
 from a woman who was 18 and
 pregnant once. "A woman who
 was scared, like you are, and
 chose abortion. After nine
 years I know what the right
 choice was, and is, and I
 just want you to know what
 they didn't tell me..."

What They Didn't Tell Me

Contrary to the belief that abortion is as simple as removing a wart, it is actually a very serious procedure that can have very serious results. The clinic personnel will lead you to believe that complications rarely arise, but that is not the case. Many women have been damaged for life as a result of their legal abortion.

2. ABORTION LEAVES EMOTIONAL SCARS

Most often a woman will feel the consequences of her decision within days of her abortion. If they don't appear immediately they will appear as she gets older. Emotional scars include unexplained depression, a loss of the ability to get closer to others, repressed emotions, a hardening of the spirit, thwarted maternal instincts (which may lead to child abuse or neglect later in life), intense feelings of guilt, and thoughts of suicide. * Don't be fooled - every abortion leaves emotional scars.

3. ABORTION KILLS A BABY

Before you even know you are pregnant, your baby's heart begins to beat. At six weeks brain waves are measurable and your baby moves and responds to touch. At eight weeks she is perfectly developed, with fingers and toes, even her own set of fingerprints. By ten weeks she can squint, swallow, and suck her thumb. All she needs to become

a healthy newborn is time and nourishment. What would you name her? Rebecca? Stephanie?

4. ABORTION IS VIOLENT

The most common method of abortif used in early pregnancy is suction aspiration. The cervix is forced open. A vacuum device 29 times more powerful than a home vacuum cleaner is used to suction out the "content of the uterus."**

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5. ABORTION EXPLOITS WOMEN

The counselors at an abortion clinic will use obscure terms such as "product of conception", "content of the uterus", and "fetal tissue" to refer to your baby. They will rarely advise you to carry your baby to term because they are operating for profit and they don't want to lose your business. Essentially the are making money off of your problem. The abortionist can make more money in 30 minutes doing an abortion than a regular physician will caring for a woman through a 9-month pregnancy. Are you going to be the poor girl who finances his next trip to Europe?

** Handbook on Abortion, Dr. & Mrs. J.C. Wilke.

* "Before You Make the Decision"- Women Exploited by Abortion

For CONFIDENTIAL help when pregnant,
call Pregnancy Help in Brighton:

- Free pregnancy testing
- Counseling suited to your needs
- Arrangements for medical attention
- Assistance with housing

Pregnancy Help

159 Washington St.
Brighton, MA Tel. 782-5151

In other localities call Birthright:

Attleboro: 226-2220

Beverly: 922-6441

Boston: 227-4822

Concord: 369-2624

Fall River: 675-1561

Framingham: 620-0657

Gloucester: 281-4199

Lowell: 454-9749

New Bedford: 996-6744

Norwood: 769-3627

Quincy: 822-2921

Hudson: 568-1955

In Worcester call Problem Pregnancy:

332 Main St., Worcester

755-4130

**24 HOUR
PREGNANCY
HOT LINE:**

436-3944

Physical effects.

- Sterility
- Miscarriages
- Ectopic pregnancies
- Stillbirths
- Menstrual disturbances
- Bleeding
- Infections
- Shock
- Coma
- Perforated uterus
- Peritonitis
- Passing blood clots
- Fever/cold sweats
- Intense pain
- Loss of other organs

"My doctor didn't tell me about
the possible profuse bleeding and
infection that lasted for weeks.
And he never said anything about
the possibility of the hysterectomy
I had to have eight months later."

- Crying/sighing
- Insomnia
- Loss of appetite
- Weight loss
- Exhaustion
- Nervousness
- Decreased work capacity
- Vomiting
- Gastro-intestinal disturbances
- Frigidity

Women Exploited By Abortion

Psychological effects.

- Guilt
- Suicidal impulses
- Sense of loss
- Unfulfillment
- Mourning
- Regret and remorse
- Withdrawal
- Loss of confidence in decision making capability
- Lower self esteem
- Preoccupation with death
- Hostility
- Self destructive behavior
- Anger/rage
- Despair
- Helplessness
- Desire to remember death date
- Preoccupation with "would be" due date or birth month

"No one ever told me
I would live with this decision
for the rest of my life.
It's been several years,
but my grief continues."

- Intent interest in babies
- Thwarted maternal instincts
- Hatred for anyone connected with abortion
- Desire to end relationship with partner
- Loss of interest in sex
- Inability to forgive self
- Feeling of dehumanization
- Nightmares
- Seizures/tremors
- Frustration
- Feelings of being exploited
- Child abuse

SPECIAL ALERT

TO: Friends of Choice

DATE: October 1988

FROM: Nicki Nichols Gamble, Executive Director *mg*
Planned Parenthood League of Massachusetts

RE: "Operation Rescue"

A militant antiabortion group calling itself "Operation Rescue" has announced its plans to come to Boston on October 22 and 29. Its members openly assert their intention to disrupt and close down clinics that provide abortion services. They claim that their mandate, which comes from God, permits them to override any civil authority or individual belief.

Their mode of operation is to harass patients coming to clinics and block their entry by lying down in front of the doors. They state that they will do anything short of actual physical violence to prevent women from exercising their constitutional right to an abortion.

Nevertheless, by assaulting women verbally and preventing them from entering a building, they are guilty of both physical and psychological violence against people who are behaving in an absolutely lawful manner. This fundamentalist crusade has already led to anti-clinic actions in Atlanta, New York, Philadelphia, and numerous other communities around the country.

The members of Operation Rescue quote scripture to lend legitimacy to their illegal behavior. Planned Parenthood cites the law of the United States to remind all Americans that women have a constitutionally protected right to make private, personal decisions about bearing children.

When "Operation Rescue" comes to Boston, our first responsibility will be to provide our patients with the health care they want and need in a safe and secure environment. We will use all legal means to do so.

PPLM is coordinating a coalition of abortion providers and advocates in these actions:

- seeking an injunction to limit the scope of the demonstrations,
- developing security protocols for our clinics,
- negotiating with the police about the need for increased protection for staff and patients,
- educating the media about this unlawful attempt to interfere with women's access to medical care,
- planning a "Stand Up for Choice" line of supporters to meet at our clinics on October 29 to send a clear message to patients and the public that we will not be intimidated or closed down.

Operation Rescue has declared war on the concept of a pluralistic society in which people respect the beliefs of others. As friends of choice we do not tell our opponents what decisions to make in their reproductive lives. We demand the same respect from them and will not tolerate their attempts to deprive women of their right to choose.

Orchestrating an effective response to Operation Rescue strains our limited financial resources. **Please help us "Stand Up For Choice" by giving generously to combat this invasion of personal and medical privacy.** Your contribution will help us keep our clinics open and enable our patients to obtain the services they need--services guaranteed by the Constitution of the United States.

We Won't Go Back—Defend the Right to Abortion! No Forced Sterilization!

Anti-abortionists calling themselves "Operation Rescue" are continuing their campaign to shut down abortion facilities and rally people behind attacks on the right to abortion. They have targetted Boston for Oct. 22 & 29 and proclaimed the 29th a "National Day of Rescue that could mark the beginning of the end of legalized abortion in America."

The anti-abortion movement is led and encouraged from the highest offices of government to be shock troops in a reactionary offensive against women. "Defense of the family" (shoving women back into the home) has emerged as a key rallying cry and organizing center for patriotic traditionalism and the fight against abortion is integrally bound up with the enforcement of these values. This movement is not just one of right-wing fanatics that can be ignored but has served as a training ground for proto-fascist activity against the masses of people: blacklists and smear campaigns against women who speak out in favor of abortion and doctors who perform them, firebombings of clinics and other terror aimed at the women's health movement. Their own leaders call Operation Rescue "the green berets of the pro-life movement."

Other recent attacks on the right to abortion further underscore the political urgency of taking on campaigns like "Operation Rescue." There have been many state legislative measures aimed against abortion including attempts to ban all abortions except in cases where the life of the woman is in danger. On the federal level efforts continue to end funding for any health facility that even mentions the word abortion in its counseling. Several well-publicized legal efforts by men to prevent women from getting abortions have served to promote the reactionary line that women (and children) are just another piece of private property over which men must assert their "rights."

History shows that an effective means of enforcing the social subjugation of women is by controlling women's sexuality and reproduction. Forced reproduction is often the preferred method against women of the dominant race while sterilization is often used as method of genocide against women of the oppressed nations. But this division is not an absolute. Abortion has only been legal in the US since 1973 and since the passing of the Hyde Amendment in 1977, which cut off Medicaid funding for abortion, many poor women, especially Black women and women of oppressed nationalities have effectively been denied the choice of abortion. Forced reproduction is a shackle on all women preventing their full participation in society. It must be stated that as long as the process of human reproduction is rooted in individual women the overall physical and social well-being of women must take precedence over any subordinate processes such as reproduction.

The abortion issue is one of the fault-lines over which American society has been and is likely to be even more polarized. There is a sharp "us versus them" edge to this battle. The anti-abortion movement is an important foundation for the overall program of conservatism and patriotism in pre-war America. Well-publicized campaigns like "Operation Rescue" are part and parcel of an offensive being waged by the rulers of this country to secure the homefront and prepare for war. A fight for public opinion is being waged and we cannot let it be one-sided. Defeating the plans of the anti-abortionists - going up against them in actions as well as words - is an important part of going up against their whole reactionary agenda as well as a blow on behalf of women's liberation. It is also part of preparing the ground for revolution here, pushing forward the level of resistance among broad sections of people and raising the sights of many to the real necessity - as well as possibility - of getting rid of this whole stinking system that promotes, breeds and thrives on the oppression of women.

