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I. INTRODUCTION

In Canada's determinative pronouncement on the tension between the right of access to abortion clinics and the freedom of religious expression, Justice Adams insightfully conceived of this conflict as touching upon "the impact of the protest activity on women patients and on their medical service providers in the context of an equally full appreciation of the role of free speech in a democratic society."[1] The Canadian court in *Dieleman* employed its customary proportionality analysis to measure the value of religious expression against the liberty to freely enter medical centers, balancing "the wish of some to protest or oppose or express dissent with the right of others to follow their own course."[2] Two months earlier, the U.S. Supreme Court had considered a factually similar case, *Madsen v. Women's Health*

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1. Ont. (Att'y Gen.) v. Dieleman, [1994] 20 O.R.3d 229, *available at* 1994 W.C.B.J. 2729, at *18 (official reporter providing abridged opinion).

2. R. v. Lewis, [1996] 39 C.R.R. (2d) 26, 45.

Center,[3] reaching the same result as the Canadian court. Specifically, both courts ultimately privileged the right of access to abortion clinics over the right to free religious expression. But, interestingly, the reasoning deployed in reaching these parallel conclusions was conspicuously different.

What is significant about *Dieleman* is that the right to privacy and the right to free religious expression took center stage in the Canadian court's opinion. This stands in acute contrast to the American decision, in which the *Madsen* Court appears to have constrained itself to avoid such a focus. Indeed, the Court limited itself to ascertaining whether the limitation on protest outside abortion clinics represented a content-neutral restriction, without explicitly considering questions of privacy or religious freedom. In the pages to follow, I will illustrate that *Dieleman* is a uniquely Canadian decision, for it differs sharply from the corresponding American jurisprudence.

It is worth noting that Canadian jurists often call upon American legal pronouncements to inform their judgments.[4] Indeed, this has been the case in such contexts as abortion,[5] due process,[6] euthanasia,[7] evidence,[8] free exercise,[9] free speech,[10] jurisdiction,[11] the political question doctrine,[12] and the right to counsel.[13] It is, therefore, quite peculiar that Canada chose a markedly divergent course in refereeing the friction between access and speech. Indeed, it is curious that the Canadian court expounded on questions left wholly untouched by the U.S. Supreme Court. This is particularly noteworthy since the timing of *Madsen* in relation to the judgment in *Dieleman* – which followed *Madsen* by only two months and may thus be seen as a

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3. 512 U.S. 753 (1994).

4. *See* Gerard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211 (1994).

5. *See* R. v. Morgentaler, [1988] 1 S.C.R. 30, 167-71, 181-83.

6. *See* McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229.

7. *See* Rodriguez v. British Columbia (Att'y Gen.), [1993] 3 S.C.R. 519.

8. *See* Mooring v. Canada (Nat'l Parole Bd.), [1996] 1 S.C.R. 75.

9. R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 779.

10. *See* Comm. for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139; R. v. Keegstra, [1990] 3 S.C.R. 697.

11. Amchem Prods., Inc. v. British Columbia (Workers' Comp. Bd.), [1993] 1 S.C.R. 897.

12. Operation Dismantle, Inc. v. The Queen, [1985] 1 S.C.R. 441.

13. R. v. Broyles, [1991] 3 S.C.R. 595, 610, 612.

"sanitized"[14] version of *Madsen* – would otherwise dictate a different outcome. Both cases arose from similar factual situations. Yet one court deliberated upon the conflicting rights of abortion and speech while another gave them no audience. This odd outcome begs reflection upon the following question: Why did Canadian jurisprudence command the court to engage *Dieleman* with such extraordinary specificity on privacy rights and religious freedom?

The answer I wish to illuminate centers upon three principal axes. The first is societal, the second historical, and the third jurisprudential.

In the period leading up to and closely following *Madsen*, there was a palpable sense of alarm in the United States about the volatility of abortion protest and clinic violence. In a series of eruptions yet unseen in neighboring Canada, the United States witnessed a horrific cycle of abortion-related violence that escalated to crimes of murder. Significantly, the impetus for this most primitive form of protest was firmly rooted in religion and religious beliefs. Perhaps recognizing the political dimension of the anti-abortion tumult, the U.S. Supreme Court was reluctant to enter the political fray by explicitly invoking a religion-related justification to sanction or silence abortion protest. This forms the first reason for the difference between *Dieleman* and *Madsen*.

Equally important in accounting for the divergence between Canada and the United States is the role of religion in Canada. Specifically, Canada's founding history is unique in that religion played an integral role in sustaining the constitutional fabric of the nation.[15] The politicization of religion in Canada has reached such a heightened plane in the Canadian polity that the judiciary must

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14. Some have argued that the Canadian Charter of Rights and Freedoms, which safeguards such liberties as the right to privacy and the freedom of religion, both at issue in *Dieleman*, was conceived as a "sanitized" version of the U.S. Bill of Rights, with the benefit of nearly two centuries of American jurisprudence. *See, e.g.*, F.L. Morton, *The Politics of Rights: What Canadians Should Know About the American Bill of Rights*, *in* THE CANADIAN AND AMERICAN CONSTITUTIONS 107 (Marian C. McKenna ed., 1993). By analogy to the Canadian Charter and the U.S. Bill of Rights, we should see *Dieleman* as a sanitized version of *Madsen*, since, just as the Charter was drafted with reference to and after the Bill of Rights, *Dieleman* was similarly drafted with reference to and after *Madsen*. Yet in *Dieleman*, although the Canadian court had *Madsen* at its disposal for guidance in crafting its judgment, the court chose against following its rationale. *See* discussion *infra* at Part IV.

15. *See* DOUGLAS A. SCHMEISER, CIVIL LIBERTIES IN CANADA 63-67 (1964).

be particularly mindful to tip its hat to religion when the occasion arises. This was the case in *Dieleman*. Whereas the *Madsen* Court had societal and safety interests at heart when it refrained from discussing religion in its decision, the *Dieleman* court had no choice but to discuss the implications of the religious nature of abortion protest, given the historically politicized status of religion in Canada.

A final reason for the difference between *Dieleman* and *Madsen* lies in the then-recent jurisprudential history of Canada. This last element explains why the Canadian court spent such a great deal of time focusing on the privacy dimensions of abortion protest. It had only been six years at the time of *Dieleman* since Canada constitutionalized the equivalent protections for abortion that had been ushered in through the seminal American decision of *Roe v. Wade*.[16] The *Dieleman* decision came at a time when public debate on questions of life, privacy, and physical autonomy were reaching their fullest scope. It was therefore politically critical for the court to reaffirm the important, though admittedly indeterminate, legal interests of privacy underlying the court's then-recent abortion rights decision in *R. v. Morgentaler*.[17]

Part II will frame the discussion by introducing the delicate tension between the right of access to abortion clinics and the freedom of religious expression. Part III will revisit the U.S. Supreme Court's decision in *Madsen*, both contextualizing and summarizing the decision. Part IV will do the same for *Dieleman*. Part V will identify and explain the differences evident between Canada and the United States in mediating the tenuous conflict of rights pitting abortion and speech, as gleaned from these two cases. And Part VI will offer a few concluding observations.

II. CONFLICTING RIGHTS

Though I cannot be certain, I imagine that committed abortion opponents struggle in deciding how best to express their disapproval with what they view as legalized murder, and in identifying the most effective ways of purging an "evil" practice from the nation. How, they ponder, may I best serve the anti-abortion movement: Through peaceful or violent protest? What is most effective in drawing attention to this issue? Will those in

16. 410 U.S. 113 (1973).
17. [1988] 1 S.C.R. 30.

power take note of nonviolent, quiet sit-ins, or will it take only revolutionary, aggressive action? These are doubtless some of the questions that anti-abortionists, young and old, deliberate upon before charting their course of action.

A. Samuel Lee's Story

In *Articles of Faith*,[18] Cynthia Gorney follows the impassioned work of Samuel Lee to overturn *Roe* and to criminalize abortion. From his days as a young student enrolling in St. Louis University to prepare for the seminary, to his change of course while en route to the Missouri state capital where he ultimately established himself as a pro-life lobbyist, Lee seeks to identify the venue from which he may best fulfill what he believes to be his life mission. Lee's chronicled experiences illuminate and personalize an issue that simultaneously appears to transcend the individual yet, critically, is also very much rooted in the notion of individuality. This study – a study of the individual, the rights he possesses and those he seeks to defend, as well as the beliefs that inform his sympathies – is the insight that the reader draws in learning about Lee the individual. But in many ways, Lee's story is illustrative of the lives of many pro-life advocates.

In seeking to give action to his disapproval of abortion, Lee pondered how he could be most effective in voicing his message. At first compelled to enter the ministry,[19] Lee abandoned that calling for a life of pacifist civil disobedience, including sit-ins and marches at abortion clinics.[20] His involvement in this form of peaceful protest led to several confrontations with law enforcement and frequent arrest for his continued demonstrations. "Gotta go out and get arrested today," Lee would say.[21]

In response to his disruptive protests, abortion clinics sought injunctive orders restricting his access to and around their facilities.[22] But Lee would deliberately defy these orders and would not relent.[23] Ultimately, after committing six separate injunction

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18. CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF ABORTION WARS (1998).
19. *See id.* at 233-36.
20. *See id.* at 308-11.
21. *Id.* at 365.
22. *Id.* at 368.
23. *See id.* at 368-69.

violations, Lee was convicted on multiple counts of contempt of court and sentenced to serve 314 days in prison.[24]

But this signaled a moment of reflection in Lee. What good, asked Lee, is an abortion protestor locked up in jail, and how effective is martyrdom as a practical matter?[25] Lee felt he could and should be doing more to help stop abortions. He could take more radical action, like destroying and setting fire to abortion clinics,[26] kidnapping[27] or even killing abortion doctors,[28] options he had never before sensibly contemplated. But he also wanted very much to raise a family, and realized that the kinds of actions he was contemplating could land him in jail for much longer than this one year sentence for violating the court's injunctive order.[29] This choice came at a critical moment in Lee's life.

His options were conceptually sharpened following his encounters with two men, each representing one of Lee's courses of action. He knew Andy Puzder, a young lawyer who had provided legal defense to abortion protestors.[30] Andy had recently turned his attention to lobbying the state for anti-abortion laws.[31] Lee was taken with Andy's work, identifying to himself the many virtues of such a life – no more arrests, continuing commitment to the anti-abortion cause, lawful and effective contribution to the public discourse on abortion.[32]

He set that life in opposition to the life of Randall Terry.[33] As a young, fiery pro-life advocate, Terry developed a strong following across many states. He urged Christians to defy civil authority or, as he put it, to "obey God's Word, even if it means disobeying the ungodly laws of men."[34] Terry led a militant group called Operation Rescue, whose members believed they sinned as Christians by allowing abortions to occur among them.[35] "We need

24. GORNEY, *supra* note 18, at 415.
25. *Id.* at 368.
26. *See id.* at 261.
27. *See id.* at 367.
28. *Id.*
29. *See id.* at 418.
30. GORNEY, *supra* note 18, at 311.
31. *Id.* at 418-20.
32. *See id.* at 418, 420-21.
33. *See id.* at 461.
34. *Id.*
35. *Id.* at 462.

to act like it's murder," Terry would say.[36] Operation Rescue's actions were conspicuously more defiant than those in which Lee had previously participated, as the group did away with such ineffective demonstrations as quiet or peaceful sit-ins. Rather, the group was committed to do whatever it could to advance its message of life and anti-abortionism. "Very simply," explained one organizer, "we want to block some doors and save some babies."[37] Lee, after much emotional reflection, ultimately chose the former course to join Puzder as a lobbyist.

B. Conceptualizing the Tension

Anti-abortion protests pose a number of legal and constitutional difficulties. In the context of abortion clinics, the right of anti-abortion protesters to express dissent comes into direct conflict with the right of women and men to freely enter the clinics, whether to procure an abortion, seek counsel, or report for work. Forms of clinic protest include sit-ins, voluntary arrest, blocking entry, physically restraining entry, arson, kidnap, and even murder. One scholar chronicles the diversity of such anti-abortion activities:

> Their tactics have included picketing clinics, pelting pregnant teenagers with plastic replicas of fetuses, harassing clinic employees, chaining themselves to doors, and lying motionless in streets and driveways. Some have sought to intimidate women seeking abortions by setting up sham pregnancy "counseling" centers. These centers, rather than provide the counseling they advertise, have traumatized unsuspecting pregnant women with films of abortions and with films of abortion and with pro-life literature graphically depicting aborted fetuses. Such centers have been known to counsel women falsely that abortion leads to death, disease, insanity, and sterility. More ominously, some antiabortion activists have vandalized and even bombed abortion facilities. There has been a remarkable, although not much-remarked-upon, rise in the incidence of such antiabortion violence. Since 1977 [to 1990] extremists in the United States have bombed or set fire to at

36. GORNEY, *supra* note 18, at 462.

37. Tom Morton, *Abortion Foes Taught Protest Tactics*, COLO. SPRINGS GAZETTE TEL., Aug. 27, 1989, at B4, *available at* 1989 WL 2904022.

> least 117 clinics and threatened 250 others. They have invaded some 231 clinics and vandalized 224 others.[38]

While there may be some question as to whether the latter examples are forms of protest or more accurately viewed as criminal actions – or as a form of terrorism, as some have argued[39] – it is unclear whether the fanatical protestor discerns any difference. To him, it is a form of protest firmly grounded in the right to express oneself. It is his contribution to the pursuit of higher-ordered justice. This is not to suggest, however, that the root of such abortion protest is inevitably religious, for it would be a mistake to dismiss all abortion protestors as "religious nuts."[40]

But religious beliefs do significantly inform anti-abortion activism.[41] Many forms of abortion protest are underscored by a religious timbre, as many people believe themselves called to such action to fulfill their religious obligations. Others view these controversial actions as a means to acquire political capital, which they may subsequently cash in with elected officials in return for legislation curtailing abortion.[42] The theory of political capital only works, however, if a sufficient number of protestors mobilize, forge groups, and form strong coalitions among these groups. And this has in fact been the case, for when one group or organization has been threatened with sanction in response to its abortion protest activity, the others have often rallied to its defense.[43] Indeed, the anti-abortion movement is a close fraternity.

In contrast, abortion clinics, too, have taken steps to advance their cause in defense of their abortion and property rights.[44] Their actions, however, are defensive measures, as opposed to the offensive attacks leveled upon them by anti-abortion groups. The

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38. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 171-72 (1990) (internal citations omitted).

39. John Lynxwiler & Michele Wilson, *Abortion Clinic Violence as Terrorism*, 11 TERRORISM 263 (1988).

40. Nancy J. White, *Abortion: Two Sides of a Controversial Issue*, TORONTO STAR, Oct. 8, 1989, at A1 (statement by sociologist studying demographics of pro-life supporters).

41. *See* Suzanne Staggenborg, *Organizational and Environmental Influences on the Development of the Pro-Choice Movement*, 68 SOC. FORCES 204, 222-23 (1989).

42. *See* David C. Nice, *Abortion Clinic Bombings as Political Violence*, 32 AM. J. POL. SCI. 178, 179-80 (1988).

43. DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST 79 (1994).

44. *Clinics Should Use Security, Good Community Ties to Protect Against Antiabortion Threats, Violence*, 18 FAMILY PLANNING PERSPECTIVES 134 (1986).

measures include tightening security, hiring armed guards, instituting emergency procedures, developing strong community ties, and cultivating good working relationships with local enforcement authorities.[45] Abortion providers have also turned to the legislature, petitioning lawmakers for legislation guaranteeing safe and unobstructed access to clinics. By 1994, for instance, the number of states with abortion anti-harassment laws had more than doubled as a result of effective lobbying.[46]

These measures helped, but they have not solved the problem. Although judicially ordered injunctive protection has itself not ended excessive abortion protest, it is perhaps the most effective defense that abortion clinics have enlisted to curb both the frequency and intensity of protest on and around their premises. Unable to reason with anti-abortion demonstrators who have harassed their clients and detracted from their business, and their greater cause, abortion clinics, consistent with liberal democratic principles, have turned to the judiciary. There, abortion clinics have secured orders that require protestors, under threat of sanction, to refrain from demonstrating on the property and in the vicinity of the abortion clinic.[47] In some instances, abortion clinics have also secured orders requiring protestors to stay away from clinic clients and employees, whether they are on the clinic's premises, on their way to the clinic, or even at home.[48]

These injunctions, however, pose a number of civil liberty issues. Because protests constitute a form of protected speech, there exists an exacting standard for issuing an injunction. Given that the protected speech in question here is often religious in nature, this high standard is justifiable given the possibility of such injunctions directly or indirectly suppressing religious expression. On the other hand, although the First Amendment prohibits infringements upon speech, it does not immunize every possible use of language.[49] As the Court has often declared, the right of free

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45. *Id.*

46. *See* Terry Sollom, *State Actions on Reproductive Health Issues in 1994*, 27 FAMILY PLANNING PERSPECTIVES 83, 84-85 (1995).

47. *See, e.g.*, New York v. Operation Rescue Nat'l, 273 F.3d 184 (2d Cir. 2001); *see also* United States v. Scott, 958 F.Supp. 761 (D. Conn. 1997).

48. *See, e.g.*, *Anti-Abortion Group to Protest Doctor*, OMAHA WORLD-HEROLD (NEBRASKA), Oct. 6, 1995, at 15; Jeffrey Kanige, *Anti-Picketing Injunction Altered*, N.J. L.J., Dec. 5, 1994, at 8.

49. Frohwerk v. United States, 249 U.S. 204, 206 (1919); *accord* Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961).

speech, religious or otherwise, is not an absolute right to speech without responsibility.[50]

To justify the suppression of free speech, there must exist reasonable grounds to fear that serious evil – one against which the state may lawfully protect[51]– will arise if the speech in question continues.[52] Within the context of the freedom of assembly, however, only the gravest abuses endangering primary interests will give occasion to permissible limitations on free speech. It is the American tradition to allow the "widest room for discussion, [and] the narrowest range for its restriction."[53] But where speech is so "interlaced with burgeoning violence" – as is so often the case in abortion protest – "it is not [necessarily] protected by the broad guaranty of the First Amendment."[54] The same is true of speech that creates an immediate panic or is intended immediately to provoke violence.[55]

It therefore follows that the right to protest or propagandize is not inalienable, for people do not have the right to engage in such activity whenever, however, and wherever they please.[56] As a corollary, no one has the right to impose even "good" ideas upon unwilling recipients of the message.[57] The rule, stated briefly, is that the Court applies its most exacting scrutiny to regulations that suppress, disadvantage, or impose dissimilar burdens upon speech on the basis of its content, while content-neutral regulations are subject to an intermediate level of scrutiny.[58]

But Americans nevertheless retain the right to be free from government regulation based on the content of their speech, because the operative principle for government action is

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50. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

51. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); *see* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (identifying factors to be considered in justifying limitations on First Amendment freedoms).

52. Am. Comm. Ass'n v. Douds, 339 U.S. 382, 412 (1950) (the First Amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom."); Bridges v. California, 314 U.S. 252, 262 (1941) (suggesting that "clear and present danger" is an appropriate guide to determine the constitutionality of restrictions upon expression).

53. Thomas v. Collins, 323 U.S. 516, 530 (1945).

54. Carroll v. President of Princess Anne, 393 U.S. 175, 180 (1968).

55. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982).

56. Adderley v. Florida, 385 U.S. 39, 47-48 (1966).

57. Rown v. United States Post Office Dep't, 397 U.S. 728, 738 (1970).

58. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641-42 (1992).

neutrality.[59] When, however, governmental action regulates speech based on its content, the action must be subjected to exacting scrutiny to ensure that the speech was not prohibited on the basis of governmental disapproval or hostility to the speech.[60] The principal inquiry in determining whether a speech restriction is neutral as to content is the government's purpose for imposing the limitation on speech.[61] Specifically, the question is whether the government has adopted the restriction because of its disagreement with the message that the speech conveys.

In the context of protest speech on and around the premises of abortion clinics, the ultimate question is whether the court-imposed injunction targets conduct or speech. Anti-abortion advocates argue that such restrictions are content-based and detract from the impact of their message. For instance, in response to injunctions prohibiting protestors from delivering their message on or around the premises of an abortion clinic, one participant asks: "Of what use is picketing in front of the wrong building? Offering a leaflet to someone who is far removed? To do so would be like addressing an audience with your back towards them or speaking with a gag over your mouth."[62] In retort, abortion clinic supporters argue that, quite the contrary, pro-life demonstrators may indeed speak – just not in a way that hinders the function of the clinic or the interest of its attendees. In theory, the demarcation may be clear, but in practice it is admittedly problematic to ascertain where the line between the two stands.

These are some of the questions that Canada and the United States have endeavored to resolve. Interestingly, although both have reached similar conclusions, the manner in which they have done so bears reflection. The reasoning and legal judgment Canada deployed in reaching its resolution to these questions has differed substantially from the reasoning used by U.S. courts. A closer look at these differing decisions reveals that historical, legal,

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59. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 67-68 (1976).

60. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980).

61. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *Cf.* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints at the expense of others.").

62. Nancy E. Roman, *Case Pits Abortion vs. Free Speech*, WASH. TIMES, Apr. 28, 1994, at A4 (statement by attorney representing pro-life supporter Judy Madsen in *Madsen v. Women's Health Center*).

and socio-political reasons satisfactorily explain this divergence. Let us consider this fascinating difference between Canada and the United States by first examining the seminal decisions from each nation and subsequently illuminating the differences in judgment. The United States will be examined first.

III. AMERICAN PRACTICE AS STANDARD: A LOOK AT *MADSEN*

In 1994 the U.S. Supreme Court decided *Madsen*, in which anti-abortion protestors challenged the validity of an injunction restricting the form and manner of their demonstrations. Although the Court's new test for assessing the constitutionality of a content-neutral injunction merits some attention,[63] my principal occupation is with what the Court did not discuss. In finding the injunction partly violative of First Amendment protections, the Court focused primarily on the content-neutrality of the injunction, rather than squarely addressing issues of privacy and religious liberty. This is quite peculiar, for these questions were prominent in the deliberations of a number of antecedent lower court cases.[64]

When the Court agreed to hear *Madsen*, the prevailing wisdom among pundits was that this case would serve as the basis for a decision of some considerable magnitude.[65] Not since 1988[66] – and prior to then, never – had the Court attended to the nascent tension between the right to abortion access and free expression. Consider that in the years between 1988 and 1994 when *Madsen* was decided, judges in at least twenty-five cities faced this contentious question yet to be addressed by the Supreme Court:

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63. Under *Madsen*, injunctions "must burden no more speech than necessary to serve a significant government interest." This is a departure from the Court's previous "standard time, place, and manner analysis [which] is not sufficiently rigorous." *Madsen*, 512 U.S. at 765.

64. *See* Women's Health Care Servs. v. Operation Rescue-Nat'l, 773 F. Supp. 258 (D. Kan. 1991), *rev'd*, 24 F.3d 107, *vacated by* 25 F.3d 1059 (10th Cir. 1994); Pursley v. City of Fayetteville, 628 F. Supp. 676 (W.D. Ark. 1986), *rev'd*, 820 F.2d 951 (8th Cir. 1987); Welsh v. Johnson, 508 N.W.2d 212 (Minn. Ct. App. 1993); Eanes v. Maryland, 569 A.2d 604 (Md. Ct. App. 1990).

65. *See* Joan Biskupic, *Supreme Court to Decide About Limits on Abortion Protests*, WASH. POST, Jan. 22, 1994, at A7; Richard Carelli, *Supreme Court to Rule on Abortion Clinic Protest Limits*, ASSOC. PRESS, Jan. 21, 1994, *available at* 1994 WL 10129823.

66. In 1988, the Supreme Court upheld a Brookfield (WI) ordinance that prohibited targeted picketing in residential areas. Brookfield had enacted the ordinance in response to orderly and peaceful picketing outside the residence of a doctor who performed abortions at clinics in two neighboring towns. Frisby v. Schultz, 487 U.S. 476-77 (1988).

When does anti-abortion speech breach the admittedly blurry boundary between constitutionally protected expression and illegal harassment?[67] The lower courts tried valiantly to resolve this thorny issue without much guidance from the Court. At least in part, this absence of direction sheds light upon the resultant divergent rulings from lower federal[68] and state[69] courts on this conflict of rights.

A. Reviewing the Facts

"We're there on a mission of mercy,"[70] implored Judy Madsen, one of the individuals who contested the validity of injunctive restrictions that constrained what she believed to be her right to express moral disagreement with abortion. Along with dozens of demonstrators from Operation Rescue, Madsen was arrested for violating the terms of a restraining order prohibiting various forms of protest activity, including: staging anti-abortion protest within thirty-six feet of clinic property, approaching individuals seeking the services of the clinic within 300 feet of the clinic, and organizing demonstrations within 300 feet of the homes of clinic personnel.[71] Below is a summary of the critical historical details leading to Madsen's violation of the injunction.

In September 1992, a Florida trial court entered a permanent injunction restraining Madsen and other anti-abortionists from blockade activity and interference with public access to the Aware Woman Center for Choice ("Center"), an abortion clinic in Melbourne, Florida.[72] The restrictions, designed to protect against physical abuse, extended equally to those entering as well as

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67. David G. Savage, *Justices to Enter Abortion Clinic's 'Buffer Zone,'* L.A. TIMES, Apr. 24, 1994, at A20.

68. *Compare* Cheffer v. McGregor, 6 F.3d 705, 710 (11th Cir. 1993) (striking down injunction prohibiting anti-abortion activists from protesting at and around abortion clinics), *with* N. Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1364 (2d Cir. 1989) (upholding similar injunction).

69. *Compare* Horizon Health Ctr. v. Felicissimo, 638 A.2d 1260, 1262 (N.J. 1993) (adopting a narrow view of allowable restrictions imposed on anti-abortion protestors), *with* City of Cleveland v. Uveges, Nos. 58498, 59499, 59500, 58501, 1991 Ohio App. LEXIS 2272 (Ohio Ct. App. 1991) (advancing more expansive limitations on the rights of anti-abortion protestors).

70. Joan Biskupic, *Limit on Protests at Abortion Clinic Reaches Top Court*, WASH. POST, Apr. 24, 1994, at A13.

71. *See Madsen*, 512 U.S. at 759-60.

72. *Id.*

exiting the clinic.[73] Only half a year later, the Center petitioned the court to expand the terms of the injunction because the protestors had not ceased impeding the work of the Center, both directly by engaging in blockade activity[74] and indirectly by discouraging prospective patients from visiting the Center.[75] Because of this and other unseemly forms of protest activity,[76] the trial court amended and re-entered a farther-reaching injunction against anti-abortion demonstrations at and around the Center.

Upon initial consideration, the terms of the court's injunction were particularly stifling.[77] But when viewed alongside the scope and fanaticism of the protest activity the injunction was intended to curb, it is less problematic to perceive the injunction as appropriate. Consider the terms of the order: Madsen and others were (1) barred from entering the Center; (2) prohibited from engaging in any blockade activity; (3) prohibited from demonstrating within a thirty-six feet buffer zone of the Center's entrance; (4) prohibited from singing, chanting, making noise or broadcasting any images within a patient's sight or hearing distance in the Center during the morning hours; (5) forbidden

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73. *Id.*

74. The trial court concluded that mass congregation in front of the clinic and marching in front of the Center's driveway entrance impeded access to the Center. *See id.* at 758. There also appeared to be a coordinated effort to distribute anti-abortion literature to the Center's clients: as vehicles entering the clinic slowed down because of nearby and advancing protestors, "sidewalk counselors" would approach drivers and passengers brandishing literature. *Id.* On occasion, demonstrators numbered into the hundreds, which produced a great deal of noise in the community. *Id.*

75. Some potential Center clients were forced to turn away because of the crowd. *Madsen*, 512 U.S. at 758.

76. The trial court also found that the vigor of demonstrations exacted a measurable toll upon the Center's patients. For instance, the demonstrations and noise created increased tension and anxiety among patients, thus requiring a higher level of sedation before surgery. *Id.* Anti-abortionists also picketed Center personnel at home, identified Center personnel as "baby killer" in uninvited conversations with personnel neighbors, and even confronted children of Center personnel. *Id.* at 759.

77. If we consider the Court's traditional jurisprudence on injunctions upon speech, the speech restrictions imposed by the Florida trial court upon Madsen and her fellow anti-abortionists is relatively severe and exceptionally harsh. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (reversing federal district court's issuance of a permanent injunction prohibiting military authorities from interfering with the making of political speeches or the distribution of leaflets in areas of a military installation open to the general public); *Carroll*, 393 U.S. at 181 (reversing state court's issuance of an ex parte 10-day restraining order against a white supremacist rally); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 504 (1949) (upholding state trial court's injunction of officers and members of a labor union from picketing appellee's place of business).

from ever approaching individuals seeking the services of the Center within 300 feet of the Center absent a clear invitation; (6) barred from ever protesting within 300 feet of the homes of Center personnel, and from inhibiting access to their respective homes; (7) prohibited from physically abusing or intimidating or otherwise disturbing clients, prospective clients, and personnel entering or exiting the Center or their homes; and (8) prohibited from encouraging, counseling, or inciting others to commit any of the acts forbidden under the injunction.[78] On review, the Florida Supreme Court upheld the trial court's amended injunction. The court concluded that the forum at issue was a traditionally public one, and subsequently determined that the injunctive limitations were content-neutral. This finding commanded the court to examine whether the speech restrictions were narrowly tailored to serve a significant government interest instead of applying the heightened scrutiny applicable to content-based restrictions, which requires restrictions narrowly tailored to achieve a compelling state interest.[79] The state high court concluded that the restrictions were sufficiently narrowly tailored so as not to foreclose other means of non-violent expression.

Madsen herself opposed violent forms of protest, but nevertheless vehemently challenged the constitutionality of protest-free zones as unfairly restrictive. Madsen said, "we are peacefully acting within the law, using our freedom of speech to say that human life needs to be protected."[80] And peaceful she was, according to the Supreme Court, as it ultimately invalidated the speech-restrictive constraints imposed upon her. But as Madsen and her fellow activists soon learned, American jurisprudence has "vigorously and forthrightly rejected"[81] the assumption that people have a constitutional right to protest whenever and however and wherever they please. Indeed, as the Court has previously declared, "the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may

78. *Madsen*, 512 U.S. at 759-61.

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

80. Craig Crawford, *Brevard Case May Become Landmark*, ORLANDO SENTINEL, Apr. 2, 1994, at A6.

81. *Adderley*, 385 U.S. at 48.

address a group at any public place and at any time."[82] The Supreme Court's resolution of *Madsen* merits further examination.

Madsen came to the U.S. Supreme Court on a writ of certiorari. The Florida high court had upheld the constitutionality of the injunction, concluding that the restrictions imposed by the trial court's order were content-neutral and did not unduly infringe upon the First Amendment rights of anti-abortion protestors. Florida's decision was not the sole impetus for the Court's intervention, however, as the Eleventh Circuit had just presided over a challenge to the same injunction. Before the state court issued its opinion upholding the order, the federal appellate court considered a separate objection to the injunction. But rather than sustaining the injunction, as the Florida court subsequently did, the Eleventh Circuit promptly invalidated the injunction. Declaring that "the clash here is between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights,"[83] the federal court framed the balance as between a concretized harm to expression rights and a possible harm – neither a latent nor prospective one, according to the Court – to a relatively "new one stemming from *Roe v. Wade*."[84] The matter was therefore ripe for a higher authority to settle the split between the Florida Supreme Court and the Eleventh Circuit.[85]

B. Examining the Court's Decision

The Court's decision may be conceived of as eight separate statements: (1) the injunction imposed upon Madsen was content-neutral; (2) because injunctions on expression bring a greater threat to otherwise protected speech, the injunction in *Madsen* must be assessed under a more stringent standard than the Court's customary "time, place, and manner" analysis. This new standard ought to require that the injunctive order burden no more speech

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82. Cox v. Louisiana, 379 U.S. 536, 554 (1965).