STOP THE ATTACKS ON THE CLINICS! ORGANIZE A "FITTING WELCOME" FOR "OPERATION RESCUE"!

BREAK THE CHAINS! Unleash the Fury of Women as a Mighty Force for Revolution

106 Wash.2d 212

1213 Stacie C. BERING, M.D., individually and as a Washington professional corporation; Pamela G. Silverstein, M.D., individually and as a Washington professional corporation; Howard Johnson, individually and as a general partner of Stevens Medical-Dental Limited Partnership; Michael McCarthy, M.D., individually, Respondents,

v.

SHARE; Michael Walters, individually and in his representative capacity as co-director of Share; Grace A. Gerl, individually and in her representative capacity as co-director of Share; Teresa R. Lindley, individually and as a member of Share; "John" and "Jane Doe" and all other persons acting in concert with any or all of the above named defendants, Appellants.

No. 51533-6.

Supreme Court of Washington,
En Banc.

June 19, 1986.

Physicians sought to enjoin antiabortion organization from picketing in front of medical building. The Superior Court, Spokane County, Willard A. Zellmer, J., granted injunction, and organization appealed. On joint review of appeal and contempt orders, the Supreme Court, Pearson, J., held that: (1) place restriction prohibiting picketing in front of main entrance to medical building did not regulate content of speech, served compelling state interests in providing access to necessary medical care and in protecting woman's constitutional right to privacy, was not overly broad, and provided organization with ample alternative forums for expression; (2) content restriction prohibiting all oral use of words "murder," "kill," and their derivatives was not impermissible prior restraint and served compelling state interest in prohibiting children from overhearing those words,

but had to be narrowed to prohibit their use only where children under 12 were present; (3) injunction was postpublication, not prior, restraint and was permitted by State Constitution; (4) those who had picketed in front of building after issuance of injunction could be held in civil contempt and assessed attorney fees and costs; and (5) award of \$7,000 in attorney fees and \$1,200 in costs was not abuse of discretion.

Affirmed.

Dolliver, C.J., concurred and filed opinion.

Dore, J., dissented and filed opinion.

Andersen, J., dissented in part and filed opinion.

Goodloe, J., dissented and filed opinion.

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1215 Van Camp, Bennion & Kelleher, W. Russell Van Camp, Kelleher, O'Shaughnessy, Brown & Newell, Kevin O'Shaughnessy, Spokane, for appellants.

Stiley & Kodis, Patrick Stiley, Jeffrey Finer, Spokane, for respondents.

Wichwire, Lewis, Goldmark & Schorr, John Phillips, Wolfe & Cullen, James Lobsenz, Geraghty, Geraghty, VanDerhoef & Sawyer, Kenneth D. VanDerhoef, Seattle, Catholic League for Religious and Civil Rights, Steven Frederick McDowell, Milwaukee, Wis., Gary Preble, Tumwater, William W. Messer & Assoc., Monica LaBeck, Walla Walla, Tanksley, Padden, Derr, Reeves & Hanley, Mark J. Hanley, Sara B. Derr, Spokane, amicus curiae for appellants.

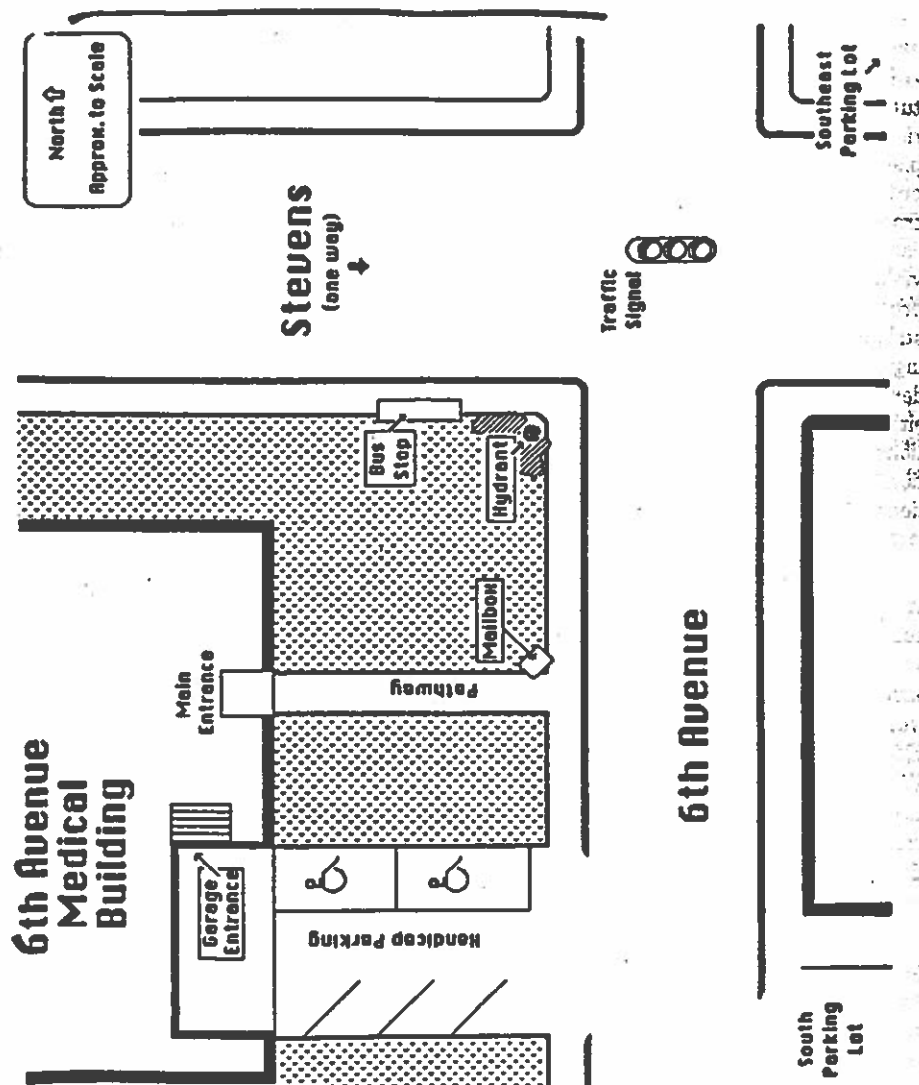
National Lawyers Guild—Seattle Chapter, Janet Varon, Franklin W. Shoichet, Fred Diamondstone, Nancy Hawkins, Marilyn Endriss, Seattle, amicus curiae for respondents.

PEARSON, Justice.

No judicial task is more difficult than balancing the constitutional rights and freedoms of citizens of this country against conflicting rights and freedoms of their fellow citizens. In accepting this delicate task, we recognize there can be few absolutes under the constitutions of a state and country boasting of such a diverse people. The magnificence of the documents under which we have consented to governance lies in their flexibility to accommodate the conflicting views and lifestyles of the governed. In our role as arbiter, we cherish such flexibility.

This appeal presents two principal constitutional issues requiring the accommodation of conflicting rights. First, whether a place restriction in a permanent injunction, ordering anti-abortion picketers to refrain from picketing directly in front of a medical clinic in which abortions are performed, violates either state or federal free speech protections? Second, whether a content restriction in a permanent injunction, enjoining picketers' oral use of the words "murder", "kill", and their derivatives, violates either state or federal free speech protections? Subject to one limited 1216 qualification which follows, we answer both questions in the negative, holding that the permanent injunction does not violate picketers' free speech rights under the state or federal constitutions.

Respondent-physicians Michael McCarthy, Pamela Silverstein, and Stacie Bering practice medicine in offices located in the Sixth Avenue Medical Building (Medical Building) at W. 508 Sixth Avenue, Spokane, Washington, situated at the corner of Sixth and Stevens Avenues. See illustration. Respondent Howard Johnson is a general partner/owner of the Medical Building. The Medical Building is nine stories tall, with a single public entrance, a side door, and a rear door. The side door is locked in winter, and its stairway blocks handicapped visitors.



Over two dozen medical offices are located in the building, offering a wide range of services including family oriented health care, pediatrics, prenatal care, laboratory procedures, geriatrics, internal medicine, outpatient surgery, weight loss counseling, dentistry, psychological counseling, and elective abortions.

In December 1984, members of SHARE, an informal organization opposed to abortion, began picketing and sidewalk "counseling" in front of the Medical Building.

At times, other anti-abortion picketers who were not members of SHARE were present with placards at the Medical Building. Picketing occurred generally on Fridays, with a morning group usually consisting of 2 or 3 picketers, and an afternoon group of as many as 8 to 13.

The respondent-physicians became concerned for their patients' welfare following face-to-face encounters between picketers and patients. Respondents filed suit in Spokane County, in part requesting a tem-

porary restraining order. On March 7, 1985, the trial court issued a temporary restraining order, which was superseded on March 18, 1985 following a day-long show cause hearing. The court entered a permanent injunction on March 22, 1985.