83. *Cheffer*, 6 F.3d at 711.

84. *Id.* at 711 (quoting Miss. Women's Med. Clinic v. McMillan, 866 F.2d 788, 791 (5th Cir. 1989)).

85. Interestingly, the Supreme Court announced it would hear *Madsen* on the same day that 35,000 anti-abortion activists staged their annual "March for Life" demonstration to mark the anniversary of *Roe v. Wade*, the 1973 case in which a woman's right to choose was constitutionalized. *See* David G. Savage, *Justices to Rule on Abortion Clinic Protests*, L.A. TIMES, Jan. 22, 1994, at A25; Mary Deibel, *Limits on Abortion Protesters Unfair?*, ATLANTA J. CONST., Jan. 22, 1994, at A10; *Roe*, 410 U.S. at 113.

than necessary to serve a significant government interest; (3) under the Court's newly-ushered standard, the thirty-six foot buffer zone around the Center's entrance burdens no more speech than necessary to safeguard the government's interest in preserving unfettered access to and from the Center; (4) this buffer zone, however, may not extend to private property adjoining the Center, for such a restriction burdens more speech than is necessary to protect the governmental interest of free access; (5) also, because noise control is an important interest for medical facilities, the injunctive noise restrictions are not unnecessary infringements upon fundamental speech rights; (6) but because the prohibition on the broadcast of images (i.e., visual signs) constrains more speech than necessary, this provision must therefore fail; (7) moreover, the 300-foot no-contact cushion around the Center for individuals seeking the services of the Center is too far-reaching an infringement upon speech; and (8) similarly, the 300-foot no-entry, no-protest zone around the homes of Center personnel burdens more speech than is necessary to accomplish the permissible goals of the injunction, which focus principally upon access to the Center. Each of these statements will now be examined in detail.

The first question for the Court to settle was whether the injunction was neutral as to the content and the kind of speech it was designed to restrict. Three days before the Court issued its *Madsen* decision, it struggled to articulate the distinction between content-neutral and content-based restrictions, writing that "deciding whether a particular regulation is content based or content neutral is not always a simple task."[86] The Court explained that if actions "confer benefits or impose burdens on speech without reference to the ideas or views expressed [they] are in most instances content neutral."[87] By contrast, regulations "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."[88] In *Madsen*, the Court exhibited no discernible vacillation on this question as it had a few days earlier.

Following its earlier reasoning that speech may not be suppressed "based on hostility – or favoritism – towards the

86. *Turner Broad. Sys.*, 512 U.S. at 642.
87. *Id.*
88. *Id.*

underlying message expressed,"[89] the Court found the injunction to be content-neutral. Although the Court acknowledged that the form of speech suppressed in *Madsen* was anti-abortionist in nature, this result was only incidental. Where restrictions are "intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others,"[90] such limitations constitute permissible content-neutral infringements upon speech. Indeed, "none of the restrictions imposed by the [trial] court were directed at the contents of [Madsen's] message," because there is no indication that "Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion."[91] In this sense, the Court rationalized that "the fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion."[92] Moreover, the Court suggests that the restrictions leveled upon Madsen were justly adopted "without reference to the content of the regulated speech."[93]

In recognizing that "the constitutional right of free expression is powerful medicine in a society as diverse and populous as ours,"[94] the Court took great care to stress that an injunction carries "greater risks of censorship and discriminatory application than do general ordinances."[95] This point is of particular significance, for the Court adjudged this difference to warrant a more stringent review of injunctive restrictions upon speech. Whereas the standard time, place, and manner analysis would otherwise govern, the Court deemed it necessary in evaluating the content-neutral injunction in *Madsen* to fashion a new form of review, one that ensured the terms of the injunction "burden no more speech than necessary to serve a significant government interest."[96] On appeal, the Florida Supreme Court identified a

89. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).
90. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 122 n.1 (1991).
91. *Madsen*, 512 U.S. at 762-63.
92. *Id.* at 762.
93. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).
94. Cohen v. California, 403 U.S. 15, 24 (1971).
95. *Madsen*, 512 U.S. at 764.
96. *Id.* at 765.

number of governmental interests served by the injunction that it would later go on to uphold.[97] Among these, the appellate court listed the interests in protecting a pregnant woman's freedom to seek lawful medical or counseling services, ensuring public safety and public order, safeguarding property rights, and assuring residential privacy.[98] The Court endorsed each of these as a sufficiently significant interest.[99] It was therefore under this intermediate level of scrutiny that the Court proceeded to review the four corners of the injunction.

A number of factors led the Court to conclude that the 36-foot buffer zone around the entrance to the Center was a permissible infringement upon the right to free speech. In addition to focusing on the narrowness of the confines around the Center and the picketing activities targeting patients and clinic staff, the Court declared that the failure of the first injunction to protect access to the Center and enable an orderly flow of traffic on nearby streets suggested that the buffer zone was necessary.[100] The Court insisted, however, that the buffer zone's extension onto private property impermissibly infringed upon speech because picketing and other forms of protest on the private property adjacent to the Center did not inhibit its operation, nor did they impede access to the Center.[101]

With respect to the noise around the Center during hours of operation, the injunction appropriately provided for control of excessive noise so as not to interfere with patients during surgery or in recovery.[102] The injunctive prohibition on images, however, burdened more speech than necessary because, unlike noise, the staff may simply pull shut the curtains to conceal bothersome images.[103] Moreover, absent clear evidence that Madsen's speech is independently proscribable or is so imbued with violence, the 300-foot zone around the Center in which anti-abortionists cannot approach individuals heading to or from the Center burdens more speech than is necessary to preserve the right of access to the

97. *Id.* at 767-68.
98. *Id.*
99. *Id.* at 768.
100. *See id.* at 769-70.
101. *Madsen,* 512 U.S. at 771.
102. *See id.* at 772.
103. *Id.* at 773.

Center.[104] Although it is true that people may have a right to be free from undue intimidation, "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[105]

Similarly, the 300-foot buffer zone around the homes of Center personnel reaches much further than necessary to protect the privacy people expect in their homes.[106] Admittedly, "there simply is no right to force speech into the home of an unwilling listener,"[107] but the broad sweep of this provision detracts from too much otherwise lawful speech. The Court suggested that perhaps a temporal limitation or a limit on pickets could have achieved the same result.

This was the extent of the Court's deliberation in *Madsen*. The Court dispensed with the case rather promptly, devoting relatively few pages to its opinion. Having first asserted that the injunction was content-neutral, the Court proceeded to uphold and invalidate select elements of the injunction.[108] But the Court did not give significant attention either to questions of religion, which was the impetus for the protests, or privacy, which the Center sought to preserve for its clients.

IV. CANADIAN PRACTICE AS DEVIATION: SURVEYING *DIELEMAN*

Two months after *Madsen*, the Ontario court issued its eagerly anticipated *Dieleman* decision.[109] As in *Madsen*, the major issue was the constitutionality of an injunctive buffer zone in which anti-abortionists were barred from engaging in forms of protest against abortion rights and the right of access to abortion clinics.[110] In *Dieleman*, the Government of Ontario petitioned the court for an order enjoining all forms of anti-abortion protest occurring around a number of abortion-related locations, including hospitals, abortion clinics, offices, and physicians' homes.[111] Joanne

104. *Id.* at 774.
105. *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).
106. *Id.* at 775.
107. *Frisby*, 487 U.S. at 485.
108. *See Madsen*, 512 U.S. at 753.
109. *See Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *1.
110. Differences, however, did exist in the radii of the buffer zones. *See id.*; *Madsen*, 512 U.S. at 753.
111. *See Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *1.

Dieleman, a long-time opponent of abortion, invoked her constitutional freedoms of expression, assembly, and religion in response to the challenge levied against her demonstrations.[112]

In its ruling, the court granted the province an injunction restraining Dieleman from several forms of protest activity, including picketing, sidewalk counseling, interfering with access to the clinic, and intimidating clinic visitors and employees. Specifically, the court imposed twenty-five to sixty-foot buffer zones around the abortion locations, in addition to 130 to 160-foot protective radii within which individuals heading toward the clinic would be safe from unwanted approach or contact.[113] The court also approved a 500-foot protective zone around the homes of abortion physicians.[114] An examination of the events leading to the court's decision follows.

A. Reviewing the Facts

Long before 1994, when Ontario filed its case against Joanne Dieleman, she had established a lengthy history of anti-abortion involvement. In the late 1980s, Dieleman served as manager of The Way Inn, a restaurant and pro-life counseling service located next door to an abortion clinic.[115] A mother of eight – including two disabled adopted children – and a foster parent, Dieleman was a born-again Christian whose pro-life purpose stemmed not only from her religious grounding, but from her memories of the Nazi occupation in her native Holland: "We're living with the gas ovens now... but we're getting used to the smell,"[116] she once said, lamentably comparing the Holocaust to the increasing societal acceptance of abortion.

For Dieleman, life begins at conception, and nothing – not even rape or incest – can justify abortion.[117] In a letter to the editor, she once explained that "after all, [abortion] does not make a

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112. *Id.* at *18.

113. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *702-03.

114. *Id.* at *708-09.

115. *Pro-Life Group Complains Police Won't Probe Vandalism*, TORONTO STAR, Apr. 16, 1988, at A24.

116. White, *supra* note 40.

117. Judy Steed, *There's No Law But There's Still a Fight*, TORONTO STAR, Feb. 29, 1992, at D5.

woman 'not pregnant,' it makes her the mother of a dead baby."[118] Resolved that her concept of justice would ultimately prevail and that her demonstrations outside abortion facilities would reveal to abortionists the light of her model of truth, Dieleman said that "at times we don't look like we're gaining. But I've read the last chapter. Eventually, we win."[119]

But Dieleman was not only a perpetrator of protest activity; she had also been a target of pro-choice militants. In response to an incident in which someone threw a brick through her window, Dieleman exclaimed, "we're used to this sort of stuff."[120] But unlike the help extended to vandalized abortion clinics – which prompted the government to restrict excessive protests – Dieleman felt that little was done to identify and bring her assailant to justice.[121] Whether or not her claim had merit, enforcement authorities surely gave more than sufficient attention to the clinics' complaints against her. To be sure, the protest actions of Dieleman and her fellow protestors long remained a focus of law enforcement officials. Their efforts against her culminated in 1994, when the Government of Ontario applied for an injunction to prevent Dieleman and others from blocking access to clinics, disturbing the peace, intimidating clinic clients, and from shouting such statements to physicians and clinic employees as, "Baby killer," "You are going to hell," and "Going in for your blood money again?"[122]

Spearheading the government challenge was then-Attorney General Marion Boyd. Boyd was a pro-choice advocate whose department had gone to great lengths to incapacitate the pro-life movement, having, for instance, hired a publicly funded private investigator to infiltrate pro-life circles in order to gather incriminating evidence.[123] Boyd was a member of the New

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118. Joanne Dieleman, *Studies Show that Long-Term Remorse After Abortion Is Felt by Many Women*, TORONTO STAR, Nov. 12, 1993, at A26.

119. White, *supra* note 40.

120. *Pro-Life Group Complains Police Won't Probe Vandalism*, *supra* note 115.

121. *Id.*

122. Tracey Tyler, *Are Pro-Life Pickets Homespun or Dangerous?*, TORONTO STAR, Jan. 24, 1994, at A1.

123. *See Ontario Sets Out to Crush Pro-Life: A Feminist Attorney-General Sues 18 Demonstrators for Legally Holding Signs*, CAN. BUS. & CURRENT AFFAIRS W. REP., Feb. 21, 1994, at 23-24.

Democratic Party (NDP), which had entered into power in Ontario in 1990 as a strident warden of abortion rights.[124] In fact, the NDP had commissioned a consultation group on how to improve access to abortion services.[125] Coupled with its recommendation that Ontario immediately improve access to clinics, the commission urged the NDP to seek an injunction to halt pro-life demonstrations.[126] The work of this consultation group offered the necessary compulsion for the government's action in *Dieleman*, although it is more than likely that the NDP would have acted to suppress anti-abortionist activity around medical facilities without this public impetus.[127]

In seeking the injunction against Dieleman, the government invoked a number of interests it sought to preserve, including: (1) the health and safety of abortion seekers; (2) unimpeded physical access; (3) medical personnel's freedom from harassment or intimidation in the course of administering abortions; and (4) physicians' and their families' freedom from harassment and intimidation in their private lives.[128] In response to Dieleman's claim that an injunction restraining her right to protest would interfere with her freedoms of religion,[129] expression,[130] and assembly,[131] as enshrined in the Canadian Charter of Rights and Freedoms, the government argued the following.

Principally, the NDP relied on the long-standing notion that the rights and freedoms guaranteed in the *Charter* are not absolute.[132] Specifically, the government contended that freedom

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123. Andrew Duffy, *NDP Urges Access to Abortions*, TORONTO STAR, Oct. 14, 1990, at A3. *See* Paula Todd, *Bob Rae's Year of Trial by Fire*, TORONTO STAR, Sept. 6, 1991, at A23 (noting the government's effort to lobby the Senate on abortion rights).

124. *Id.*

125. *See Morgentaler Proposal Accepted for Ottawa Abortion Clinic*, CAN. NEWSWIRE, Feb. 17, 1994, *available at* LEXIS, Nexis Library.

126. William Walker, *Boost Security for Abortions, Police Are Told*, TORONTO STAR, Dec. 18 1992, at A1.

127. *See, e.g.*, Susan Pigg & Paula Todd, *Pro-Choicers Challenge Rae*, TORONTO STAR, Oct. 24, 1990, at A13 (describing the pro-choice movement's mounting pressure on the government of Ontario); Paula Todd, *Ontario Set to Challenge Planned Law on Abortion*, TORONTO STAR, Oct. 24, 1990, at A1 (outlining the government's concern with women's constrained access to abortion services).

128. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *388-89.

129. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.

130. *Id.* at § 2b.

131. *Id.* at § 2c.

132. *See* Young v. Young [1993] 4 S.C.R. 3, 11 (italics in original).

of religion was not properly at issue because Dieleman's religion did not require her to picket as a tenet of her faith.[133] Moreover, the Attorney General argued that freedom of religion does not extend to activities that harm others, or interfere with or impede the parallel rights of others.[134] With respect to Dieleman's freedom of expression claim, the government responded that violent and threatening forms of speech – like the form of speech Dieleman had deployed – are not entitled to protection under the Constitution.[135]

B. Examining the Court's Decision

"The instant matter," proclaimed the court in *Dieleman*, "involves a clash of constitutional values."[136] It did, in fact, involve a conflict of rights, as the freedom of speech stood squarely before the constituent rights and freedoms underlying the right to access abortion clinics. In addressing the merits of the case, the court first dispensed summarily with NDP's claims of assault,[137] trespass and mischief,[138] watching and besetting,[139] stalking,[140] causing a disturbance,[141] and other secondary claims.[142] Although this analysis spanned several pages, the court's substantive deliberation effectively began with its consideration of the Attorney General's claim that Dieleman's protest activities constituted an invasion of privacy.[143]

The court struggled with the notion of privacy. Although the court clearly wanted to settle this dispute, at least in part, on privacy grounds, applicable privacy precedent remained scarce. Evident in the court's deliberation was a back-and-forth in which the court would acknowledge the force of the government's

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133. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *398 .
134. *Id.*
135. *Id.*
136. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *487.
137. *Id.* at *491 (declaring that claims brought under assault were best analyzed in the context of the doctrine of nuisance).
138. *Id.* at *492-94 (finding no criminal violation).
139. *Id.* at *494-502 (declining to address these issues independently of the freedoms of expression and religion).
140. *Id.* at *502-03 (declining to consider this claim because the statutory provision under which it was brought did not exist at the time of the challenged conduct).
141. *Id.* at *504 (finding no proof that a prima facie violation had been established).
142. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *504-25.
143. *Id.* at *525-26.

privacy claim and subsequently reserve judgment as to whether the claim was in fact meritorious. For instance, the court first appeared to foreshadow a victory for the government in explaining that "when the defendants and others shout, scream, speak to and otherwise communicate with women patients entering an abortion clinic, they do so with a clear understanding that these women wish anonymity and may be deterred from seeking an abortion by an invasion of their privacy."[144] The court recognized that an unseemly result would follow from Dieleman's actions, but nevertheless felt constrained from declaring an outright violation of privacy given that the privacy infringement occurred on public sidewalks and roadways. The court found that "there is nothing 'private' about the locations where the plaintiff seeks an injunction."[145] Trying to supersede the public-private hurdle in order to grant the NDP's privacy claim, the court turned to tort law, but concluded that it could not "speak with confidence of a Canadian tort of invasion of privacy."[146] The court continued, "the concept of privacy is too ambiguous and broad to be able to be covered adequately in one cause of action."[147]

The court's decision took a turn toward embracing a more expansive understanding of privacy in noting that "the decision to have an abortion is a profoundly personal matter. Those defendants who picket and those who advocate picketing of abortion facilities are acutely aware that women who attend such facilities desire privacy. . . . The defendants intend to 'expose' these decisions as part of a strategy to deter women from carrying them out."[148]

Having earlier invoked William Prosser's powerfully influential article, *Privacy*,[149] which contrasted privacy tort law in Canada and the United States, the court called upon Edward Bloustein's response[150] to Prosser and stressed that the real nature of a privacy complaint is that the intrusion is demeaning to

144. *Id.* at *526.
145. *Id.* at *528.
146. *Id.* at *529.
147. *Id.* at *530.
148. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *536-37.
149. William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
150. Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

individuality and an affront to personal dignity.[151] "When the right [to privacy] is violated," wrote the court, "she suffers outrage or affront, not necessarily mental trauma or distress. And, even where she does undergo anxiety or other symptoms of mental illness as a result, these consequences themselves flow from the indignity which has been done to her."[152]

The court then made a calculated jump from privacy protections to the law of nuisance, declaring that there exists a "close relationship between existing torts such as nuisance and the elements of human dignity which give rise to concerns for individual privacy."[153] The court identifies privacy as an interest that is protected by law. Thus, "privacy can be accommodated within an established tort, simply because established torts only illustrate more general principles as these principles are related to, though not limited by, a specific family of facts."[154] The court then made two significant statements: (1) given the close connection in this context between privacy and expression, an injunction to safeguard privacy interests cannot issue without a full analysis of speech rights; and (2) because women's privacy interests in this context are integrally related to the location and operation of a medical facility, they are perhaps best accommodated under the doctrine of private and public nuisance.

C. The Court's Proportionality Analysis

In determining whether or not a nuisance exists, the court explained that we must reconcile conflicting claims, that is, "the claim to undisturbed use and the enjoyment of land on the one hand with the claim to freedom of action on the other."[155] Did the defendants' actions – which included surrounding patients as they approached clinics, interfering with or blocking or partially blocking their entry into the clinic, shouting at them, making patients feel guilty, shoving literature in patients' faces, waving placards outside the clinics, thrusting plastic fetuses into the faces of women trying to enter the clinics, and intimidating clinic employees – constitute a nuisance? Yes, the court says: "the

151. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. LEXIS 2729, at *538.
152. *Id.*.
153. *Id.* at *546.
154. *Id.* at *547.
155. *Id.* at *552 (quoting REMEDIES IN TORT (Linda D. Rainaldi ed., 1992)).

evidence reveals a prima facie interference with the reasonable use and enjoyment of the clinic locations and the homes and offices of physicians."[156] But this did not signal a victory for the NDP, as the court then turned to weigh the countervailing interests of the defendants, namely, the freedoms of expression, assembly, and religion.

With respect to the defendants' claim that an injunction would violate their freedom of expression under the Canadian Charter of Rights and Freedoms, the court, in recognizing that "the exercise of speech on a street or in a public park is fundamentally important,"[157] concluded that an injunction would in fact infringe upon their constitutional right. This did not mean, however, that an injunction could not issue restraining Dieleman's freedom of expression because, as the court noted, "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[158]

Under Section 1 of the Charter, the court must balance competing values and undertake a proportionality analysis to determine which right trumps the other. But the court was careful to note that such an appraisal commands the very highest degree of judicial caution. The court stated that "the right to freely express one's views on social and political issues resides at the very heart of a democracy." Therefore, "restrictions which target social and political debate . . . trigger the foundational nature of freedom of speech. For this reason, such restrictions demand particular scrutiny."[159] Accordingly, Canada's proportionality analysis merits further attention.

Section 1 of the Charter, Canada's equivalent to the U.S. Bill of Rights, provides that the rights and freedoms guaranteed to Canadians are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[160] This means that the rights and freedoms set out in the Charter are not absolute in nature and thus can be lawfully curtailed or even extinguished. Section 1 contemplates that judicial

156. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *571.
157. *Id.* at *608.
158. CAN. CONST. pt. I, § 1.
159. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *615-16 .
160. CAN. CONST. pt. I, § 1.

review of legislation proceeds in two distinct stages: (1) the court must determine whether the challenged legislation has the effect of limiting the guaranteed Charter rights, for instance, speech or religious observation; and (2) if the challenged law does have this effect, the court must then determine whether this legislatively imposed limit is a reasonable one that can be demonstrably justified in a free and democratic society.[161]

Under Section 1, the government shoulders the onus of demonstrating the propriety of any limitation upon speech although, as the court has previously accepted, "not all speech is of equal value and . . . much depends on the particular context."[162] Developed in the leading Charter case, *R. v. Oakes*,[163] Canada's Section 1 analysis involves a two-pronged inquiry to establish that a limit upon Charter rights is reasonable and demonstrably justified in a free and democratic society.

First, the objective served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns that are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, the party invoking Section 1 must show that the means are reasonable and demonstrably justified. This involves a form of proportionality involving three important components. First, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. Next, the means should impair the right in question as little as possible. Finally, there must be proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.[164]

But in considering this Section 1 test, an important question arises: What are the societal values and larger rights that could

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161. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 688 (2d ed. 1997).
162. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *619.
163. The Queen v. Oakes [1986] 1 S.C.R. 103.
164. *See id.*

possibly justify infringing upon a fundamental right? Chief Justice Dickson answered this question in the seminal *Oakes* case:

> The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person,[165] commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[166]

The court took little time in concluding that the government's concerns constituted objectives of sufficient importance to warrant overriding the constitutionally protected freedom of expression.[167] These concerns – including the consequences of any delay to women's access to safe abortion services, the physiological and psychological health of women, privacy interests of women in coming to terms with issues of life, death, sexuality, self-image, relationship, family and future plans, unnecessary humiliation and embarrassment inflicted upon women, protecting health care providers from the nuisance created by the defendants, privacy interests of physicians and their captive families – were sufficient to resolve the court's analysis of the first prong.[168]

To answer the second prong, the court proceeded to examine each type of location where the defendants had crossed the bounds of constitutional expression. With respect to hospitals, the court found insufficient evidence to constitute unreasonable interference with their operation; thus, the requirements of the second prong were not met and no injunction could be lawfully issued. Because public hospitals are multi-service facilities and people enter hospitals for a multitude of medical reasons, it is not possible for protestors to identify, target, and capture abortion patients.[169]

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165. Note that one justification listed by Dickson is the "inherent dignity of the human person." Notably, not only is dignity one of several principles that underlies a woman's right to abortion, but it was the very basis upon which the *Dieleman* court subordinated the freedom of religion expression to the right of access to abortion. *See Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *694.

166. *See Oakes*, [1986] 1 S.C.R. at 136.

167. *See Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *643-59.

168. *Id.*

169. *Id.* at *656-59.

Moreover, hospital entrances are often set back from public roads and streets where protestors are confined.[170]

However, freestanding abortion clinics are much different from hospitals in that they often do not have multiple entrances and their main entrances are often quite close to public streets, thus placing protestors in close proximity to the buildings and to attending individuals.[171] Importantly, because of the specialized services offered at such clinics, protestors can more easily identify clients as they enter the buildings. The court wrote that "while the temporary costs of annoyance or shock in these locations should usually give way to the more lasting benefits of a broader outlook obtained from open expression, this general perspective must be subject to reasonable contextual limitations arising from the nature of a medical facility and the emotional vulnerability of its women patients."[172] Moreover, although the interests of free speech have the greatest weight on a public street, "this important use of our streets, however, is subject to the protection of public health and to reasonable limitations consistent with the freedom of others to receive or not receive the information at issue."[173]

Yet the court was not prepared to issue the 500-foot buffer zone injunction requested by the government. This, the court declared, would not impair the protestors' freedom of expression "as little as possible" as required under *Oakes*. Indeed, it would completely silence the protestors, a result wholly unacceptable under the Charter. Rather, the court reasoned, a smaller buffer zone ranging from thirty to sixty feet, depending upon the physical setting of the clinics, would be more appropriate because it would allow both parties to engage in their constitutionally permissible activities: public protest, on the one hand, and the procurement of abortion services, on the other.[174] The court also created an additional 100-foot zone within which protestors could not approach clinic attendants if the latter made it clear that they desired no contact.[175] With regard to physicians' offices, the court established a twenty-five foot buffer zone during business hours, noting that fewer restrictions were necessary because of their

170. *Id.* at *656-57.
171. *Id.* at *659-60.
172. *Id.* at *666.
173. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *666.
174. *Id.* at *666-69.
175. *Id.* at *670.

multi-service nature.[176] The court did, however, approve the government's request for a 500-foot buffer zone around physicians' residences.[177] Given that the picketing of a particular home and a particular family is prima facie a private and public nuisance[178] in contravention of an individual's interest in residential privacy, an injunction was appropriate. Nevertheless, homeowners "have no absolute right to privacy [and] focused picketing is not prima facie justified in these particular circumstances [because] the doctor, family members and neighbours are held captive by the picketers in a manner completely at odds with free expression."[179]

The court undertook a similar analysis in assessing the defense of freedom of assembly. Although the injunctions issued "will violate the defendants' freedom of assembly," the court was comfortable that such an infringement "constitutes a reasonable limit in a free and democratic society."[180] The defense of freedom of religion applied to only one defendant, Jane Ubertino. Ubertino's actions differed from those of the other protestors in that she did not engage in excited forms of picketing or protest. Rather, she and a few friends walked down the street on which a clinic was located and prayed silently for one hour on the first Friday of each month. They did not stop in front of the clinic, carry signs, or accost women entering the clinic. Moreover, because the clinic in front of which they prayed is a medical center that performs procedures other than abortions, it was not possible for them to identify and specifically target abortion seekers. The court properly treated Ubertino independently of the other defendants, and granted her freedom of religion defense as one falling within the freedom of conscience. The court reasoned that "if Ubertino's belief that her protest activity is required by her religion is not shared by the vast majority of the members of her religion . . . it is difficult to conclude that her conduct constitutes the exercise, practice or manifestation of her religion."[181] But "this is not to deny that she is motivated by profound moral considerations."[182]

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176. *Id.* at *678-80.
177. *Id.* at *689.
178. *See id.* at *688-89.
179. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *688.
180. *Id.* at *693.
181. *Id.* at *697.
182. *Id.*

The court therefore subsumed the religion claim into one of conscience and indemnified Ubertino, thus permitting her to continue her quiet form of protest.

V. COMPARING *MADSEN* AND *DIELEMAN*

Having compared the sharply divergent approaches in Canada and the United States in resolving a similar constitutional conflict, the remaining question is why such dissimilarity exists between continental neighbors? Notably, this dissimilarity is one of rationale rather than one of result, since both jurisdictions reached the same decision in principle. The fascinating question is why the Canadian court chose to eschew custom and decline to follow American jurisprudential development on this new question of law involving the tension between abortion and expression rights. Or more precisely, why did Canada, in *Dieleman*, engage the conflict between access to abortion rights and speech with such specificity on privacy and religious freedom, even as the U.S. Supreme Court in *Madsen* chose not to consider these two elemental rights?

It is quite peculiar that although both *Dieleman* and *Madsen* arrived at similar conclusions, their reasoning was strikingly different from what the other invoked. *Dieleman* was decided two months after *Madsen*, and thus the Canadian court had the occasion to review the *Madsen* decision. Indeed, the *Dieleman* court took great care to stress that it had carefully considered the *Madsen* decision before reaching its own conclusion.[183] But although the *Dieleman* court referred to *Madsen*, it did not follow *Madsen*'s rationale. This calculated divergence warrants attention.

Consider the three major features of the decisions: (1) the buffer zone around abortion facilities in which demonstrations are prohibited;[184] (2) the no-approach zone within which individuals are to be free from harassment, intimidation, and, indeed, all unwanted contact;[185] and (3) the home shield in which personal residences are to be effectively off-limits to picketers.[186] Both

183. *Id.* at *451.

184. *Id.* at *659-76.

185. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *670.

186. *Compare Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *689 *with Madsen*, 512 U.S. at 774 (addressing injunction against picketing or demonstrating near clinic staff residences).

Dieleman and *Madsen* approved similar-sized buffer zones,[187] although Canada sanctioned both a no-approach zone and a home shield[188] while the United States declined to authorize either of these.[189] More importantly, however, is that the *Madsen* Court did not find privacy rights to be nearly as important to its decision,[190] whereas the *Dieleman* court found such rights determinative.[191] A number of reasons help illuminate this inconsistency.

Three reasons for the difference in legal reasoning between Canada and the United States are societal, historical, and jurisprudential in nature. First, in the period leading up to and closely following *Madsen*, there were increasing incidents of religion-based abortion protests and clinic violence in the United States.[192] The scourge of violence was particularly shocking as protestors committed a number of abortion-related murders.[193] Canada did not witness a similar outbreak of violence.[194] In an effort to avoid adding fuel to the rising fire, the U.S. Supreme Court refrained from touching upon matters of religion in its *Madsen* decision, fearful that any religion-based or religion-related justification for its conclusion might lead to further violence.[195] Second, while the United States avoided the question of religion, Canada had no choice but to engage questions of religion in *Dieleman* because of the constitutionally privileged status of

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187. *Compare Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *668 (specifying 30-foot radius buffer zone on the lands on which the clinic is located) *with Madsen*, 512 U.S. at 768-71 (upholding 36-foot buffer zone around clinic entrances).

188. *Dieleman*, at *670, 688-89 (describing personal and residential buffer zones).

189. *See Madsen*, 512 U.S. at 771, 774 (holding that the buffer-zone surrounding the clinics burdens more speech than necessary and overturning complete injunction on approaching individuals entering the clinic).

190. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. LEXIS 2729, at *536-38 (providing a description of the application of privacy rights to a woman's entrance into abortion facilities in the United States and a Canadian approach).

191. *Id.* (comparing the application of a woman's privacy rights to enter abortion facilities in the United States and Canada).

192. *See* Susan Faludi, *The Antiabortion Crusade of Randy Terry: Operation Rescue's Jailed Leader and His Feminist Roots*, WASH. POST, Dec. 23, 1989, at C1, *available at* 1989 WL 2006448.

193. *See* Colleen O'Connor, *Abortion Violence No Middle Ground,* DALLAS MORNING NEWS, Jan. 30, 1994, at F1; *see also Abortion Doctor Shot by Woman During Protest at Kansas Clinic*, WASH. POST, Aug. 20, 1993, at A17.

194. *E.g., Lewis*, [1996] 39 C.R.R. (2d) at 34 (describing rise in protests following the opening of two abortion clinics after 1988 Canadian decision holding abortion no longer illegal).