¹²¹⁷There was substantial conflict between the witnesses' testimony at the show cause hearing. Respondents' evidence included live, eyewitness testimony; numerous affidavits from patients, nurses, and visitors to the Medical Building¹; and dozens of photographs of picketers at the ¹²¹⁸picket site. The evidence detailed episodes of picketers (1) grabbing patients and staff, (2) patrolling the sidewalk in groups, (3) blocking the sidewalk, (4) causing patients to cut across the lawn—which at times was covered with ice and snow, (5) threatening or screaming at patients who refused to take literature, (6) accusing patients or their doctors of killing babies, (7) telling one patient that she would go to hell for seeing particular doctors, (8) interfering with parents bringing young patients to see their respiratory allergist, and (9) interfering with patients in advanced stages of pregnancy.

Respondent-physicians and a nurse testified that picketers interfered with ill patients, placing a pregnant woman possibly suffering from toxemia in acute medical danger, and delaying a patient who was miscarrying a wanted pregnancy and bleeding heavily. This last patient had to force her way through a group of picketers in order to reach her nurse and wheelchair.

A pediatric nurse asked picketers to please refrain from bothering Dr. McCarthy's young patients because his office did not provide abortion-related services. The picketers told the nurse to "move out" of the building. In addition to their sidewalk activity, the evidence showed that picketers entered the Medical Building, and even

physicians' offices, to advocate their views on abortion.

In issuing its order, the trial court considered the live testimony from both parties, all the affidavits, diagrams, and numerous photographs depicting picketers arrayed in groups along the sidewalk in front of the Medical Building. Based on this evidence, the court issued its findings and the permanent injunction.

¹²¹⁹The court found that: (1) it had jurisdiction over the parties and subject matter; (2) picketers positioned themselves on the public sidewalks along Sixth Avenue and at the only walkway to the main entrance; (3) picketers had obstructed the passage of visitors and staff at the Medical Building; (4) picketing had caused the physicians and patients emotional distress, created a substantial risk of physical and mental harm, and "counseling" had been forced upon persons attempting to enter or leave the premises; (5) picketing had been conducted in an aggressive, disorderly, and coercive manner, and in instances gave rise to a clear and present danger to patients; (6) picketing had been conducted in a manner incompatible with the character and function of the Medical Building; and (7) picketers had repeatedly referred to physicians practicing in the Medical Building as killers or murderers in the presence of young children.

The resulting injunction prohibits picketers from (1) picketing, demonstrating, or "counseling" at the Medical Building, except along the public sidewalk north of the bus stop on Stevens Avenue; (2) threatening, assaulting, intimidating or coercing anyone entering or leaving the Medical Building; (3) interfering with ingress or egress at the building or parking lots to the south or southeast of the premises; (4) trespassing on the premises; (5) engaging in any unlawful activity directed at respon-

1. Numerous affidavits were filed at the show cause hearing on March 18, 1985, in accordance with RCW 7.40.060. These affidavits were held by the court until presentment, on March 22, 1985, at which time they were filed with the clerk's office and date stamped. Appellants' request to exclude evidence entered after March

18, 1985 cannot apply to the affidavits made available to counsel and the court before the show cause hearing, notwithstanding their date stamp of March 22, 1985. The court specifically stated that it considered all the affidavits before reaching its decision.

dent-physicians or their patients; (6) referring, in oral statements while at the picket site, to physicians or patients, staff, or clients as "murdering" or "murderers", "killing" or "killers"; or to children or babies as being "killed" or "murdered" by anyone in the Medical Building.

Subsequent to entry of the permanent injunction, the court found that picketing and counseling activities continued at the Medical Building in violation of the court order. On June 7, 1985 the court entered an order of contempt against picketers Steven Fuhrman, Richard Van Dyke, Daniel Scalf, and Alfred Derby. The findings regarding contempt of court by these individuals specifically state ¹²⁰that the contemnors violated paragraph 1 of the March 22, 1985 order. Paragraph 1 is a geographic limitation.

On June 7, 1985, the court also assessed attorney fees of \$7,000 and costs of \$1,200 against Grace Gerl and Teresa Lindley for their contempt of the permanent injunction. The court imposed the order regarding fees and costs as a result of repeated contempts by Grace Gerl and Teresa Lindley. The trial court found that contemnors Gerl and Lindley had "knowingly and intentionally violated the [geographic restriction] of the permanent injunction" on at least seven occasions between the order's issuance and the date of the original contempt proceeding. Based on these findings, the trial court issued its order to impose *coercive* fines and confinement upon contemnors Gerl and Lindley.

We granted appellants' request to join review of these orders with the appeal of the permanent injunction in order to dispose of the case in its entirety.

I

Evidentiary Support for Injunction

[1] SHARE assigns error to many of the trial court's findings of fact, and argues the permanent injunction lacks evidentiary support in the record. In Washington, findings of fact supported by substantial evidence will not be disturbed on

appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re Snyder*, 85 Wash.2d 182, 185-86, 532 P.2d 278 (1975).

SHARE sharply disputes the trial court's findings, and argues that this court should substitute its findings for those of the trial court because the trial court based its findings in part on affidavits and photographs. Although this court is not necessarily bound by the trial court's findings when based *solely* upon written or graphic evidence, *State v. Rowe*, 93 Wash.2d 277, 609 P.2d 1348 (1980), the trial court in this case also considered considerable live testimony²²¹ during a day-long show cause hearing. Accordingly, because the rule enunciated in *State v. Rowe, supra*, does not apply, this court must affirm the trial court's findings if supported by substantial evidence.

After reviewing the entire record, which includes a full day of live testimony, numerous affidavits, and approximately 100 photographs, we conclude substantial evidence exists to support the trial court's findings.

II

Place Restriction

A. Federal Constitution

SHARE argues that the trial court violated picketers' First Amendment rights by issuing an injunction imposing a place restriction upon the picketers' activities. The injunction limited picketing to the public sidewalk north of the bus stop bench at the northwest corner of the intersection of Stevens and Sixth Avenues. See Appendix, at —. According to SHARE, this restriction is not a reasonable place restriction, and thus violates the picketers' First Amendment free speech rights.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." The rights of

free speech and peaceable assembly are fundamental rights which are safeguarded against State interference by the due process clause of the Fourteenth Amendment. 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)).

De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937). The issuance of the permanent injunction by the trial court constitutes State action. See *Shelley v. Kraemer*, 334 U.S. 1, 17, 68 S.Ct. 836, 844, 92 L.Ed. 1161 (1948); *American Fed'n of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941). Thus, SHARE is entitled to the protection afforded by the First Amendment.

1. Content Neutrality

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As a general matter, peaceful picketing and leafletting are expressive "speech" activities protected by the First Amendment. *United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983). Furthermore, places ¹historically associated with the free exercise of expressive activities, such as streets and sidewalks, are considered "public forums". *Grace*, at 177, 103 S.Ct. at 1707. In such places, the First Amendment sharply curtails the government's ability to permissibly restrict expressive conduct.

[2] Nevertheless "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Hefron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). A state may impose reasonable time, place and manner restrictions upon all expression, whether written, oral or symbolized by conduct. *Clark v. Community for Creative Non-Violence*, 468 U.S. 228, —, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984). Such restrictions ² are valid if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Grace*, 461 U.S. at 177, 103 S.Ct. at 1707 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,

2. As discussed with respect to the second constitutional issue, "[a]dditional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly

drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983).

2. Significant State Interest

A valid place restriction also must "serve a significant governmental interest." (Citations omitted.) *Heffron*, 452 U.S. at 649, 101 S.Ct. at 2565. Here, the principal justifications for the trial court's geographical restriction were (1) to facilitate actual ingress into and egress from the Medical Building, and (2) to avoid the heightened coercive impact suffered by patients, staff and visitors due to the conduct of the picketers in close proximity to the only public entrance to the Medical Building.

A litany of Supreme Court cases recognize that the State has a substantial interest in keeping community streets and sidewalks open and available for movement of people and property. See *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939); *Schneider v. State*, 308 U.S. 147, 160-61, 60 S.Ct. 146, 150-51, 84 L.Ed. 155 (1939); *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938); *Cantwell v. Connecticut*, 310 U.S. 296, 306-07, 60 S.Ct. 900, 904-05, 84 L.Ed. 1213 (1940); *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941). In *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), the Court indicated that because of the special nature of the place, persons could be constitutionally prohibited from picketing in or near a courthouse with the intent of interfering with, obstructing, or impeding the administration of justice. Likewise, in *Cameron v. Johnson*, 390 U.S. 611, 616, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182 (1968), the Supreme Court upheld a statute which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" any courthouse.

In *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640,

649-50, 101 S.Ct. 2559, 2564-65, 69 L.Ed.2d 298 (1981), the Court recognized a State's significant interest in maintaining "the orderly movement" of a crowd at a large state fair. The Court began by noting that "a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." *Heffron*, at 650, 101 S.Ct. at 2565. After recognizing that "consideration of a forum's special attributes is relevant to the constitutionality of a regulation", the Court went on to distinguish public streets from a public fairground, noting that "any comparisons to public streets are necessarily inexact." *Heffron*, at 650-51, 101 S.Ct. at 2565-66.