195. *See generally Madsen*, 512 U.S. 753.

religion and its politicized character in Canada.[196] And third, the then-recent jurisprudential history of Canada commanded the court to give extended audience to questions of privacy,[197] which the *Madsen* Court refrained from doing. Having recently enshrined the equivalent protections of the seminal American *Roe* decision, Canada stood on unsteady ground, at best, on the issue of abortion rights.[198] For this reason, the Canadian court viewed *Dieleman* as a timely opportunity to bolster Canada's then-indeterminate privacy protections, as well as the privacy underpinnings of a woman's right to choose.[199] Below is a full examination of these points.

A. Religious-Based Anti-Abortion Violence

A long history of abortion protest exists in the United States.[200] But the early 1980s appear to have marked a significant change in the form of discourse deployed by anti-abortion activists, as violence became a more widespread vehicle through which to express dissent.[201] What is significant about these violent forms of protest is that religious beliefs often stimulated such aggression.[202] Impelled by their conviction that abortion and support for abortion ran counter to their sacred teachings, many anti-abortion protestors readily turned to violence as the most effective way of redressing an unacceptable medical practice.[203] This was an ongoing movement during the time leading up to and following *Madsen*. Indeed, the murders committed around the period of *Madsen* alone reveal that violence continued to be used as a proxy for speech. Faced with an escalating intensity of anti-

196. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *693-701 (discussing religious freedom and its application to this case).

197. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. LEXIS 2729, at *536-38 (providing a description of the application of privacy rights to a woman's entrance into abortion facilities in the United States and a Canadian approach).

198. *Id.* at *536 (noting the "difficulty in locating a robust constitutional privacy doctrine" and the "even greater difficulty in discerning a correlative common law right").

199. *See Lewis*, 39 C.R.R. (2d) at 31 (discussing history of abortion in Canadian law).

200. *See* Virginia Mann, *125 Years Later Time Does Not Heal All Wounds*, REC. N. N.J., Jan. 17, 1988, at L1, *available at* 1988 WL 5577095.

201. Nice, *supra* note 42, at 178.

202. Joe Pichirallo & Ruth Marcus, *No Conspiracy Seen in Clinic Attacks: Violent Antiabortionists Share Religious Fervor, Political Naivete*, WASH. POST, Jan. 6, 1985, at A1.

203. *See* Laura Goldberg, *Abortion Doctor Hurt in Kansas Shooting*, USA TODAY, Aug. 20, 1993, at 3A; *see also Madsen*, 512 U.S. at 787 (describing protest signs in front of abortion clinics).

abortion violence that was conspicuously laced with religious underpinnings, the Court had little choice but to approach *Madsen* with the utmost caution.[204]

In the 1980 Presidential election, anti-abortion activists were very active in supporting then-candidate Ronald Reagan for office and targeting a number of abortion supporters in the Senate and House for defeat.[205] In November, pro-lifer Reagan won the presidential election. And, equally important to anti-abortionists, four influential abortion adherents lost their seats in the Senate.[206] But although the nature of political mobilization is in most cases a social virtue and should accordingly be encouraged, the anti-abortion lobby went far beyond this civil manner of participation. Indeed, the content of the public discourse on abortion may have forever changed two years later when the Army of God made headlines across the nation.[207]

In August of 1982, Don Anderson and two other men kidnapped an abortion doctor and his wife.[208] Dr. Hector Zevallos practiced at the Hope Clinic for Women in Illinois, where he administered abortions to women who came to him from a number of states.[209] Anderson abducted the Zevalloses from their home on the pretense of responding to a real estate advertisement, and held them captive for eight days in an isolated bunker.[210] Anderson and the two men ultimately disclosed their affiliation with the Army of God, a religious anti-abortion group, and told the Zevalloses that they had targeted them because of their involvement with abortion at the Hope Clinic.[211] Under threat of death, Dr. Zevallos complied with Anderson's order that he record a message to President Reagan requesting legislation banning abortion.[212] Zevallos was also compelled to promise to never again perform an abortion.[213] Throughout the weeklong confinement, the captives were

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204. *See generally Madsen*, 512 U.S. 753.

205. Mann, *supra* note 200, at L1.

206. Birch Bayh (IN), Frank Church (ID), John Culver (IA), and George McGovern (SD) were defeated. *Id.*

207. William Schneider, *Terrorists and the Issue of Abortion: What Will the Bombers Achieve?*, L.A. TIMES, Jan. 6, 1985, at 1.

208. United States v. Anderson, 716 F.2d 446, 447 (7th Cir. 1983).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 447-48.

subjected to spartan conditions and remained in constant fear.[214] Although Anderson ultimately released the Zevalloses, Anderson was sentenced to a total of thirty years in jail.[215]

Soon thereafter, a number of bomb and arson attacks hit abortion clinics.[216] After only three recorded attacks on abortion facilities in 1982 and two in 1983, the number shot up dramatically.[217] In 1984, there were twenty-four such incidents, to which the Treasury Department's Bureau of Alcohol, Tobacco and Firearms assigned 500 of its 1,200 agents.[218] Among the most notable in 1984 was an Independence Day bomb placed at the District of Columbia headquarters of the National Abortion Federation that, despite failing to detonate, nevertheless caused the explosion of a propane tank.[219] "These are the latest in a list of orchestrated acts by common criminals,"[220] reacted Barbara Radford, Executive Director of the National Abortion Federation.[221] Despite the increasing frequency of such attacks, the Federal Bureau of Investigation did not view them as a priority, which prompted feminists to charge that the Reagan Administration had failed to move aggressively against the perpetrators.[222]

Politicians also entered the fray, as then-Mayor Marion Barry suggested a link between these bombings and religion: "I'm outraged," the mayor said. "Now it's a clinic, next time a house, a synagogue or a church. Those who have a disagreement philosophically with the abortion issue ought to come out strongly against [the bombings]. The Jerry Falwells of the world ought to condemn this type of terrorist activity."[223] In response, Falwell condemned the violence, though he appeared to justify it: "You

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214. *Anderson*, 716 F.2d at 447.

215. *Id.* at 447-48.

216. *See* Martin Weil & Lyle V. Harris, *Blast Damages SE Building Housing Abortion Clinic*, WASH. POST, Jan. 1, 1985, at A1.

217. *Id.*

218. Mann, *supra* note 200, at L1.

219. Marcia Slacum Greene, *Federal Agents Probing Abortion Clinic Attacks*, WASH. POST, July 14, 1984, *available at* 1984 WL 2027994.

220. Victoria Churchville, *Blast Strike 2 Md. Clinics: Family Planning, Abortion Centers Damaged*, WASH. POST, Nov. 20, 1984, at A1.

221. *Id.*

222. *Abortion Clinic Bombing Not Considered Terrorism*, REC. N. N.J., Dec. 5, 1984, at A5, *available at* 1984 WL 2457901.

223. Margaret Engel & Lyle V. Harris, *Blast Spurs New Protests: Barry, Falwell Clash Over Clinic Violence*, WASH. POST., Jan. 2, 1985, at A1.

can understand how a deranged person might do that kind of thing. But you can't condone it. You can understand when you realize that what's happening in the back of those abortion clinics is the mutilation, the destruction of one and a half million little babies."[224]

There was some truth to Barry's assessment of a link between the clinic violence and its sustaining motivations. Indeed, the attackers' deep religious views presented a striking unity.[225] One commentator observed that the frustration "stems from the fact that no real progress [had] been made toward recriminalizing abortion even though the Republican Party [was] committed to that position and [had] been in control of the White House and Senate for the last four years."[226] Motivated by anti-abortion fervor and convinced they were acting "for the glory of God," anti-abortionists were willing to risk long prison terms to achieve more immediate results.[227]

The connection between clinic violence and religion was further underscored in 1987 when Dennis Malvasi made headlines as one of the most sought after suspects.[228] A Vietnam veteran who worked on the Statue of Liberty celebration as a fireworks technician, Malvasi was a Catholic religious zealot thought to be responsible for several bombings of Manhattan abortion clinics.[229] Long on the run and pursued by over 300 federal agents and city officials,[230] Malvasi finally turned himself in at the urging of Cardinal John O'Connor, who delivered a televised plea for Malvasi to do so.[231] In fact, Malvasi called the archdiocese within minutes of viewing the Cardinal's address.[232] To special agent Robert Creighton of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), there was no doubt that Malvasi's religious

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224. Michelle Coppola, *Falwell Calls Abortion Clinic Bombing Terrorism*, ASSOC. PRESS., Jan. 2, 1985, *available at* 1985 WL 2847194.

225. Pichirallo & Marcus, *supra* note 202, at A1.

226. Schneider, *supra* note 207, at 1.

227. Pichirallo & Marcus, *supra* note 202, at A1.

228. Sandra Widener, *'Zealot' Sought in Clinic Bombings*, NEWSDAY, Feb. 20, 1987, at 4.

229. *Id.*

230. Samuel G. Freedman, *Christian Soldier Who Turned Criminal: The Many Faces of a Man Charged with Bombing Abortion Centers*, S.F. CHRON., May 17, 1987, at 3.

231. John J. Goldman, *Bomb Suspect Gives Up After Cardinal's Plea,* L.A. TIMES, Feb. 25, 1987, at 1.

232. *Id.*

beliefs played a role in his abortion clinic violence: "We do believe there's a religious motivation here, a warped belief . . . we have evidence it's religious conviction."[233] And there was indeed a religious basis, as Malvasi himself declared upon being sentenced to seven years in prison for his actions: "The cardinal is my shepherd," said Malvasi. "If he tells me I cannot, that's an order. I cannot because that would get me in trouble with the Almighty, and I ain't looking for that."[234] By 1989, the increasingly violent escalation of anti-abortion activity had reached staggering proportions: 117 clinics had been bombed and set on fire, 224 had been vandalized, 231 had been raided, and 250 had received bomb threats.[235]

Similar incidents occurred between this period and *Madsen*.[236] The motivation often appeared to be religious in nature, as suggested by the words of Randall Terry, once leader of anti-abortion group Operation Rescue: "This is not civil disobedience, it's obedience to God's law."[237] Indeed, the anti-abortionist protesters are, in large part, "self-proclaimed soldiers in God's army. They come from across the nation to fight an all-out war between absolute evil and shining righteousness,"[238] observed one writer. But the anti-abortion violence grew much fiercer.[239] Certainly, bombs and arson are not exactly victimless crimes, though when this form of abortion protest is staged at night, when the clinics have long been deserted, no deaths ensue. Anti-abortion violence soon extended much further than quasi-victimless crimes.[240]

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233. Widener, *supra* note 228, at 4.

234. *Abortion-Clinic Bomber Gets Prison Term*, SEATTLE TIMES, Sept. 3, 1987, at A13.

235. Faludi, *supra* note 192, at C1.

236. Alissa Rubin, *The Abortion Wars Aren't Over: Beyond the Court, Battles over Access and Restrictions Have Just Begun*, WASH. POST Dec. 13, 1992, at C2 (describing continued protest, violence at abortion clinics).

237. Christopher Scanlan, *Enemies of Abortion Take to the Streets*, ST. PETERSBURG TIMES, Nov. 13, 1988, at D1.

238. Scott Bronstein & Gustav Niebuhr, *Dozens From Across Nation Use Protests as 'Ministry'*, ATLANTA J. & CONST., Oct. 6, 1988, at B6.

239. *See generally* Paul Leavitt, *Stolen 'Weeping Icon' Returned to Church*, USA TODAY, Dec. 30, 1991, at 3A; *see also Abortion Doctor Shot by Woman During Protest at Kansas Clinic*, *supra* note 193, at A17 (discussing violent murders of two identified abortion doctors).

240. *See Abortion Doctor Shot by Woman During Protest at Kansas Clinic*, *supra* note 193, at A17.

Around the time of *Madsen*, there were a number of abortion clinic related shootings.[241] Significantly, a number of them occurred in Florida, where *Madsen* had originated.[242] The first such incident, however, occurred outside of Florida.[243] In December 1991, a man entered a Missouri abortion clinic, demanded to see the doctor on duty, and subsequently shot and wounded two people,[244] paralyzing one of them.[245] The clinic had previously been the site of anti-abortion protests.[246]

Less than two years later, the United States witnessed the first abortion clinic murder.[247] As Dr. David Gunn arrived for work at Pensacola Women's Medical Services, he was shot in the back at close range.[248] Gunn had entered the building through the rear entrance to avoid an abortion protest outside the building's main entrance.[249] The shooter, Michael Griffin, calmly surrendered to police officers right after the shooting, declaring, "I just shot someone and he's laying behind the building."[250] A resident of Alabama, Gunn's picture and home phone number had been featured on posters during an Operation Rescue rally only months before his death.[251] Furthermore, only days before Griffin would take Gunn's life, he had offered a prayer for Gunn at the Whitfield Assembly of God church. "[H]e asked that the congregation pray, and asked that we would agree with him that Dr. Gunn would give his life to Jesus Christ."[252] Griffin, whose car flashes a bumper sticker proclaiming that "God is Pro-Life,"[253] wanted Gunn to "[s]top doing things the Bible says is wrong and start doing what

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241. O'Connor, *supra* note 193, at 1F.
242. *Id.*
243. Leavitt, *supra* note 239, at 3A.
244. *Id.*
245. O'Connor, *supra* note 193, at 1F.
246. *Two Shot at Clinic*, NEWSDAY, Dec. 29, 1991, at 16.
247. O'Connor, *supra* note 193, at 1F.
248. Mimi Hall & Sara Lamb, *Doctor Slain at Fla. Abortion Clinic*, USA TODAY, Mar. 11, 1993, at 1A.
249. Garry Mitchell, *Man Charged in Clinic Slaying Suffered "Great Fits of Violence," Wife Says,* ASSOC. PRESS, Mar. 11, 1993, *available at* 1993 WL 4531237.
250. Hall & Lamb, *Doctor Slain at Fla. Abortion Clinic*, *supra* note 248, at 1A.
250. Mimi Hall & Sara Lamb, *Abortion Fight Takes Deadly Turn: Violent Tactics on the Increase*, USA TODAY, Mar. 11, 1993, at 3A.
251. *Id.*
252. Rita Ciolli, *Protester Slays Abortionist*, NEWSDAY, Mar. 11, 1993, at 4.
253. Phil Long & Martin Merzer, *Protester Charged in Death of Doctor*, HARRISBURG PATRIOT, Mar. 11, 1993, at A1, *available at* 1993 WL 8109994.

the Bible says was right."[254] Held without bond, Griffin informed the judge of his intentions to represent himself in court, and requested permission to keep his Bible in jail with him as a legal document.[255] Clearly in shock over the Gunn incident, Eleanor Smeal, president of the Fund for the Feminist Majority, remarked that "[t]here is an intensity and a call for violence that I haven't seen before."[256]

In an eerie foreshadowing, Dr. James Todd, executive vice-president of the American Medical Association, observed of the Gunn murder: "this deranged act is an alarming example of the increased level of violence being directed at health care professionals for political reasons."[257] Only months later, Dr. George Tiller of Kansas was shot outside an abortion clinic.[258] Tiller was the leading abortion doctor in the state,[259] specializing in late-term abortions.[260] As Tiller was sitting in his car in the clinic driveway,[261] a woman approached him and began firing shots at his car, striking him twice in the arms.[262] Earlier, the same woman had been seen handing out anti-abortion literature.[263] Later identified as Rachelle Shannon, she was subsequently "indicted by federal grand juries in both California and Oregon in connection with attacks on nine abortion clinics in four western states."[264] A member of the anti-abortion group Rescue America, commented that the shooting "may be a blessing in disguise for Tiller . . . God

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254. *Clinic Doctor Fatally Shot During Anti-Abortion Protest*, TULSA WORLD, Mar. 11, 1993, at A11.

255. *Slain Doctor Knew Risks of 'Baby Killer' Stigma*, SEATTLE TIMES, Mar. 11, 1993, at A1.