Admittedly, a public sidewalk differs markedly from a large public fairground. Nevertheless, an examination of the special attributes of the Sixth Avenue sidewalk and the facility it fronts convinces this court that there is a significant State interest in regulation. As shown by numerous photographs, the sidewalk is relatively narrow; if two people are walking abreast, a third cannot pass. In the winter, when there is snow on the ground, the sidewalk only can ¹²²accommodate persons walking single file. Most importantly, this narrow sidewalk fronts a medical clinic which provides needed, and sometimes emergency, medical care to citizens of the state.

In *Tinker v. Des Moines Indep. Comm'ty Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) the Supreme Court held the school district could not punish students for wearing black arm bands to school in protest of the Vietnam war. In *Grayned v. Rockford*, 408 U.S. 104, 117-18, 92 S.Ct. 2294, 2304, 33 L.Ed.2d 222 (1972), however, the Court dismissed the idea that *Tinker* stood for the proposition that anyone had "an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes." According to the Court, the "crucial question is whether the manner of expression is basically incompatible with the normal activity

of a particular place at a particular time." *Grayned*, at 116, 92 S.Ct. at 2303.

[4] The trial court found that picketers blocked ingress and egress of patients visiting the Medical Building. This type of conduct clearly is incompatible with the normal activity of the Medical Building—the treatment of persons requiring medical care. In *Grayned*, the Court recognized that the city had a "compelling interest in having an undisrupted school session conducive to the students' learning ..." *Grayned*, at 119, 92 S.Ct. at 2305. Likewise, this state has an equally substantial interest in ensuring its citizens unimpeded access to necessary medical care. In the trial court's opinion, this interest could be served only by restricting picketing to Stevens Avenue, away from the public entrance to the Medical Building. Even if the State's interest might be served adequately by a more narrowly tailored injunction, we believe the State has a compelling interest in geographically restricting the picketing to Stevens Avenue.

As stated above, the second principal justification for the place restriction was to reduce the coercive impact of picketing upon staff and patients of the medical clinic. In *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, ¹²²*supra*, the petitioners asserted the State's interest in protecting fairgoers from being harassed or otherwise bothered, likening fairgoers to the "captive audience" discussed in *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). The Court concluded, however, that it need not reach the constitutional sufficiency of that particular interest because of its holding that the regulation was justified solely by the State's interest in crowd control. *Heffron*, 452 U.S. at 650, 101 S.Ct. at 2565. Thus, the question remains whether a State's interest in reducing the coercive impact of protected expressive activity is

sufficiently significant to warrant a reasonable place restriction.

[5] Speech does not lose its protected character simply because it may embarrass others or coerce them into action. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 3424, 73 L.Ed.2d 1215 (1982); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971). According to the Supreme Court, "[t]here is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Claiborne*, 458 U.S. at 913, 102 S.Ct. at 3425 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964)). In the words of Justice Rutledge, "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 326, 89 L.Ed. 430 (1945).

Notwithstanding our "profound national commitment" to free speech, the First Amendment admits of no absolutes. The Supreme Court has "regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (Citations omitted.) *United States v. Grace*, 461 U.S. 171, 177-78, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983). This flexibility in First Amendment doctrine is reflected by the principle that speech may be regulated in order to serve a substantial State interest. Accordingly, it follows that the State may regulate even ¹²²coercive speech if a sufficiently significant interest exists for doing so.

In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court held that a constitutional right of privacy³ protects a woman's decision

3. This constitutional right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ..." *Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973). Thus, respondent-physicians could not successfully

bring a constitutionally-based privacy action against SHARE on behalf of their patients, even though they otherwise have standing. *Singleton v. Wulff*, 428 U.S. 106, 113-18, 96 S.Ct. 2868, 2873-76, 49 L.Ed.2d 826 (1976), because SHARE's activity does not constitute State ac-

whether to have an abortion.⁴ *Roe v. Wade*, at 153, 93 S.Ct. at 726. The right of privacy in this context involves different interests, including a woman's freedom to make a decision to have an abortion and to be able to effectuate that decision. See *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876-77, 51 L.Ed.2d 64 (1977); *Family Life League v. Illinois Dep't of Pub. Aid*, 132 Ill.App.3d 929, 88 Ill.Dec. 117, 478 N.E.2d 432, 434 (1985). The right of privacy dictates protection of the private relationship between a woman and her physician, *Roe v. Wade*, 410 U.S. at 153, 93 S.Ct. at 726, and the physician's right to freely practice medicine and perform legal abortions without coercive outside restraints. See *Nyberg v. Virginia*, 495 F.2d 1342, 1344 (8th Cir.), cert. denied, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974).

The ability of a woman to make and effectuate her decision to obtain an abortion depends upon relatively free access to the counseling and care of a licensed physician. Similarly, both the abortion decision and the woman's ability to effectuate that decision necessarily are dependent ¹²²upon and intertwined with the willingness and ability of the physician to provide the care and counseling sought by the patient. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). As stated by the Court in *Akron* at 427, 103 S.Ct. at 2491, "the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'" (Citations omitted.)

As the foregoing suggests, picketing in close proximity to a clinic in which abortions are provided can be expected to impinge upon a woman's constitutional right of privacy in two ways. First, the very

tion. Nevertheless, for the purpose of defining a State's interest in a reasonable place restriction, this court recognizes the constitutional protection afforded the right to an abortion. The State's interest in protecting this privacy right can be no less substantial than the interest in imposing a protective order in discovery to accommodate the privacy interests of litigants and third parties. See *Rhinehart v. Seattle*

presence of anti-abortion picketers directly in front of the clinic could have such a coercive impact upon a woman that she foregoes the exercise of that right or seeks to exercise it elsewhere under the care of a licensed or unlicensed physician not of her first choosing. If a woman decides to visit the clinic anyway, picketers' conduct actually might have a deleterious impact upon the procedure itself. As recently noted by a federal district court judge,

Women entering and leaving clinics have been verbally harassed; the effect of such harassment has been to increase the level of anxiety a woman feels and to exacerbate any emotional problems associated with the abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter.

American College of Obstetricians & Gynecologists v. Thornburgh, 613 F.Supp. 656, 666 (E.D.Pa.1985), *aff'd*, — U.S. —, 106 S.Ct. 2169, 90 L.Ed.2d — (1986). These consequences are unacceptable given the constitutional protection afforded the abortion decision by *Roe v. Wade*.

Second, continued harassment of physicians as they enter their lawful place of business may cause them to refuse to perform legal abortions for women. Accordingly, women would be denied the opportunity to effectuate their constitutional right to obtain an abortion within the ambit of *Roe v. Wade*. In the words of an Illinois appellate court,

¹²³[r]ecognition of this reality is a significant consideration here. In our present social climate of dangerous emotional highs on both sides of the abortion issue, it can hardly be denied that the insidious threat of harassment and harm to physi-

Times Co., 98 Wash.2d 226, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

4. *Roe v. Wade*, *supra*, recently was reaffirmed in *Thornburgh v. American College of Ob. & Gyn.*, — U.S. —, 106 S.Ct. 2169, 90 L.Ed.2d — (1986).

cians performing legal abortions and the terrorism of abortion clinics by anti-abortion vigilante groups are very real.

Family Life League, 88 Ill.Dec. at 120, 478 N.E.2d at 435.

In Washington, such harassment has "persuaded" physicians in numerous counties to stop performing abortions. Anti-abortionists "have proclaimed 21 counties 'abortion-free zones' and announced plans to put pressure on physicians in Washington's other 18 counties." Seattle Post-Intelligencer, Aug. 22, 1985, at A1, col. 2. Amici set forth the statistics regarding clinic harassment and violence, including the arson attacks on clinics performing abortion services in Bellingham and Everett. Although members of SHARE have not engaged in such violence, the trial court found their picketing was "aggressive, disorderly, and coercive", and that therefore physicians had a well-grounded fear for the continued viability of their lawful medical practice.

[6] If this harassment continues, we can reasonably conclude that the respondent-physicians eventually might refuse to participate in a woman's abortion decision. On the other hand, if the respondent building owner perceives a serious impact upon his ability to fill tenancies in the Medical Building due to such harassment, he might be unwilling to execute or renew leases with physicians who provide abortions. Either way, the coercive presence of the picketers directly in front of the Medical Building would severely compromise the ability of a woman to effectuate the abortion decision, in turn violating the woman's constitutional right of privacy under *Roe v. Wade*, *supra*. Given this court's previous commitment to personal privacy, *see e.g.*, *State v. Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975) (minor's right to abortion); *In re Colyer*, 99 Wash.2d 114, 660 P.2d 738 (1983) (patient's right to die); *In re Rosier*, 105 ¹²⁰Wash.2d 606, 717 P.2d 1353 (1986) (privacy interest in personal information), protection of that right, even from private invasion, constitutes a compelling State in-

terest justifying a reasonable place restriction on picketing.

3. Narrowly Drawn Injunction

A state clearly "may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." (Citations omitted.) *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980). Thus, although an injunction barring all speech might constitute an unconstitutional prior restraint, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), a reasonable place restriction narrowly tailored to serve a significant State interest does not violate the First Amendment. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654, 101 S.Ct. 2559, 2567, 69 L.Ed.2d 298 (1981). To determine whether the necessary nexus exists, the court must compare the identified State interest with the terms and effect of the injunctive relief.