256. Ciolli, *supra* note 252, at 4.

257. Larry Weintraub, *2 Sides Here Decry Slaying; One Anti-Abortion Group Says It 'Will Not Lament' Shooting*, CHI. SUN-TIMES, Mar. 11, 1993, at 10.

258. *Abortion Doctor Shot by Woman During Protest at Kansas Clinic*, *supra* note 193, at A17.

259. American Political Network, *Kansas: Editorials Support Stephan's Challenge*, 5 ABORTION REPORT 15 (1993).

260. *Id.*

261. Michael Bates, *Wichita Abortion Doctor Shot*, ASSOC. PRESS, Aug. 19, 1993, *available at* 1993 WL 4554289; *Abortion Doctor Shot by Woman During Protest at Kansas Clinic*, *supra* note 193, at A17.

262. *Id.*

263. *Id.*

264. *Jury Seeks Link Among Abortion Clinic Attacks*, CHI. TRIBUNE, Dec. 15, 1994, at 24.

may be giving him another chance to realize the horror of what he is doing."[265]

Less than one year later, two men were shot and killed by a militant anti-abortionist.[266] James Barrett, a retired serviceman, was in the practice of escorting patients and doctors from their cars into abortion facilities to shield them from protesters.[267] He and his wife, June, also a retired servicewoman, had begun volunteering in this capacity following Gunn's shooting death.[268] One morning, as the Barretts escorted Dr. John Britton to the clinic where he performed abortions, Reverend Paul Hill shot Dr. Britton in the head as they pulled into the clinic parking lot,.[269] James Barrett also died and his wife was shot in the shoulder.[270]

Reverend Hill was a Presbyterian minister in Pensacola from 1984 to 1991, having earned a Master's of Divinity in 1983.[271] Hill's past was littered with the advocacy of violence. For instance, he had once written in an anti-abortion pamphlet that, "[t]he justice of using force to defend the unborn is apparent if we don't forget that the object is to defend unborn babies from a violent death."[272] He also believed that "[i]f an abortionist is about to violently take an innocent person's life, you are entirely morally justified in trying to prevent him from taking that life."[273] It should come as no surprise, then, that Hill believed he was serving God by killing Dr. Britton and James Barrett, who supported the abortionist cause.[274] Upon being sentenced to death by electric chair, Hill said as much: "I know for a fact that I'm going to go to heaven when I die."[275]

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265. Goldberg, *supra* note 203, at 3A.

266. *Couple Pay Dearly for Conviction*, ST. PETERSBURG TIMES, July 30, 1994, at 8A.

267. *Id.*

268. *Id.*

269. Sue Landry et al., *Anti-Abortion Activist Kills Clinic Doctor, Escort*, ST. PETERSBURG TIMES, July 30, 1994, at 1A; *see also Couple Pay Dearly for Convictions, supra* note 266, at 8A.

270. Landry, *supra* note 269, at 1A.

271. James Risen, *Shooting Suspect Has Advocated Clinic Violence*, L.A. TIMES, July 30, 1994, at A1.

272. Jeff Kunerth, *2 Killed at Pensacola Abortion Clinic*, ORLANDO SENTINEL TRIB., July 30, 1994, at A1.

273. *Un Militant Anti-Avortement Tue Deux Personnes Devant une Clinique*, AGENCE FR.-PRESSE, July 29, 1994, *available at* 1994 WL 9567565.

274. Mark Holmberg, *Sentence 1st Under New Law: Two Life Terms Given in Clinic Access Case*, RICH. TIMES-DISPATCH, Dec. 3, 1994, at A9, *available at* 1994 WL 7128750.

275. William Booth, *Abortion Clinic Slayer Is Sentenced to Death*, WASH. POST, Dec. 7, 1994, at A1.

Shortly after the Hill murders, the federal government launched a grand jury investigation into the recent anti-abortion violence, hoping to determine whether the various acts of violence were in fact linked to each other.[276] As the investigation got underway, yet another abortion clinic massacre occurred. This time, the venue was Brookline, Massachusetts.[277] A man entered a Planned Parenthood clinic, which had been participating in a nationwide trial of the French abortion pill RU-486,[278] where he shot and killed a young receptionist and wounded three others.[279] He then proceeded to the nearby Preterm Health Services clinic, where he shot and killed another receptionist, and wounded both a man and woman.[280] The total count at the end of the day was staggering: two dead and five wounded within a matter of minutes.[281] Both clinics had previously been the site of hundreds of arrests for anti-abortion protest over the past decade.[282] Buses frequently descended upon Brookline, offloading scores of protestors who engaged in highly orchestrated disruptions, including a number of incidents in which anti-abortionists would chain themselves to the clinics.[283] When asked to respond to the killings, Bill Cotter, a member of the Boston Chapter of Operation Rescue who spent nineteen months in jail for violating injunctions against blocking access to the clinics,[284] said, "[a]s much as I condemn this action, I do think it's time for Planned Parenthood and the rest of them to own up to the violence they perpetrate day

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276. Pierre Thomas & Bill Miller, *U.S. Probes Conspiracy at Clinics*, WASH. POST, Dec. 15, 1994, at A21.

277. Christopher B. Daly, *Two Slain at Boston Abortion Clinics: Black-Clad Gunman Wounds Five Others in Shooting Spree*, TORONTO STAR, Dec. 31, 1994, at A1.

278. *Id.*

279. *Id.*

280. Christopher B. Daly, *Gunman Kills 2, Wounds 5 in Attack on Abortion Clinics*, WASH. POST, Dec. 31, 1994, at A1.

281. Daly, *supra* note 277, at A1.

282. *Gunman Kills 2 in Attacks at Abortion Clinics in East*, ST. LOUIS POST-DISPATCH, Dec. 31, 1994, at A1.

283. Elizabeth Mehren & John J. Goldman, *2 Killed, 5 Wounded in Shootings at 2 Abortion Clinics*, L.A. TIMES, Dec. 31, 1994, at A1.

284. Ronald J. Ostrow & James Risen, *2 Abortion Clinics Were Not Protected by U.S. Marshalls*, S.F. CHRON., Dec. 31, 1994, at A3.

in and day out inside their clinics."[285] And one Reverend characterized these murders as "justifiable homicide."[286]

These were the fateful circumstances under which the Court had to decide *Madsen*. Escalating protests and violence directed toward abortion clinic employees and attendants – rising even to murder – were widespread across the United States.[287] Importantly, the terror had not been confined to one particular part of the country, indicating that there was sweeping anti-abortion sentiment from several admittedly extremist segments of the community. Nevertheless, much of the bloodshed transpired in Florida,[288] where *Madsen* had originated. It appeared that Florida was a particularly volatile soil for abortion activity. Indeed, the whole nation seemed to exhibit such instability. A 1994 survey conducted by the Feminist Majority Foundation reported that abortion clinic violence had increased when compared to the previous year.[289] More than half of clinics reported at least one act of anti-abortion violence during the first seven months of 1994, with 52% reporting death threats, stalkings, bombings, invasions, arson, or blockades.[290] Moreover, 67% also reported other forms of protest activity, for instance, home picketing, gunfire, or vandalism.[291]

As *Madsen* sat on the docket, the Court had to assume both the role of adjudicator and firefighter. The Court assessed the merits of the injunction in its role as adjudicator but was also careful not to further inflame the manifest sentiments of anger among anti-abortionists.[292] For instance, not once did the Court

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285. Mitchell Zuckoff & Pamela Ferdinand, *Anti-Abortion Activists React: Some Grieve for Victims, Others Focus on Clinics*, S.F. EXAMINER, Dec. 31, 1994, at A18.

286. Ceci Connolly, *Gunman Kills 2, Wounds 5 at Abortion Clinics*, ST. PETERSBURG TIMES, Dec. 31, 1994, at A1.

287. *Compare Scanlan*, *supra* note 237, at 1D (describing the activities of Operation Rescue hosting sit-ins to block abortion clinic entrances), *with* Schneider, *supra* note 207, at 1 (increasing abortion clinic bombings), *and* Hall & Lamb, *Doctor Slain at Fla. Abortion Clinic*, *supra* note 248, at 1A (shooting of a Florida doctor by Michael Griffin).

288. *See generally* Hall & Lamb, *Doctor Slain at Fla. Abortion Clinic*, *supra* note 248, at 1A; *see also* Booth, *supra* note 275, at A1 (describing shootings of Florida abortion clinic doctor).

289. *Clinic Survey Shows Slight Increase in Anti-Abortion Violence*, ASSOC. PRESS, Dec. 20, 1994, *available at* 1994 WL 10113543.

290. *Id.*

291. *Id.*

292. *See generally Madsen*, 512 U.S. 753 (limiting the holding of the case in weighing free speech).

turn to questions of religion or faith. The Court did not consider the religious underpinnings of the violence perpetrated against Florida clinics and others across the nation in general, or specifically against the Melbourne Women's Health Center. The Court recognized its firefighter role in refraining from touching the combustible question of religion, thereby reaching a sustainable compromise acceptable to both anti-abortionists and their opponents.[293]

This point is significant, for the opposite occurred in *Dieleman*. Although Canada also experienced a troubling rash of anti-abortion violence,[294] this became a reason for the court to squarely address religion in its deliberation. Therefore, while religious motivation of anti-abortion violence was a reason to avoid the question altogether in the *Madsen* Court's decision, in Canada the religious motivation of anti-abortion violence was itself a reason for the court to address the issue in *Dieleman*.

B. The Constitutional Status of Religion in Canada

A further difference between Canada and the United States lies in the constitutional status of religion in Canada. Historically regarded as a source of conflict in both nations,[295] religion retains a privileged standing in the Canadian polity.[296] Paradoxically, although the freedom of religion is deemed a "fundamental

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293. *See id.* (noting lack of discussion of religion in opinion).

294. In January 1992, an abortion clinic was bombed. Jim Wilkes, *Fire-Bombing Suspected in Morgentaler Clinic Fire*, TORONTO Star, Jan. 24, 1992, at A7. Dr. Henry Morgentaler, one of Canada's most prominent abortion doctors, owned the targeted clinic. The pro-life lobbyist did not seem too distressed by a subsequent bombing in May of 1992 and, in fact, justified the violence in the following terms: "Violence begets violence.... There is no more vicious violence than the abortionists' solution to crisis pregnancies." Bob Brent, *Opposing Sides in Abortion Issue Decry Violence*, TORONTO STAR, May 19, 1992, at A6. There was also a highly publicized shooting in 1994, in which an abortion doctor was shot in his Vancouver home while eating breakfast. *Shooting of B.C. Doctor Sparks Angry Reactions*, TORONTO STAR, Nov. 9, 1994, at A21. Dr. Garson Romalis's home had been regularly picketed. Michael Bernard, *Abortion MD Shot at Home*, WINNIPEG FREE PRESS, Nov. 9, 1994, *available at* 1994 WL 15176785.

295. *See, e.g.*, CHURCH AND STATE IN CANADA, 1627-1867: BASIC DOCUMENTS (John S. Moir ed., 1967); ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES (1964).

296. *See* CHURCH AND STATE IN CANADA, 1627-1867: BASIC DOCUMENTS, *supra* note 295, *Lewis*, 39 C.R.R. (2d) at 47-49 (discussing freedom of conscience and religion promulgated by section 2(a) of the Charter); *see also* Zylberberg v. Sudbury Bd. of Educ., [1988] 65 O.R.2d 641, 651 (describing affirmative recognition of religious expression in public schools).

freedom" in the Canadian Constitution and is preserved in the Canadian equivalent to the American First Amendment,[297] there exists in Canada a critical exception to the rule of non-discriminatory enjoyment and exercise of religious liberty.[298]

To be precise, the Canadian Constitution actually commands inequitable treatment of religions.[299] Although this constitutionally sanctioned discrimination extends only to the realm of public funding for parochial instruction,[300] it nevertheless informs the current discussion of the tension between abortion and speech. Section 93 of the Canadian Constitution makes special reference to Catholicism,[301] ensuring that from the founding of Canada onward, government funds must continue to be issued for Catholic-based educational instruction, a situation that results in exclusive public funding for Catholicism.[302] The original purpose of Section 93 "[w]as to give the provinces plenary jurisdiction over education while protecting the religious education of the Protestant minority in Quebec and the Catholic minority outside Quebec."[303]

Section 93 and its historical origins lend credence to the view that a strict separation of church and state was not – and is not – envisioned in Canada, and that "the advancement of religion is permissible as long as it does not infringe anyone's religious freedom."[304] This may be in large part due to Canada's embrace of the salad bowl metaphor[305] – the acceptance, facilitation, and celebration of diversity – to illustrate its societal objective, as

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297. Much like the First Amendment, the Canadian Charter of Rights and Freedoms affords similar freedoms of religion, expression, assembly, and of the press. It does not, however, have an equivalent protection against establishment. *See* CAN. CONST., pt. I, § 2.

298. *See* CAN. CONST., pt. I, §7.

299. *See id.*

300. *See* CAN. CONST. (The British North American Act, 1867), § 93 (Legislation respecting Education).

301. *Id.*

302. In 1867, the Roman Catholic and dissentient Protestant religions were granted constitutionally enshrined protections for religious instruction under Section 93 of the British North America Act. *Id.* But, as Protestant school boards no longer exist in Canada (having been effectively subsumed by the public educational system), only Roman Catholic schools remain as denominational schools receiving constitutionally sanctioned funding from the public purse. *See* SCHMEISER, *supra* note 15, at 127.

303. Ontario English Catholic Teachers' Ass'n v. Ont., [2001] 1 S.C.R. 470, 493-94.

304. *Zylberberg*, 65 O.R.2d at 674.

305. Peter H. Schuck, *Uri and Caroline Bauer Memorial Lecture: The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1932-33 (2001) (describing "melting pot" diversity).

opposed to the American metaphor of a melting pot, which calls for general assimilation and adoption of the American way.[306] Given that Canada's salad bowl metaphor encourages diversity, it is unsurprising that the nation would adopt a system that makes it possible for the state to fund private religious schools and in so doing, affirms the national aim of celebrating and not stifling diversity. Indeed, in Canada, "[r]eligion is one of the dominant aspects of a culture which the Charter is intended to preserve and enhance."[307]

Having reviewed the basis for Canada's exception to the otherwise governing rule of non-discriminatory treatment of religions, the next consideration is its intersection with the tension between right of access to abortion facilities and free religious expression. A recent case, in which a Canadian court assessed the force of freedom of religion as a defense to a charge of disruptive protest at an abortion clinic, best illustrates this intersection of tensions.[308]

"One of the tests of a free society," declared Justice Saunders of the British Columbia Court of Appeal, "[i]s how it balances the wish of some to protest or oppose or express dissent with the right of others to follow their own course."[309] Justice Saunders articulated this standard in *R. v. Lewis*, a case in which abortion protestors breached a legislated bubble zone around a freestanding abortion clinic.[310] In 1995, British Columbia passed the Access to Abortion Services Act, which invoked in its preamble the objectives of access to health care, the preservation of dignity and the protection of privacy.[311] The stated purpose of the Act was to ensure that abortion services were provided in an atmosphere of security, respect, and privacy by creating a mandated distance between anti-abortionists and individuals seeking or providing abortion services.[312] The *Lewis* court employed the customary proportionality analysis to measure the

306. *Id.*
307. *Zylberberg*, 65 O.R.2d at 676.
308. *See generally Lewis*, 39 C.R.R. (2d) at 26.
309. *See generally id.* at 45.
310. *Id.* at 30.
311. Access to Abortion Services Act, S.B.C., ch.35, §§ 1-14 (1995) (Can.).
312. *Id.* at pmbl (1995).

value of religious expression against the liberty to freely enter medical centers.[313]

Pro-life advocate Maurice Lewis, then 44,[314] had the distinction of being the first person ever arrested under the Act.[315] In clear violation of the law, Lewis had defiantly entered the bubble zone wearing a sandwich board bearing an anti-abortion slogan. Lewis had acted despite the law's prohibition of "any act of disapproval or attempted act of disapproval, with respect to issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means."[316] In his defense, Lewis asserted three points: (1) his religious beliefs required him to communicate his convictions within the boundaries of the bubble zone and, because the Act prevents him from doing this constitutionally, the Act is unconstitutional; (2) the terms of the Act constrained his freedom of expression; and (3) the Act violated his freedom of assembly.[317] Only his first claim of freedom of conscience and religion is relevant here.