As set forth above, the State has a *compelling* interest in maintaining ingress and egress of its citizens into and out of medical buildings to permit convenient access to medical care. Likewise, the State has a *compelling* interest in protecting a woman's ability to effectuate her constitutional right to obtain an abortion by mitigating the harassing effect of anti-abortion picketers. The trial court's place restriction requires picketers to restrain their activities to Stevens Avenue, away from the building's entrance and the sidewalk fronting the building.

This place restriction clearly serves the State's interest. Under the terms of the injunction, all interference with ingress and egress has been eliminated. Furthermore, restriction of the picketing to Stevens Avenue can be expected to mitigate the severe emotional impact otherwise experienced by many patients, especially women who are ¹²¹visiting the Medical Building for abortion-related services. Thus, the only question is whether the injunctive relief was

tailored as narrowly as possible to serve the State's interest.

With respect to the State's interest in maintaining ingress and egress, the injunction arguably could be narrowed without compromising that interest. The injunction could (1) limit the number of picketers, (2) require them to remain a certain distance from the walkway leading to the entrance, (3) require them to picket in single file, or (4) all of the above. By narrowing the injunction, the State could serve its significant interest in maintaining convenient access to medical care without unduly limiting the picketers' expressive activities.

In *Parkmed Co. v. Pro-Life Counseling, Inc.*, 110 Misc.2d 369, 442 N.Y.S.2d 396 (1981), a New York trial court enjoined anti-abortion picketers from demonstrating or picketing on the steps and plaza area of an abortion clinic. On appeal, the New York Supreme Court, Appellate Division, struck down this portion of the injunction on the ground that it "was overly broad and unnecessarily restricted peaceful picketing and demonstrating ..." *Parkmed Co. v. Pro-Life Counseling, Inc.*, 91 A.D.2d 551, 552, 457 N.Y.S.2d 27 (1982). Likewise, some might argue that the injunction at issue in this case is broader than necessary, thereby prohibiting peaceful, controlled picketing that does not impede ingress or egress.

[7] Nonetheless, focusing upon the State's interest in protecting a woman's constitutional right of privacy, we believe the injunction is tailored as narrowly as possible to effectuate that interest. An injunction which permitted any anti-abortion picketing on the Sixth Avenue sidewalk would not adequately serve the State's compelling interest in protecting a woman's constitutional right of privacy from the coercive impact generated by the presence of the picketers in front of the Medical Building. In the absence of a place restriction, women visiting the clinic

for abortion-related services would be forced to walk a gauntlet of placard-carrying anti-abortionists. Even if all picketers agreed to refrain from using "harassing language", it is difficult to ascertain what constitutes "harassment" in the apprehensive mind of a woman coming face-to-face with the picketers. By restraining picketing to Stevens Avenue, the court can avoid conjecture on this point, knowing that the woman's right of privacy is protected to the extent permissible under the First Amendment.

4. Ample Alternatives

For the injunction to be valid as a place restriction, "it must also be sufficiently clear that alternative forums for the expression of [appellants'] protected speech exist despite the effects of the [injunction]." *Heffron*, 452 U.S. at 654, 101 S.Ct. at 2567. According to the Court in *Heffron*, "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron*, at 655, 101 S.Ct. at 2568 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87, 69 S.Ct. 448, 453, 93 L.Ed. 513 (1949)). The trial court's place restriction does not fall afoul of these principles.

[8] First, the injunction does not prevent SHARE from picketing anywhere in the city, except upon a limited stretch of sidewalk fronting the Medical Building. Thus, the injunction is not subject to the same attack raised in *Near v. Minnesota ex rel. Olson*, *supra*, or *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). Second, the First Amendment does not afford SHARE the right to a captive audience,⁵ but rather the opportunity to win the attention of passersby and engage them in conversation if the latter so desire. The injunction does not prevent SHARE from picketing at a point reasonably close to the

a public or private building, and allow no one to pass who did not agree to listen to their exhortations."

5. As stated in *Cox v. Louisiana*, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965), "[a] group of demonstrators could not insist upon the right to cordon off ... [an] entrance to

Medical Building and the people SHARE wishes to address. The signs carried by the picketers clearly are visible to anyone entering the building. Picketers "are ¹²³not secreted away in some nonaccessible location", *Heffron*, 452 U.S. at 655 n. 16, 101 S.Ct. at 2568 n. 16, 101 S.Ct. at 2568 n. 16, but are located in plain view of persons entering the Medical Building. If anyone desires to engage them in conversation, it is a very short walk to the end of the block where picketers are free to "counsel". Accordingly, the injunction provides an alternative forum providing ample opportunity for communicative activity.

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III

Content Restriction

A. Federal Constitution

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The litany of cases cited above all phrase the test similarly: content regulation, including "an absolute prohibition on a particular type of expression[,] will be upheld only if narrowly drawn to accomplish a compelling governmental²²⁷ interest." *United States v. Grace*, *supra* 461 U.S. at 177, 103 S.Ct. at 1707 (citing *Perry Educ. Ass'n*, 460 U.S. at 46, 103 S.Ct. at 955; *Widmar v. Vincent*, *supra*). Thus, contrary to what the parties argue, the issue before us is not whether the content restriction constitutes a prior restraint, but whether the restriction serves a compelling State interest, and is narrowly drawn to serve that interest.

1. Compelling State Interest

In issuing the permanent injunction, the trial court specifically found that the picketers repeatedly used the words "kill", "killing", "killer", "murder", "murderer" and "murdering" "in indiscriminate connection with physicians and in the presence of young children ..." Based upon medical testimony, the court found further that use of such words had "inflicted trauma upon the children overhearing such references and ... by their very utterance ... harmed the doctor-patient relationship essential to the effective delivery of health care."

Based upon these findings, which are supported by substantial evidence in the record, the trial court enjoined SHARE picketers from orally referring, while at the picket site, to physicians, patients and staff as "murdering", "murderers", "killing", or "killers". Furthermore, the trial court enjoined oral statements by picketers, while at the picket site, to children or babies as being "killed" or "murdered" by anyone in or connected to the Medical Building. The court, however, did not enjoin the printed use of these words on the picket signs themselves, as it correctly assumed such an injunction would violate state and federal constitutional protections. The question is whether the State has a compelling interest in protecting such children by limiting the oral expression of the proscribed words at the picket site.

SHARE relies heavily upon *O.B.G.Y.N. Ass'ns v. Birthright of Brooklyn & Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978) which held unconstitutional an injunction prohibiting abortion picketers' use of the words "murder", "kill" and similar words on placards. Two observations ¹²⁴regarding *O.B.G.Y.N.* are worth noting. First, *O.B.G.Y.N.* is factually distinguishable from this case in that the trial court here did not enjoin the use of such words on the picketers' placards; it only enjoined the oral expression of such words. Second, and more important, *O.B.G.Y.N.* was decided 2 years prior to the decision in *Consolidated Edison*, in which the Supreme Court held that content regulation was permissible if it served a compelling state interest and was narrowly tailored to serve that interest. *Consolidated Edison*, 447 U.S. at 540, 100 S.Ct. at 2334. The court in *O.B.G.Y.N.* relied upon *Police Dep't of Chicago v. Mosley*, *supra*, and its absolute ban on content regulation, from which the Supreme Court has since retreated. See *Consolidated Edison*. Accordingly, *O.B.G.Y.N.* provides very limited guidance on whether the First Amendment protects the words proscribed in this case. We believe the Supreme Court itself has provided the guidance we seek.

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In *FCC v. Pacifica Found.*, 438 U.S. 726, 98 S.Ct. 8026, 57 L.Ed.2d 1073 (1978), the Federal Communications Commission issued an order indicating it might impose later sanctions on a radio station that broadcast George Carlin's monologue, entitled "Filthy Words", which aired during the early afternoon when children were listening. In a plurality opinion, the Supreme Court upheld the Commission's order, reversing a Court of Appeals decision which had reversed the Commission.

In his concurring opinion, Justice Powell conceded that the "Filthy Words" monologue was not "obscene" in the constitutional sense, nor did it constitute "fighting words" within the meaning of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Justice Powell recognized that Carlin could not be punished, consistent with the First Amendment, for delivering the same monologue to a live audience composed of adults. Likewise, he assumed that an adult could not constitutionally be prohibited from purchasing a recording or a transcript of the monologue and playing or reading it in the privacy of his home. *FCC v. Pacifica Found.*, *supra* 438 U.S. at 756-57, 98 S.Ct. at 3044 (Powell, J., concurring). According to Justice Powell, however, the issue was whether the Commission could impose civil sanctions on the radio station for broadcasting the monologue during the early afternoon. Answering the question in the affirmative, Justice Powell found "strong support" for the Commission's holding in its concern to prevent the language from reaching the ears of unsupervised children who were likely to be in the audience at that hour. *Pacifica Found.*, at 757, 98 S.Ct. at 3044.

Justice Powell stated that "[t]he Court has recognized society's right to 'adopt more stringent controls on communicative materials available to youths than on those available to adults.'" *Pacifica Found.*, at 757, 98 S.Ct. at 3044 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212, 95 S.Ct.

2268, 2274, 45 L.Ed.2d 125 (1975)). According to Justice Powell, "[t]his recognition stems in large part from the fact that 'a child ... is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.'" (Citation omitted.) *Pacifica Found.*, 438 U.S. at 757, 98 S.Ct. at 3044. In characterizing repetition of the words used by Carlin as "verbal shock treatment", Justice Powell stated that

children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat ...

Pacifica Foundation, at 757-58, 98 S.Ct. at 3045.

[11] ¹²⁴¹Justice Powell's concern for the welfare of children is particularly applicable to this case, in which the use of the proscribed words arguably was intended as "verbal shock treatment". Although the State has a lesser interest in regulating such words when directed to adults, there is a compelling State interest in preventing the harm perceived by the trial court when such words are heard by children. Unlike the courtroom audience in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284, *reh'g denied*, 404 U.S. 876, 92 S.Ct. 26, 30 L.Ed.2d 124 (1971),⁷ children entering the Medical Building cannot avoid this harm by simply averting their gaze, but rather are subject to it until safely out

of earshot. Similarly, unlike the children in *Pacifica Found.*, children visiting the Medical Building cannot tune into a different station or tune out completely; they cannot avoid hearing the proscribed language while in the picketers' vicinity. Accordingly, the State in this case has a compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by the picketers' speech.

2. Narrowly Drawn

As stated above, an injunction imposing an absolute prohibition on a particular type of expression must be narrowly drawn to serve the state's interest. *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736, (1983). See, e.g., *Erznoznik v. Jacksonville*, *supra*, 422 U.S. at 213, 95 S.Ct. at 2274 (restriction aimed at prohibiting youths from viewing films involving nudity impermissibly broad because not all nudity deemed obscene even as to minors). The State's ¹²⁴²interest in this case is to prevent the physical and psychological harm of young children caused by use of the proscribed words.

The injunction, however, applies to all use of such words, regardless of whether children are present. Thus, it is drawn more broadly than necessary to achieve the State's interest. As stated in *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969), the "right to receive information and ideas, regardless of their social worth ... is fundamental to our free society." The injunction cannot water down speech to make it suitable for the sandbox. Accordingly, the injunction must be narrowed.

[12] The record in this case contains medical testimony by one of the respon-

7. The importance of context in free speech cases is illustrated by the case of *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284, *reh'g denied*, 404 U.S. 876, 92 S.Ct. 26, 30 L.Ed.2d 124 (1971), which arose when Paul Cohen entered a courthouse wearing a jacket emblazoned with the words "Fuck the Draft". In holding that criminal sanctions against Cohen were unconstitutional, the Court rejected the argument that his speech would offend unwilling listeners.

Cohen, at 22, 91 S.Ct. at 1786. Although the courthouse audience could avoid the offensive speech when simply printed on an article of clothing, members of the Court have indicated a different result might obtain when similar words are spoken orally in the presence of children. See *Rosenfeld v. New Jersey*, 408 U.S. 901, 903, 92 S.Ct. 2483, 2484, 33 L.Ed.2d 321 (1972) (Powell, J., dissenting).

dent-physicians that the impact of such language would be most severe on children under the age of 12. Because we are remanding the case on this point, the trial court may wish to take additional medical testimony to determine the appropriate age limit. Furthermore, because it may be difficult to ascertain whether a child is under the identified age, the trial court may wish to provide additional guidelines for determining when picketers should refrain from using the proscribed words. Regardless, the injunction must be narrowed to proscribe the offensive language only when children of the chosen age are present at the picket site.

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DOLLIVER, C.J., UTTER, BRACHTENBACH and CALLOW, JJ., and CUNNINGHAM, J., pro tem, concur.

DOLLIVER, Chief Justice, concurring.

I concur with all aspects of the majority opinion except that portion discussing²⁴⁸ the place restriction in the trial court's

injunction. The majority has gone farther than necessary to uphold the injunction by resorting to the State's interest in protecting the right of privacy afforded women by the decision of the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). I believe the injunction is supported simply by the State's interest in maintaining access to and from a health care facility. See *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); *Pickens v. Okolona Mun. Separate Sch. Dist.*, 594 F.2d 433 (5th Cir.1979); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2d Cir.1980). I would go no further.

DORE, Justice (dissenting).

I would hold that the place and content restrictions in the permanent injunction, ordering the picketers to refrain from picketing directly in front of the medical clinic and enjoining oral use of the words "murder", "kill" and their derivatives, while young children are present, violate federal free speech protections. I would reverse the trial court and dismiss the contempt orders.

PLACE RESTRICTIONS

In my view the majority has engaged in an unlawful abridgment of appellants' exercise of their First Amendment right to picket and demonstrate in a peaceful and orderly manner. The place restrictions contained in the injunction go far beyond measures that are justifiable as reasonably necessary to maintaining access to and from a health care facility or in protecting a woman's privacy right. The majority, instead of proscribing only activity posing a serious threat to those desiring access to the health care facility and searching for less restrictive alternatives, has chosen the easier course of riding roughshod over the demonstrators' exercise of First Amendment rights in the very place where they are entitled to the most protection—our public sidewalks. It is rather ironic and unfortunate that at 124a time when the

abortion issue is at the forefront of public debate this court places a severe impediment upon those most desirous to have their opinions heard.

We start with certain indisputable propositions of constitutional law. The first of these is that public places, particularly streets and sidewalks, are the normal and natural locations for our citizens' exercise of their First Amendment right of free speech.

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. Committee for Indus. Org., 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939); see also *Lehman v. Shaker Heights*, 418 U.S. 298, 303, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974); *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wash.2d 230, 635 P.2d 108 (1981).

While the State may reasonably regulate the time, place and manner of the exercise of First Amendment rights as necessary to protection of other compelling public interests, *Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Police Dep't v. Mosley*, 408 U.S. 92, 98, 92 S.Ct. 2286, 2291, 33 L.Ed.2d 212 (1972); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Cox v. Louisiana*, 379 U.S. 536, 554-55, 85 S.Ct. 453, 464-65, 13 L.Ed.2d 471 (1965), "time and place" regulations can enormously hinder the individual's ability to engage in effective advocacy. "Access to the 'streets, sidewalks, parks, and other similar public places ... for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly....'" *Grayned*, 408 U.S. at 117, 92 S.Ct. at 2304 (quoting *Amalgamated Food Employees Local 590 v. Logan Vly. Plaza, Inc.*, 391 U.S. 308, 315, 88 S.Ct.

1601, 1607, 20 L.Ed.2d 603 (1968)). Even when regulation is justified, it must be "narrowly tailored ¹²⁵⁰to further the State's legitimate interest." *Grayned*, 408 U.S. at 116-17, 92 S.Ct. at 2303-04; *Police Dep't*, 408 U.S. at 98, 92 S.Ct. at 2291; *Cox*, 379 U.S. at 575-76, 85 S.Ct. at 467. Moreover, exercise of First Amendment rights, when logically related to a particular forum, is further protected from regulations which would preclude the use of that place. *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (plurality opinion); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1323-24 (2d Cir.), cert. denied, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974).

In balancing the individual's right to demonstrate against the concern for the protection of others, the competing interests must be assessed on an individual basis; blanket bans and absolute prohibitions against picketing in front of or near a site have been universally condemned where a less restrictive and more clearly tailored alternative may be formulated. As the United States Supreme Court stated in *Police Dep't v. Mosley*, *supra* 408 U.S. at 100-01, 92 S.Ct. at 2293:

Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter.

In short, although limited regulation is permitted, it must be carefully defined and sufficiently circumscribed to minimize the opportunities for abuse of discretion, lest this treasured constitutional right of free speech be subjected to excessive or unnecessary restraints.

The proper discharge of this responsibility is difficult. The court's task would be easier if it had broad discretion to squelch free speech and assembly without the necessity of tailoring any restraints to what is absolutely necessary in each individual case. Unfortunately, such discretion has been exercised in the present instance. The result, unsurprisingly, is an excessive restraint. The majority has placed its con-

cern for protection of one constitutional right above another, and paid scant heed to basic time honored principles of free speech and expression.

The resulting injunction, as approved by the majority, prohibits picketers from (1) picketing, demonstrating, or ¹²⁵¹"counseling" at the Sixth Avenue Medical Building, except along the public sidewalk north of the bus stop on Stevens Avenue; (2) threatening, assaulting, intimidating or coercing anyone entering or leaving the Medical Building; (3) interfering with ingress or egress at the building or parking lots to the south and southeast of the premises; (4) trespassing on the premises; (5) engaging in any unlawful activity directed at respondent-physicians or their patients; (6) referring, in oral statements while at the picket site, while young children are present, to physicians or patients, staff or clients as "murdering" or "murderers", "killing" or "killers," or to children or babies as being "killed" or "murdered" by anyone in the Medical Building.

The trial court's findings, which purportedly justify these restrictions, are that (1) picketers have positioned themselves on the public sidewalks along Sixth Avenue and at the only walkway to the main entrance; (2) picketers have obstructed the passage of visitors and staff at the Medical Building; (3) picketers have caused the physicians and patients emotional distress, created a substantial risk of physical and mental harm, and forced "counseling" upon persons attempting to enter or leave the premises; (4) picketing has been conducted in an aggressive, disorderly and coercive manner, and in instances has given rise to a clear and present danger to patients; (5) picketing has been conducted in a manner incompatible with the character and function of the Medical Building; and (6) picketers have repeatedly referred to physicians practicing in the Medical Building as killers or murderers in the presence of young children.