It is clear in reading the court's opinion that religion is afforded the utmost deference.[318] Indeed, the court even gives Lewis what amounts to be the benefit of the doubt with respect to the substance of his religious beliefs, as Justice Saunders declared he "[s]hould not inquire into the validity of his conscientiously held view."[319] The reasoning for such a deferential posture toward religion has been conveyed by former Justice La Forest: Assuming the sincerity of an asserted religious belief, it was not open to the court to question its validity. It was sufficient to trigger constitutional scrutiny if the effect of the impugned act or provision interfered with an individual's religious activities or convictions.[320] In other words, it is enough that Lewis sincerely held the views he professed to accept as true, and believed his form of protest to be in accordance with and mandated by his religious beliefs.

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313. *Lewis*, 39 C.R.R. (2d) at 30.

314. *Abortion Protest Ban Overturned*, TORONTO STAR, Jan. 24, 1996, at A8.

315. Southam Bus. Communications, Inc., *Man Arrested for Wearing Anti-Abortion Sign in Bubble Around BC Clinic*, CANADIAN OCCUPATIONAL HEALTH & SAFETY NEWS, Oct. 2, 1995.

316. Access to Abortion Services Act, S.B.C., ch.35, §§ 1-2 (1995) (Can.).

317. *Lewis*, 39 C.R.R. (2d) at 47-50.

318. *Id.* at 47-49.

319. *Id.* at 48.

320. R. v. Jones, [1986] 2 S.C.R. 284, 295.

Given this relaxed judicial standard for determining whether a belief is in fact a religious one, the court left itself no choice but to take the subsequent step to declare that the Act violated the Charter's protections of fundamental freedoms under Section 2.[321] It was clear to the court that the Act exacted a patent intrusion upon the right of Lewis and others to free religious exercise.[322] In fact, the court affirmed that "the Act infringe[s] Lewis' freedom of conscience and religion by limiting his ability to manifest his conscientiously held, religiously based views at the place he considers most effective for their communication."[323] But, although the Act constrained Lewis's freedom of religion and religious expression, it was nevertheless necessary for the court to consider the impact of the Act on Lewis's rights "in comparison to the objective of those provisions of the Act and the good to which they are directed."[324] Once again, the court undertook its Section 1 proportionality analysis to mediate this tension.[325]

Recall the proportionality inquiry under Section 1. In this context, the court must consider whether the infringement of the fundamental right to free religious expression under the Access to Abortion Services Act is a reasonable limit that can be demonstrably justified in a free and democratic society.[326] The test, referred to as the *Oakes* test,[327] counts two prongs. First, the court must ask whether the objective served by the Act relates to pressing and substantial concerns.[328] Second, the court must examine whether the measures are proportionally sensible, meaning that they must be fair and reasonably related to their objective, they must impair the constrained freedom as little as possible, and their effect must be proportional to the salutary effect of the law.[329]

In the first inquiry, the court established that the objectives of the Act—to facilitate access to abortion services and to ensure the safety of both attendants and employees—were firmly and

321. *Lewis*, 39 C.R.R. (2d) at 49.
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.* at 64.
326. *Id.* at 50.
327. *Lewis*, 39 C.R.R. (2d) at 57.
328. *Id.* at 51.
329. *Id.*

properly rooted in the legislature's substantial concern about the "invasion of privacy of the women seeking to avail themselves of the health care provided at the clinic."[330] Therefore, the court wrote, there was "no doubt that the objective of equal access to abortion services, enhanced privacy and dignity for women making use of the services and improved climate and security for service providers is a sufficiently important objective to pass the first *Oakes* test."[331]

In the second inquiry, the court declared that the measures of the Act were rationally connected to their objective.[332] Because the protest activity "clearly invades the privacy of women and those escorting them,"[333] and because "harsh and condemnatory messages communicated by sign, pamphlet and orally, have been delivered with resulting stress to an audience which can only avoid the message by declining the medical service provided by the clinic,"[334] the provisions constraining free religious expression were rationally connected to the objectives of the Act. The second prong also commanded a showing that the provisions impaired Lewis's rights as little as possible.[335] Since the size of the restricted area was "reasonable to provide a quiet space with privacy and dignity for the users of the clinic," and since a reduction of the bubble zone "would not significantly enhance the expression of the protesters,"[336] the court found the access zones to be in the range of least intrusive legislative responses necessary to achieve the Act's objectives.[337] The final test—proportionality—gave the court a little more pause.

Given that freedom of expression has high value in a democracy, the court acknowledged, "the very lifeblood of democracy is the free exchange of ideas and opinions."[338] Moreover, "in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the

330. *Id.* at 54, 56.
331. *Id.* at 57.
332. *Id.* at 58-59.
333. *Lewis*, 39 C.R.R. (2d) at 58.
334. *Id.* at 59.
335. *Id.* at 62.
336. *Id.* at 63.
337. *Id.*
338. *Id.* at 65 (quoting R. v. Kopyto, [1987] 47 D.L.R. (4th) 213, 216).

community and to the individual."[339] But, "a person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any way invoke his or her freedom of expression so as to interfere with those functions."[340] Consequently, because Lewis is not barred from expressive activity outside the access zone, he is not condemned to silence: "[A]s significant as freedom of expression is and as sincere and impassioned as the views of Mr. Lewis or other protesters are, this case does not present an example of that freedom at its highest value."[341] Because privacy for those using the facility should be impaired as little as possible, and because "not the least of the privacy interests adversely affected by the protest activity is a loss of repose from unwanted intrusion,"[342] a woman's right to access health care without unnecessary loss of privacy and dignity "outweighs the infringement of section 2 of the Charter,"[343] which safeguards religious expression. Therefore, the court concluded that the Access to Abortion Services Act was demonstrably justified in a free and democratic society, such that religious expression had to take a back seat to privacy rights. The court's conclusion may be best captured as follows:

> While non-violent and passive expression of disapproval falls within this Act, the evidence establishes that such activity, in the context of the well-known history of vigorous protest and the vulnerable nature of many of those who enter the clinic, is contrary to the well being, privacy and dignity of those using the clinic's services.[344]

Though the court's proportionality analysis ultimately declared privacy interests more compelling than religious expression, it is important to recognize that the court could have reached the same result without spilling so much ink on Lewis's right to free religious expression. Indeed, the court was constrained neither by the Constitution nor by jurisprudential precedent to extend such deference to Lewis's religious beliefs.

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339. *Lewis*, 39 C.R.R. (2d) at 65 (quoting Irwin Toy Ltd. v. Que. (Att'y Gen.), [1989] 39 C.R.R. 193, 228).

340. *Id.* at 66 (quoting Comm. for the Commonwealth of Can. v. Canada, [1991] 1 S.C.R. 139, 156-57).

341. *Id.* at 67.

342. *Id.* at 68.

343. *Id.*

344. *Id.* at 58-59.

Rather, the politicized nature of religion in Canada prompted the court to consider such questions.

The privileged status of religion in Canada commanded the court to declare that the buffer zone infringed Lewis's right to free religious expression. While the religious diversification in the United States is likely similar to that in Canada, the difference lies in the constitutional protection afforded to religion beyond the obligatory free exercise protections. In Canada, as in the United States, religious protections exist in the form of both free exercise and free speech incarnations.[345] Yet, as outlined above in the historical development of Canada, the critical divergence is that Canada's Constitution is in fact partial towards Catholicism and Catholic religious instruction.[346] This constitutional provision is, of course, but an artifact of the Canadian experience.[347] Nevertheless, it exacts a discernible impression upon other segments of the Canadian polity, namely the right to privacy.

Consider, for instance, Canada's Privacy Act. Administered under the aegis of a Privacy Commissioner,[348] the Act represents Canada's effort to safeguard matters deemed private. Significantly, the Act protects one's religion as personal information beyond the reach of others.[349] This suggests that, as a legislative matter, religion occupies a delicate sphere among the Canadian populace. This has extended to the judiciary, where judicial pronouncements have acknowledged the great care with which religion ought to be examined.[350] Matters pertaining to religion "are, and have been recognized in our multiplicity of cultures, to be of very private concern."[351] As one jurist has written, "[i]n my view, state-sponsored inquiries into any person's religion should be avoided wherever reasonably possible, since they expose an individual's

345. *Lewis*, 39 C.R.R. (2d) at 47-50; *see also* CAN. CONST., pt. I., § 2 (fundamental freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association).

346. CAN. CONST. (The British North American Act, 1867), § 93(1) (Legislation respecting Education).

347. For a historical review of this constitutional provision, see *Zylberberg*, 65 O.R.2d at 648-52.

348. For a brief, but thorough, review of the role of Canada's Privacy Commissioner, see Jonathan M. Winter, *Regulating the Free Flow of Information: A Privacy Czar as the Ultimate Big Brother*, 19 J. MARSHALL J. COMPUTER & INFO. L. 37, 53-59 (2000).

349. Privacy Act, R.S.C., ch. P-21, §§ 2-3 (1985).

350. *Lewis*, 39 C.R.R. (2d) at 48; *see also Jones*, 2 S.C.R. at 294-95.

351. R. v. Otto, [1984]16 C.C.C.3d 289, 308.

most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting."[352] This is wholly consistent with the treatment of religion in *Lewis*, where the court was constrained to tip its hat to religion even though, ultimately, the societal privacy interests of women—and the consequent right of access to abortion clinics —necessarily trumped the right to free religious expression.[353]

The imperative need for privacy interests to supersede the right to free religious expression in Canada leads to a third reason why Canada and the United States decided *Dieleman* and *Madsen* on different legal bases.

C. The Politics of Abortion

Perhaps the decisive reason the Canadian court decided *Dieleman* on privacy grounds, while the U.S. Supreme Court did not give privacy interests much consideration in *Madsen*, may be traced to the contemporaneous jurisprudential and political history of privacy in Canada. Specifically, the Canadian case *Morgentaler*, the equivalent to the seminal 1973 American case *Roe v. Wade*,[354] did not emerge until 1988. Thus, abortion as a right rooted in some measure of privacy and personal autonomy appeared in Canada some fifteen years later than it did in the United States. And *Dieleman* was decided but six years afterward in 1994.[355] Both this short intervening six-year period and the need to reaffirm the enunciation of women's personal autonomy rights as they relate to abortion explains, in part, why the Canadian court was constrained to decide *Dieleman* as it did, focusing keenly upon privacy rights. Importantly, the Canadian court did so for both legal and political reasons. Before examining these reasons, Canada's version of *Roe* merits consideration.

1. R. v. Morgentaler

In 1988, *R. v. Morgentaler* was decided by a margin of five to two.[356] For purposes of this article, *Morgentaler* stands for the proposition that state interference with the bodily integrity of a

352. *Edwards Books & Art Ltd.*, 2 S.C.R. at 779.
353. *Lewis*, 39 C.R.R. (2d) at 68.
354. 410 U.S. 113.
355. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *1.
356. *Morgentaler*, 1 S.C.R. at 32.

woman in the context of abortion constitutes an unjustifiable breach of security of the person under the Canadian Charter.[357] Moreover, the state may not interfere, by either imposing or threatening criminal sanction, with a woman's decision to carry a fetus to term.[358] Throughout *Dieleman*, the court frequently referred to *Morgentaler*, suggesting if not explicitly indicating, that *Morgentaler* would hold determinative weight upon the result.[359] The *Dieleman* court cited *Morgentaler* at great length, noting, for instance, that "[n]ot only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress."[360] Equally important was a concurrence in *Morgentaler*, which served as a basis for the *Dieleman* court to declare that the right to terminate a pregnancy is a safeguarded right to liberty. In turn, this safeguard guaranteed a degree of personal autonomy over important decisions extending to people's private lives.[361]

The *Dieleman* court's discussion of privacy was peculiarly reminiscent of *Morgentaler*. In assessing the governmental purpose behind the injunction sought by the Government of Ontario, the court discussed the relationship between abortion and the physical and emotional well being of women.[362] Citing *Morgentaler*, the court proclaimed that "beliefs about human worth and dignity are the sine qua non of the political tradition underlying the Charter."[363] The court moreover adopted the well-reasoned intervention of the *Morgentaler* concurrence, which stated that abortion is a decision "that will have profound psychological, economic and social consequences for the pregnant woman."[364] Therefore, reasoned the court, if this is the case for abortion, it must necessarily also apply to the act of physically traveling to the abortion clinic.[365] Because, indeed, the government's concern for

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357. CAN. CONST., pt. I, § 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.").

358. *Morgentaler*, 1 S.C.R. at 32-33.

359. *E.g., Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *390.

360. *Id.* at 280 (quoting *Morgentaler*, 1 S.C.R. at 56-57).

361. *Morgentaler*, 1 S.C.R. at 36-37.

362. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *645 (describing fundamental relationships between abortions and the physical and emotional well-being of women).

363. *Id.* at *645 (quoting *Morgentaler*, 1 S.C.R. at 171).

364. *Id.*

365. *Id.* at *650.

the physiological and psychological health of women patients does not disappear in the context of close contact between anti-abortionists and particularly vulnerable women patients.[366] "There can be no doubt," continued the court, "that [the moment immediately before these women are to undergo a serious medical procedure] and this decision constitute one of the most painful and intimate situations a woman can encounter."[367] Having established the clear connection between the abortion itself, the act of actually procuring the abortion, and making one's way to the clinic, the court paved the way for a declaration on the privacy interest present in the latter situation. The court ultimately did so by upholding the injunctive relief sought by the government on the interests of privacy, equality, and public safety.

Although privacy interests were central in *Dieleman*, they were not explicitly significant in *Morgentaler*. In fact, the *Morgentaler* court unequivocally declared that it was not basing its decision on privacy rights but rather on the notion of security of the person: "It is not necessary in this case to determine whether the right [to security of the person] extends further, to protect either interests central to personal autonomy, such as a right to privacy. . . ."[368] This poses a glaring quandary, given that *Dieleman* invoked and, indeed, relied upon *Morgentaler* to support women's rights of privacy and personal autonomy.[369] Although it does merit some attention, the question here is not why the *Morgentaler* court chose against articulating a privacy interest in abortion. Rather, the question is how – and why – the *Dieleman* court could have possibly relied upon *Morgentaler* to decide *Dieleman* on privacy grounds, particularly given that the *Morgentaler* court only alluded to privacy interests as underlying the right to abortion? To answer this, brief consideration must be given to the post-*Morgentaler* period in Canadian politics.

2. The Political Debate on Abortion

Following *Morgentaler*, the abortion debate had reached its zenith with fierce debate from both sides. It was clear to the federal government in power – Prime Minister Brian Mulroney's

366. *Id.* at *647-52.
367. *id.* at *648.
368. *Morgentaler*, 1 S.C.R. at 56.
369. *E.g., Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *486-87.

Progressive-Conservative Party – that the nation was in need of closure.[370] To Mulroney, this closure (if even possible on such a divisive social and moral question) would have best come in the form of legislation.[371] As a constitutional matter, Mulroney's inclination was right. For as a parliamentary supremacy, the federal legislature may, with few exceptions, effectively overrule the judiciary in saying not only what the law should be and what it is, but what the constitution holds and requires. This principle has historical beginnings,[372] although today it retains contemporary reach.[373] It may be invoked through the Notwithstanding Clause[374] of the Charter. Therefore, if the people were repulsed by the result in *Morgentaler* – the legality of abortion – then the quick and constitutional fix was legislation recriminalizing abortion. Conversely, if Mulroney wished to endorse the court's decision, he could have done so through legislation. But either way, Canadians called upon the Mulroney government to take some form of action.