Although these findings are supported by the record, the record also clearly demonstrates that such incidents have been

isolated and infrequent in occurrence. Restrictions less onerous than complete removal of the picketers from the public sidewalk fronting the health care facility are available to protect the State's interest of assuring access to the facility.

In *Parkmed Co. v. Pro-Life Counseling, Inc.*, 110 Misc.2d 369, 442 N.Y.S.2d 396 (N.Y.Sup.Ct.1981), a New York trial court enjoined antiabortion picketers "from demonstrating, picketing and in any way interfering ... on the ... plaza area and its steps." On appeal, the New York Supreme Court, Appellate Division, struck down this portion of the injunction on the ground that it "was overly broad and unnecessarily restricted peaceful picketing and demonstrating ..." *Parkmed Co. v. Pro-Life Counseling, Inc.*, 91 A.D.2d 551, 552, 457 N.Y.S.2d 27, 29 (1982). Likewise, the injunction at issue is broader than necessary, because it prohibits peaceful, controlled picketing that does not impede ingress or egress. The majority in effect concedes that the restrictions are overly broad in regard to effectuating access to the medical facility.

With respect to the State's interest in maintaining ingress and egress, the injunction arguably could be narrowed without compromising that interest. The injunction could (1) limit the number of picketers, (2) require them to remain a certain distance from the walkway leading to the entrance, (3) require them to picket in single file, or (4) all of the above. By narrowing the injunction, the State could serve its significant interest in maintaining convenient access to medical care without unduly limiting the picketers' expressive activities.

Majority opinion, at 930.

The majority nonetheless condones this excessive restraint as necessary to mitigate the harassing effect of antiabortion picketers. In so doing, the majority makes a monumental error in its constitutional analysis. The majority perceives that such picketing invades a woman's privacy rights in effectuating the abortion decision. The privacy interest espoused in *Roe v. Wade*,

410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), however, deals with a woman's right to make a decision concerning abortion without governmental intrusion. See also *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). This does not mean that a woman is entitled to make a decision about abortion in a vacuum, free from public comment including the views expressed by picketers. This privacy interest does not extend to isolate a woman from public debate by silencing others.

Moreover, speech does not lose its protected character simply because it may embarrass others or coerce them into action. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 3424, 73 L.Ed.2d 1215 (1982); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971). According to the Supreme Court, "[t]here is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Claiborne*, 458 U.S. at 913, 102 S.Ct. at 3425 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964)). In the words of Justice Rutledge, "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 326, 89 L.Ed. 430 (1945).

The majority seemingly acknowledges the overzealousness of its concern for a woman's privacy interest when it states that

it is difficult to ascertain what constitutes "harassment" in the apprehensive mind of a woman coming face-to-face with the picketers. By restraining picketing to Stevens Avenue, the court can avoid conjecture on this point, knowing that the woman's right of privacy is protected to the extent permissible under the First Amendment.

Majority opinion, at 930.

The ultimate strength of our constitutional guaranties lies in their being unhesi-

tatingly applied in time of controversy and tranquility alike. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483, 54 S.Ct. 231, 256, 78 L.Ed. 413 (1934) (Sutherland, J., dissenting). The majority here has affirmed an overly broad injunction which abridges the picketers' First Amendment right of free speech.

¹²⁵⁴For these reasons I would remand the case to the trial court with directions to narrow the injunction by eliminating the place restrictions which prohibit picketers from picketing, demonstrating, or counseling on the sidewalk fronting the Medical Building. The remaining restrictions in the injunction are sufficient to assure adequate access to the facility.

Because I would hold that the place restrictions are invalid, I would also reverse the contempt orders and fee awards and assessments. These penalties were levied against picketers who violated the place restrictions by picketing along the sidewalk fronting the medical clinic. There was no evidence that these picketers violated any other restrictions in the injunction relating to interfering with ingress or egress to the clinic.

CONTENT RESTRICTIONS

It is also my view that enjoining oral use of the words "murder", "kill" and their derivatives in the presence of children under an identified age violates First Amendment rights of free speech. Because the injunction restricts the content of speech in advance of actual publication or broadcast, it constitutes a prior restraint. The United States Supreme Court held in *Keefe*, 402 U.S. at 419 that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-559, 96 S.Ct. 2791, 2801-03, 49 L.Ed.2d 683 (1976). The primary reason for this heavy presumption of invalidity was articulated by the Court in *Southeastern Promotions, Ltd. v. Con-*

rad, 420 U.S. 546, 559, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975):

[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

The only basis upon which a prior restraint can be ¹²⁵⁵upheld is if the communication restrained is constitutionally unprotected speech such as obscenity, incitement to acts of violence, or speech that directly threatens military security. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931). The speech restrained by the majority here does not fall within any of these narrow categories.

The only possible unprotected category under which the restrained words in these actions might fall is the category of words identified in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), as having "no essential part of any exposition of ideas, . . ." and whose "very utterance inflict injury or tend to incite an immediate breach of the peace."

Contemporary applications of this doctrine prove that it is a very narrow exception to the rule that prior restraints are presumptively unconstitutional. In *Tinker v. Des Moines Indep. Comm'ty Sch. Dist.*, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969), the Court, overturning a restriction on wearing of armbands in school as a political protest, emphasized that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Restraint of speech may not be constitutionally justified from a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, at 509, 89 S.Ct. at 738. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-10, 102 S.Ct. 3409, 3423-24,

73 L.Ed.2d 1215 (1982); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

The evidence fails to demonstrate any incitement to violence or other significant harm to the listeners. Significantly, the words proscribed play an important role in the "exposition of ideas" in the abortion debate. The combination of the absence of significant harm and the importance of the restricted words to the abortion debate dictates that the prior restraint cannot be constitutionally justified. While the majority finds that the doctor-patient relationship may be harmed by the use of such words, and that ¹²⁵⁶they may have some "physical and psychological" effect on young children, none of the evidence demonstrates an incitement to violence or a harm that was any greater than the kind of anger, agitation, embarrassment, and emotional turmoil that is the natural product of debate and the conflict of ideas deemed permissible in the cases discussed above.

Further, the majority's command that the trial court provide guidelines for ascertaining when a child of susceptible age is present is an impossible task. I can conceive of no reasonable means of determining on casual meeting of a child on a sidewalk whether the child is 11 or 12 years of age. A prior restraint cannot be justified on such evidence.

The words "murder", "kill", and their derivatives play an essential role in the debate concerning abortion. To those opposed to abortion, the logical conclusion of that moral position is that abortions result in babies being killed or murdered. If the court were to deprive picketers of the words which most clearly embody the moral position of those picketers, it would eviscerate completely the debate concerning abortion. Just as abortion proponents must be able to articulate their belief that abortion is constitutionally justified as an aspect of a woman's right to procreative freedom, see *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), so must abortion opponents be permitted to articulate their belief that abortion should

not be permitted because it involves the taking of human life.

There is no question that the use of words such as "kill" and "murder" caused some agitation and emotional turmoil. Such responses are an inevitable part of debate that lies at the very heart of freedom of speech. Those words embody and crystallize the position of antiabortion activists. Deprived of such words, antiabortion activists would be deprived of the right to carry their argument fully to the public. The worth of such words can only be evaluated in the commerce of ideas where they will be judged in relation to opposing arguments and ultimately either accepted or rejected.

¹²⁵⁷In sum, the restrictions on content in the injunction is an unconstitutional prior restraint, and the evidence presented in this case did not establish a narrow exception to the rule of presumptive unconstitutionality for such restraints.

CONCLUSION

I would hold that the place and content restrictions in the permanent injunction are violative of picketers' First Amendment rights of free speech. The place restriction is overly broad and unnecessarily prohibits peaceful picketing and demonstrating on the public sidewalk fronting the medical clinic. The content restriction is an unjustified prior restraint which would prohibit use of words which are an inevitable part of debate concerning abortion.

ANDERSEN, Justice (dissenting in part).

I disagree with the majority's decision to uphold the place restriction in the trial court's permanent injunction because it seems obvious to me that it is an overbroad restraint of citizens' constitutional rights to publicly express their views.

At issue in this case are the competing rights of those people having opposing views on abortion. On the one side are women who have the legal and constitutional right to obtain abortions, and doctors who have the right to perform them, so

long as all concerned comply with this state's abortion laws.¹ On the other side are those who oppose abortion and who have the legal and constitutional right to express their views by peacefully picketing and distributing leaflets in public forums such as the streets and sidewalks of our cities.²

On the one hand, the abortion proponents have the right to ignore the opponents' signs and leaflets or to consider them, as they deem fit. On the other hand, the abortion ~~125~~opponents have the right to peacefully and publicly declare their opinions on the subject. The law as we have stated it with regard to labor picketing is equally applicable in the context of abortion picketing:

Peaceful picketing is an exercise of the right of free speech. Organized labor has the right to communicate its views either by word of mouth or by the use of placards. This is nothing more nor less than a method of persuasion. But when picketing ceases to be used for the purpose of persuasion—just the minute it steps over the line from persuasion to coercion—it loses the protection of the constitutional guaranty of free speech, and a person or persons injured by its acts may apply to a court of equity for relief.

Swenson v. Seattle Cent. Labor Coun., 27 Wash.2d 193, 206, 177 P.2d 873 (1947), cited in *Gazzam v. Building Serv. Employees Local 362*, 29 Wash.2d 488, 498, 188 P.2d 97 (1947) and *Audubon Homes, Inc. v. Spokane Bldg. & Constr. Trades Coun.*, 49 Wash.2d 145, 151, 298 P.2d 1112 (1956), cert. denied, 354 U.S. 942, 77 S.Ct. 1392, 1 L.Ed.2d 1536 (1957).

The fact that the sidewalk picketing became "aggressive, disorderly, and coercive" (as the trial court described the picketers here) does not justify the court in

then proceeding to so restrict the right to picket as to render it totally meaningless. As the United States Supreme Court held in *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 963-64, 83 L.Ed. 1423 (1939), the right of citizens to publicly discuss their views on important issues is one which our society holds dear:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not ~~125~~absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; *but it must not, in the guise of regulation, be abridged or denied.*

(Italics mine.) The majority concedes that "the First Amendment sharply curtails the government's ability to permissibly restrict expressive conduct" in public forums such as streets and sidewalks. (Majority at 925). I believe that the place restriction contained in the trial court's permanent injunction unconstitutionally abridges the protected right of citizens to express their views on abortion, which is undeniably a national issue that has aroused considerable public debate.

As the majority also acknowledges, place restrictions on constitutionally protected expression are valid only if narrowly tailored to serve a significant government interest.³ The significant interests that the

1. See *Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 726, 35 L.Ed.2d 147, reh'g denied, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973); RCW 9.02.060.

2. See *United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983).

3. See *Grace*, 461 U.S. at 177, 103 S.Ct. at 1706; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

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majority cites as justification for the geographical restriction imposed on the picketers are (1) facilitating actual ingress into and access from the Medical Building and (2) reducing the coercive impact of picketing upon patients and staff of the Medical Building.

It is interesting to note that the permanent injunction ordered by the trial court *does* protect both of these interests and does so independently of the place restriction it also imposes. In addition to restricting picketers to the Stevens Avenue location, the injunction properly prohibits the abortion picketers from "interfering with ingress or egress at the building or parking lots to the south or southeast of the premises", from "threatening, assaulting, intimidating or coercing anyone entering or leaving the Medical Building", and from "engaging in any unlawful activity directed at respondent-physicians or their patients." Thus, anyone who violates one of these three provisions of the injunction will be liable for contempt regardless of where 1200 around the Medical Building he or she is picketing. That is both appropriate and legal.

The geographical restriction in the injunction, therefore, is surplusage that unnecessarily restrains constitutionally protected expression. If a place restriction on the anti-abortion picketers is needed (in the opinion of the trial court on remand), given the other restrictions contained in the injunction, it should be narrowed from the unduly broad place restraint currently in effect. I agree with the majority (slip op. at 20) that the place restriction could be narrowed by (1) limiting the numbers of picketers, (2) requiring them to remain a certain distance away from the walkway leading to the entrance, (3) requiring them to picket in single file, or (4) all of the above. I depart from the majority because

I would hold that the remand to the trial court should include instructions to that court to narrow the injunction's place restriction placed upon the anti-abortion picketers. In my view, when the trial court limited picketing to a location around the corner and down the block from the entrance to the building, it left no alternative channel of communication open to the picketers and, as a consequence, the place restriction was overly broad and unnecessarily restrictive.⁴ The injunction could accord the same protections to the patrons of the clinic and their doctors without resorting to that.

For the foregoing reasons, I respectfully dissent from only that part of the majority's opinion which upholds the place restrictions in the trial court's injunction, and from the contempt convictions based thereon.

GOODLOE, Justice (dissenting).

I am in complete agreement with Justice Andersen's dissent. I write separately only to note that if, on remand, a narrower place restriction is imposed that such restriction should state specifically where the picketers may not be. Any injunction which 1201 states only where the picketers shall be is necessarily too broad and logically precludes them from being anywhere else.



4. *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91

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

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JUDY MADSEN, ET AL., PETITIONERS v. WOMEN'S HEALTH CENTER, INC., ET AL.

No. 93-880

SUPREME COURT OF THE UNITED STATES

512 U.S. 753; 114 S. Ct. 2516; 1994 U.S. LEXIS 5087; 129 L. Ed. 2d 593; 62 U.S.L.W. 4686; 94 Cal. Daily Op. Service 5040; 94 Daily Journal DAR 9272; 8 Fla. Law W. Fed. S 426

April 28, 1994, Argued

June 30, 1994, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

DISPOSITION: 626 So. 2d 664, affirmed in part and reversed in part.

CORE TERMS: injunction, clinic, patient, foot, First Amendment, buffer zone, abortion, zone, picketing, protesters, street, noise, concert, regulation, driveway, physically, sidewalk, traffic, strict scrutiny, protest, staff, approaching, content-based, viewpoint, boycott, observable, violence, ingress, front, demonstrating

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DECISION:

State court injunction provisions restricting activities of antiabortion protesters held partially constitutional and partially unconstitutional.

SUMMARY: A Florida state court permanently enjoined certain groups and individuals from blocking or interfering with public access to an abortion clinic and from physically abusing persons entering or leaving the clinic. Six months later, the operators of the abortion clinic sought to amend the injunction on grounds that (1) access to the clinic was still impeded by antiabortion protesters' activities; and (2) such activities had discouraged some potential patients from entering the clinic and had had deleterious physical effects upon others. Following an evidentiary hearing, the court issued an amended permanent injunction which prohibited the protesters, and all persons acting "in concert" with them, from (1) "congregating, picketing, patrolling, demonstrating, or entering," apart from specified exceptions, the public right-of-way "or private property" within a 36-foot buffer zone around the property line of the clinic; (2) singing, chanting, whistling, shouting, yelling, or using bullhorns, auto horns, sound amplification equipment, or other sounds to, or within earshot of, patients inside the clinic during specified hours; (3) using "images observable" to patients during such hours; (4) physically approaching, within 300 feet of the clinic, any person seeking clinic services, unless such person indicated a desire to communicate; and (5) approaching, congregating, picketing, patrolling, demonstrating, for using bullhorns or other sound amplification equipment within 300 feet of the residences of clinic staff, or obstructing the entrances, exits, or driveways of such residences, or impeding access to streets that provided the sole access to streets on which such residences were located. The protesters appealed, and the Florida Fifth District Court of Appeal certified the injunction order for immediate review by the Supreme Court of Florida. Shortly before the Florida Supreme Court's decision was announced, the United States Court of Appeals for the Eleventh Circuit heard a separate challenge to the same injunction and held that the injunction violated the *Federal Constitution's First Amendment* (6 F3d 705). The Florida Supreme Court, approving the injunction order, expressed the view that the restrictions contained in the amended injunction were constitutional, under the First Amendment, in light of the medical services provided at the clinic and the protesters' past conduct (626 So 2d 664). In order to resolve the conflict between the Eleventh Circuit Court of Appeals decision and the Florida Supreme Court decision, the United States Supreme Court granted certiorari to review the Florida Supreme Court decision (510 US ___, 127 L Ed 2d 98, 114 S Ct 907).

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512 U.S. 753, *; 114 S. Ct. 2516, **;
1994 U.S. LEXIS 5087, ***; 129 L. Ed. 2d 593

On certiorari, the United States Supreme Court affirmed in part and reversed in part the Florida Supreme Court decision. In an opinion by Rehnquist, Ch. J., joined by Blackmun, O'Connor, Souter, and Ginsburg, JJ., and by Stevens, J., as to the staff residences provision, it was held that (1) the inquiry in evaluating a content-neutral injunction under the First Amendment was whether the challenged provisions of the injunction burdened no more speech than necessary to serve a significant government interest; (2) under such standard, the provision establishing a 36-foot buffer zone around the clinic entrances and driveway and the provision establishing noise restrictions were constitutional, but the following provisions were unconstitutional: the 36-foot buffer zone as applied to "private property" on the back and side of the clinic, the "images observable" provision, the prohibition against uninvited approaches of persons seeking the services of the clinic, and the prohibition against picketing within 300 feet of the residences of clinic staff; and (3) the "in concert" provision of the injunction was not unconstitutional.

Souter, J., concurring, expressed the view that (1) the issue of who was acting "in concert" with the protesters named in the injunction was not to be decided on the basis of protesters' viewpoints; and (2) the named protesters had acknowledged that governmental interests in public safety, free traffic flow, and property rights were reflected in Florida law.

Stevens, J., (1) concurring in part, expressed the view that (a) the ban on picketing within 300 feet of residences of clinic staff was unconstitutional, and (b) the "in concert" provision of the injunction was not unconstitutional; and (2) dissenting in part, expressed the view that (a) the prohibition against physically approaching persons within 300 feet of the clinic was valid as a reasonable time, place, and manner restriction, and (b) constitutional issues as to the following provisions were not properly before the United States Supreme Court and should not have been decided: the 36-foot buffer zone, the noise restrictions, and the "images observable" provision.

Scalia, J., joined by Kennedy and Thomas, JJ., (1) concurring in the judgment in part, expressed the view that reversal was proper because the entire injunction departed from the established course of the Supreme Court's jurisprudence; and (2) dissenting from that portion of the judgment upholding parts of the injunction, expressed the view that the judicial creation of a 36-foot zone in which only a particular group, which had broken no law, could not exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition applicable to that group alone, were profoundly at odds with First Amendment precedents and traditions.

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