What followed was a political disaster. The Mulroney government introduced in the House of Commons legislation that would prohibit abortions except when a woman's physical, mental,

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370. *See* David Vienneau, *Abortion Bill: MP's Ready to Torpedo It Survey Finds*, TORONTO STAR, Nov. 25 1989, at A1.

371. *See id.*

372. This principle derives from Canada's Commonwealth origins. Similar to the sovereignty of the United Kingdom Parliament, which has the power to make or unmake any law, there are effectively no limits to legislative power in Canada, i.e., the people can alter any law through ordinary legislative action. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 307 (4th ed. 1997).

373. Unlike the American system of governance, under which the decisions of the Supreme Court are not subject to overrule by the legislature, in Canada the *Charter of Rights and Freedoms* permits the legislative branch to enact a law that will override the civil rights and liberties preserved in the *Charter*. This override, however, only lasts up to five years, at which point the legislature must be dissolved for a general election. *See id.* at 310-11, 907-11.

374. CAN. CONST., pt. I, § 33 ("(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).").

or psychological health was threatened,[375] thereby effectively overturning *Morgentaler* by recriminalizing abortion.[376] A Roman Catholic, Mulroney said his new bill "will satisfy some and will render others less satisfied, but it is a matter that has to be dealt with and we hope to deal with it in a sensitive and thoughtful way."[377] But his political instincts proved wrong, as his proposed law was quickly condemned by both pro-life and pro-choice groups, the former lamenting that the law would not go far enough and the latter decrying the reality that the bill would not guarantee equal access to abortion in all parts of the nation.[378] Specifically, however, the bill exhibited a number of concerns, including its lack of delimitation of the terms "mental" or "psychological health."[379] This prompted several editorials expressing rabid disapproval with the proposed law.[380] Not only did it appear that Canadians were irreparably torn on this issue, but it was clear that elected officials quite simply wanted to get abortion off the political agenda.[381]

Yet Mulroney persevered, sending his proposed law to a special committee on the support of a majority of the Parliament members in the House of Commons.[382] Following committee revisions, the bill was presented to the House for final passage, and narrowly passed by a vote of 140 to 131, with a number of abstentions.[383] The bill then proceeded to the Senate for approval, where it met stiff challenge from senators,[384] with one senator pledging his all to defeat the bill.[385] Indeed, the bill was not

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375. Peter O'Neil, *New Bill Would Permit Abortion If Physical, Mental State at Risk*, VANCOUVER SUN, Nov. 3, 1989, at A9.

376. Vienneau, *supra* note 370, at A1.

377. Peter O'Neil, *Compromise Bill on Abortion Won't Please All, PM Admits*, VANCOUVER SUN, Nov. 3, 1989, at A9.

378. David Vienneau, *Both Sides Unhappy with Reported Abortion Bill*, TORONTO STAR, Nov. 3, 1989, at A15.

379. David Vienneau, *Legislation Would Make Abortions Easy to Obtain*, TORONTO STAR, Nov. 4, 1989, at A8.

380. *E.g.*, Editorial, *Still Unfair*, OTTAWA CITIZEN, Nov. 12, 1989, at A8.

381. Geoffrey Stevens, *Abortion Law Simply Passes the Buck*, TORONTO STAR, Nov. 12, 1989, at B3.

382. *2nd-Reading Win for Abortion Bill Doesn't End Fight*, WINDSOR STAR, Nov. 29, 1989, at A11.

383. Paul McKeague, *Outrage Greets Abortion Law*, WINDSOR STAR, May 30, 1990, at A1.

384. Kim Bolan, *New Abortion Law Challenge Expected*, VANCOUVER SUN, May 30, 1990, at A1.

385. *Senator Vows Campaign Against Abortion Law*, WINDSOR STAR, May 29, 1990, at A10.

expected to pass the upper chamber,[386] as only four of the thirty-eight individuals or groups serving as witnesses expressed support for the bill during committee hearings.[387] As one commentator observed, "[f]ar from the 'compromise' it was intended to be, the bill pleases virtually no one."[388]

It was perhaps fitting, then, that such a controversial issue would set a Canadian precedent for creating the first ever tie in the history of the Senate. Deadlocked at forty-three in a senate of 104 members, Senate procedural rules held that defeat was the result in the event of a tie.[389] Interestingly, both pro-choice and pro-life advocates celebrated the defeat of the bill. Minister of Justice Kim Campbell remarked that the closeness of the vote reflected the divisiveness of abortion in Canada.[390]

Following the bill's defeat in 1991, a powerful pro-choice sentiment in the nation emerged.[391] To be sure, the pro-life lobby remained in aggressive pursuit of new legislation, as it was politically concerned about keeping such a conflict-ridden issue at the fore of their mandate, but its failed abortion bill convinced the Mulroney government to wash its hands of the abortion debate.[392] Subsequently, both the Canadian Medical Association and the Society of Obstetricians and Gynecologists stepped up their efforts to increase access to abortions,[393] and noted abortionist Henry Morgentaler announced that he would open a number of abortion clinics across the country.[394] The government of Ontario also

386. David Vienneau, *Abortion Bill Faces Senate Hurdle*, TORONTO STAR, Jan. 20, 1991, at B4.

387. David Vienneau, *Abortion Bill Nears Final Vote: Condemnation of Proposed Law Almost Unanimous, Senate Told*, TORONTO STAR, Jan. 24, 1991, at A14.

388. William Walker, *Tories Could Look Other Way as Senate Kills Abortion Bill*, TORONTO STAR, Jan. 31, 1991, at A2.

389. William Walker, *Senate Kills Abortion Bill by a Tie Vote*, TORONTO. STAR, Feb. 1, 1991, at A1.

390. Jonathan Ferguson & William Walker, *Both Sides Hail Abortion Bill Defeat Pro-Choice and Pro-Life Groups Stunned, Pleased by Senate Vote*, TORONTO STAR, Feb. 1, 1991, at A12.

391. Andrew Duffy, *Pro-Lifers Gear Up For New Fight: Abortion Bill's Defeat in Senate Not End of the Issues, Activists Vow*, TORONTO STAR, Feb. 18, 1991, at A15.

392. Lois Sweet, *Abortion Issue up to Provinces Now*, TORONTO STAR, Feb. 3, 1991, at B1.

393. Susan Pigg, *Doctors to Resume Doing Abortions*, TORONTO STAR, Feb. 2, 1991, at A7.

394. William Walker, *Elated Morgentaler to Open Network of Abortion Clinics*, TORONTO STAR, Feb. 2, 1991, at A7.

entered the picture, proclaiming its plans to publicly fund abortion clinics and recruit doctors to staff them.[395]

3. The Legal Result of the Mulroney Government's Failed Bill

What may have been the most important though certainly least considered consequence of the Mulroney government's failed bill was the legal result. Canada was left without a law on abortion three years after the *Morgentaler* decision.[396] As one observer noted, the bill's defeat in the Senate had "left a void in the law."[397] Another remarked that "[a]fter three full years of political manoeuvering [*sic*], the unusual status quo dictated by the Supreme Court's Morgentaler decision remained intact; Canada still had no abortion law."[398] This lack of specificity in the law exacted a measurable toll on the nation. Canadians had no guidance as to the popular force of *Morgentaler*, given that Parliament, the voice of the people, had failed to successfully respond to the decision, either by adopting its holding or charting a different course. Therefore, although *Morgentaler* had effectively decriminalized abortion and proclaimed its legality, Canadians remained uncertain as to *Morgentaler*'s weight absent an offspring Parliamentary declaration, resolution, or legislation. This is evident in the distribution of public attitudes in Canada on abortion between 1988 when *Morgentaler* was decided, and 1991 when the Mulroney government's flagship legislation for the year died on the Senate floor.[399]

Consider that in 1988, 60% of Canadians believed that abortion should be legal only under certain circumstances, and only 24% believed that abortion should be legal under all circumstances.[400] The remaining 14% of Canadians held fast to the rule that abortion should be illegal under all circumstances.[401] Three years later in 1991, after *Morgentaler* ushered into the

395. *Surge in Abortion Protests Forecast as Federal Bill Dies*, TORONTO STAR, Feb. 2, 1991, at A7.

396. Laurie Watson, *Canadian Parliament Defeats Proposed Abortion Law*, UNITED PRESS INT'L, Feb. 1, 1991.

397. Duffy, *supra* note 391, at A15.

398. Janine Brodie, *Choice and No Choice in the House*, *in* THE POLITICS OF ABORTION 57, 115 (Janine Brodie et al. eds., 1992).

399. RAYMOND TATALOVICH, THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA 111 (Gregory S. Mahler ed., 1997).

400. *Id.*

401. *Id.*

national consciousness a sense of the legal and sociological righteousness of choice—and during the year Mulroney's abortion bill succumbed to defeat—the attitudes of Canadians had not changed. In fact, Canadians had remained unmoved by *Morgentaler*, perhaps largely due to the sharpened public discordance brought about by both the process of legislative deliberation on the abortion bill and by the bill itself.[402] This time, 60% again believed that abortion should be legal only under certain circumstances, 24% believed it should be legal under all circumstances, and 14% thought that abortion should be illegal in all cases.[403]

From the liberal Canadian standpoint, the problem was clear. There had been no marked progress since *Morgentaler*, though the contrary should have been the case. As the closest Canadian equivalent to *Roe*, *Morgentaler* carried weight only by default. And this default force existed only because the legislative branch could not reach majority agreement on the most advisable course for the nation to take on abortion. The result was truly lamentable, for through three years of heated political debate on the subject, the nation made no discernible progress. While there is some social and political merit to heated public discourse, and while dissent among the populace is generally a constructive tool for advancement of and challenge to the existing polity, in Canada the extended dialogue on abortion regressed as a result of the impassioned exchange. Granted, the three-year stalemate may have engaged the nation and its people, but good certainly did not result from the process, particularly when the status of women and their right to physical sovereignty was advanced no further than before. As a consequence, the tie between the abortion rights established in *Morgentaler* and the implicit privacy-based grounding of these rights had yet to be articulated, though it needed to be done. *Dieleman* provided a captive forum and a prime opportunity to do so.

In *Dieleman*, the court summoned *Morgentaler* to inform its decision on whether a woman's right to access abortion clinics could trump anti-abortionists' right to free religious expression.[404] Although the *Morgentaler* court had explicitly declined to extend

402. *Id.*
403. *Id.*
404. *E.g.*, *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. LEXIS, at *39-41.

its reasoning to create privacy protections and a notion of women's personal autonomy as relates to abortion, it was clear that these considerations had underpinned the Court's decision.[405] Six years removed from *Morgentaler* and fewer than three years removed from the vigorous abortion debate on Parliament Hill, the *Dieleman* court deemed it imperative to make explicit precisely what *Morgentaler* should have done and what legislators had failed to do.

By affirming women's privacy interests in seeking and securing abortion services, the *Dieleman* court made both a legal statement and a politically motivated declaration. The legal statement, of course, was the court's holding.[406] Beyond the court's legal conclusion, however, the court took bold steps toward enshrining privacy as an abortion-related right.[407] This is significant because the court's privacy-grounded declarations were unnecessary to resolving the legal dispute at hand. As was seen in *Madsen*, in which dimensions of privacy were not critical to the holding,[408] the *Dieleman* court could very well have settled the question without relying upon privacy considerations. Earlier Canadian cases had actually resolved similar questions without invoking privacy considerations.[409] One case, for instance, granted an injunction to enjoin picketing outside doctors' offices.[410] Another involved an injunction issued to restrain similar protests

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405. *Id.* at *39 (cataloguing three different decisions forming the majority agreeing that: (1) Section 287 (then 251) of the Criminal Code infringed a woman's right to security of the person; (2) the process by which a woman was deprived of that right was not in accordance with fundamental justice; (3) the state interest in protecting the foetus [*sic*] was sufficiently important to justify limiting individual Charter rights at some point; and (4) a pregnant woman's right to security of the person was infringed more than was required to achieve the objective of protecting the foetus [*sic*], and the means were not reasonable).

406. *Dieleman*, 20 O.R.3d 229, 1994 W.C.B.J. 2729, at *701-10 (holding that application for interlocutory injunction to enjoin all anti-abortion activity occurring within 500 feet of hospitals, free-standing abortion clinics, and offices and homes of physicians be allowed in part).

407. *Id.* at *651-52 ("The physiological, psychological and *privacy* interests of women about to undergo an abortion constitute objectives of sufficient importance to warrant overriding a constitutionally protected right or freedom.") (emphasis added).

408. *Madsen*, 512 U.S. at 776.

409. *See, e.g.*, Assad v. Cambridge Right to Life, [1989] 69 O.R.2d 598; Canadian Urban Equities Ltd. v. Direct Action For Life, [1990] 68 D.L.R.4th 109.

410. *Assad*, 69 O.R.2d at 599.

outside abortion clinics,[411] and yet another had upheld a similar injunctive order.[412]

The significance of these decisions is that they came between *Morgentaler* and the Mulroney government's failed legislative efforts in 1991. That they were decided on non-privacy grounds, like *Madsen*, suggests that there is a particular significance to *Dieleman*, which came after both *Morgentaler* and the infamous Senate tie in 1991. The *Dieleman* court declined to follow the lead of previous Canadian decisions and *Madsen*, choosing instead to chart its own course. In doing so, the court gave teeth to the *Morgentaler* decision, which stopped short of asserting women's privacy interests in the right to abortion, thereby articulating the ever-important link between the two related rights. Moreover, the *Dieleman* court successfully responded to the failures of the political actors who had fallen short of the mark.

VI. CONCLUSION

This article has primarily reviewed two decisions that address the tension between the right of access to abortion clinics and the freedom of religious expression: *Madsen*, the U.S. Supreme Court decision, and *Dieleman*, a Canadian Supreme Court decision. In so doing, I have endeavored to illuminate how and why the Canadian decision deviated from the American practice in mediating the tenuous conflict of rights pitting abortion and speech.

Dieleman focuses at great length upon questions of privacy and religious freedom, whereas *Madsen* constrains itself to steer clear from such a focus. That *Dieleman* embarked upon such a different decisional path highlights uniquely Canadian principles and prudential concerns. Indeed, *Dieleman* is uniquely Canadian.

Although Canadian jurists often call upon American jurisprudence to inform their judgments, this was not the case here. Rather than adopt the American reasoning, Canada deviated from this practice and fashioned its own, wholly independent legal reasoning. This is due primarily to societal, historical, and jurisprudential reasons.

With respect to the societal component, the fateful circumstances in which the Court decided *Madsen* required the Court to delicately refrain from touching upon matters of religion.

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411. *Canadian Urban Equities Ltd.*, 68 D.L.R.4th at 110.
412. R. v. Bridges, [1990] 78 D.L.R.4th 530, 535-36.

The Court instead fashioned a sustainable compromise acceptable to both anti-abortionists and their opponents, but did so without touching the combustible question of religion. The *Madsen* Court understandably feared that explicitly invoking religion or faith-based justification—to either give voice to the anti-abortionists by striking down the injunction or silence them by allowing the injunction—would exacerbate the existing tension and violence.

Second, the privileged role of religion in Canada was prominently featured in the Canadian court's choice to carefully attend to questions of religious freedom. While the American Court prudently avoided the question of religion, the Canadian court had to engage questions of religion in *Dieleman* because of the constitutionally privileged status of religion and its politicized character in Canada.

Finally, a third reason for the difference between *Dieleman* and *Madsen* lies in the contemporaneous jurisprudential development in Canada. Canada did not have a standing law on abortion, and the court felt compelled to remedy the existing void. The *Dieleman* court therefore leapt at the occasion to shape abortion as a privacy right. This may be seen as a political imperative. The court chose to give teeth to and bestow a fuller reach upon the *Morgentaler* decision, which had stopped short of asserting women's fundamental, though indeterminate, privacy interest in the right to abortion.