

together with the reality that male institutions like VMI wield more social and economic power than female institutions like VWIL, likely will deter a male plaintiff from seeking to integrate VWIL in the near future.

The *VMI* case, properly understood, did not achieve equality for women, either at VMI or in the law more generally. Opening to women male bastions of power like VMI is, undeniably, a critical step. The case also shows how further steps are called for to question and renovate historically and stereotypically male characteristics of existing institutions, standards, and uses of power. Kevin Trujillo, who was the peer-elected president of the graduating class the year women arrived at VMI, gave cause for optimism in explaining that he saw the arrival of women at VMI as “a chance to professionalize” VMI by amending some of the more adolescent and destructive rituals of VMI, and thereby improving it for both sexes.⁹³ Such change was not required by the lawsuit, but we should hope that it will be the eventual result. Meeting male standards is what got women into VMI, but until those standards, however demanding, are genuinely egalitarian and no longer palpably male, women at VMI will not have truly arrived.

⁹³ BRODIE, *supra* note 13, at 216.

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By Serena Mayeri*

Civil Rights on Both Sides: Reproductive Rights and Free Speech in *Schenck v. Pro-Choice Network of Western New York*

Introduction

Since the Supreme Court decided *Roe v. Wade* in 1973, abortion has been the subject of passionate debate not only in courtrooms and legislatures, but also on the streets of American cities and towns. Though frequently and sometimes cynically manipulated for political gain, the abortion controversy may be the quintessential example of a dispute in which activists on both sides act out of deep, often immovable moral conviction. To advocates of reproductive choice, the availability of safe, legal abortions is central to women’s ability to control their lives and destinies, and to achieve equality and dignity as human beings. To opponents of abortion, the procedure is antithetical to every human value, a desecration of body and soul that is morally equivalent to murder.

Beginning in the mid-1980s, abortion clinics became the site of picketing and protest. Abortion clinic protest tested the limits of the First Amendment in a society torn between its commitment to protect the constitutional rights of women seeking reproductive health services, and its dedication to freedom of speech and assembly. *Schenck v. Pro-*

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Choice Network of Western New York, filed in 1990 and decided by the Court in 1997, was one of many constitutional challenges to injunctions that sought to strike a balance between these competing values. *Schenck* provides a particularly vivid and revealing glimpse into the world of abortion clinic protest and its impact on American communities. *Schenck* also provides a classic example of a case in which both parties saw themselves as defending civil rights against attacks potentially fatal—both literally and figuratively—to their respective causes. Both pro-choice and pro-life advocates proclaim themselves heirs to the legacy of the civil rights movement, with its courageous stance against injustice and for basic human rights amid a climate of violence and fear.

“A Troublemaker and a Crazy”

It was a humid Sunday in the summer of 1987 that transformed twenty-eight-year-old Paul Schenck into an anti-abortion activist. He had just finished delivering his morning sermon at the New Covenant Tabernacle Church in Tonawanda, New York, when two members of his congregation approached him with a look of urgency in their eyes. They needed to speak with him right away, the husband and wife said. The husband held a nondescript bag tightly in his hands.

Inside the bag, Schenck and his parishioners were horrified to find, were what they believed to be the remains of four aborted fetuses, unceremoniously discarded in a dumpster across the street from the couple’s home in a Buffalo suburb. When calls to the police and the local health department proved unavailing, Schenck and his parishioners appealed to the public conscience. They obtained burial sites in Mount Olivette Cemetery and held religious services to mourn what they felt were the cruel murder and ignominious disposal of unborn children. “Before that,” Schenck recalled, “I called myself pro-life by conviction and pro-choice by default. I had not taken into account the unborn child as a victim until that event.”¹

Shortly after the symbolic burial, a group of Schenck’s parishioners informed him that they would be holding a prayer meeting in front of a local reproductive health clinic to voice their opposition to abortion. “I was very, very reluctant,” Schenck remembered. “I knew the mayor and local officials by their first names. I had a lot of entrée into local government, and was afraid I would lose some of that access, that I would be considered a troublemaker and a crazy.”² He agonized over the matter at length with his wife, Rebecca. If you don’t join the protest, she said finally, I will.

¹ Interview with Paul Schenck, Apr. 19, 2000.

² *Id.*

The next day, the Schencks were among one hundred protesters gathered at the front and back entrances of a downtown reproductive health clinic, situated between a hairstyling salon and a pizza joint. When the police arrived and asked the demonstrators to disperse, they refused. The protesters were arrested and transported to a nearby ice skating rink, where they were given their court papers. That evening, Schenck found himself sharing dinner with the world-renowned evangelical preacher Billy Graham. It was a day he would not soon forget.³

Paul Chaim Schenck was born in 1959 in Grand Island, New York, to a Reform Jewish family, liberal in their politics and proud of their Jewish identity. He and his twin brother Robert were young teenagers when they became acquainted with members of a local Methodist youth group. “I saw in their lives a very sincere faith,” Paul recalls, “and so I began to explore the claims of Christianity. I subsequently became convinced that the claims that Jesus made to fulfill Old Testament prophecies, to be the Jewish Messiah, were truthful.” At sixteen, he was baptized, and joined the Methodist Church in Orchard Park. “I did not feel that I was repudiating my Jewish identity. . . . I saw Christianity as fulfilling the promises of Judaism. And still today I don’t feel that I’ve rejected my Jewish heritage; I have fulfilled it.”⁴

A few months after Schenck’s first abortion protest, another young evangelical Christian New Yorker founded what would become the most famous—and infamous—anti-abortion group in the nation. Twenty-nine-year-old used car salesman Randall Terry’s Operation Rescue, based in Binghamton, wasted no time in bringing the pro-life cause to national attention. Terry attracted hundreds of people to Atlanta, site of the Democratic National Convention, in July, 1988, including Paul Schenck. Schenck promptly founded the Northeastern Clergy Council, a group of clerics “on call” to minister to women considering abortion. Meanwhile, demonstrators numbering in the hundreds refused to identify themselves to police, going to jail in the names of Baby Jane Doe and Baby John Doe, attracting precious media attention and straining city resources.⁵ Their success in Atlanta galvanized anti-abortion leaders to launch a nationwide crusade. The cities and towns of upstate New York were among Operation Rescue’s first targets.

By 1990, thousands of protestors had been arrested throughout the country, many of them for physically blockading clinics.⁶ Seeing their

³ *Id.*

⁴ *Id.*

⁵ See Ronald Smothers, *Atlanta Protests Prove Magnet for Abortion Foes*, N.Y. TIMES, Aug. 13, 1998, at 6.

⁶ See *Nearly 400 Abortion Protesters Arrested*, L.A. TIMES, Nov. 20, 1988, at 2.

cause as analogous to the civil rights struggle, they invoked and used tactics of civil disobedience pioneered in the United States by Martin Luther King, Jr., and even sang civil-rights era spirituals retooled with pro-life lyrics.⁷ In one typical incident, four protesters chained themselves to a Kenmore, New York clinic; two of them served time in jail when they refused to post bail, and were cheered by five hundred supporters as they spent over a week fasting in their cells.⁸ “We felt there was a compelling need to stop abortions for as long as we could,” Schenck recalled, “so that women could receive the help they truly needed, the services they truly needed.” He describes pro-life “sidewalk counselors”—“mostly women, some of whom were post-abortive”—providing bibles, information, and prayers to women entering the abortion facilities. “They spoke only loving and caring words and offered services and information to the women.”⁹

Marilynn Buckham remembered things very differently. By the late 1980s Buckham was a veteran of reproductive health services, having begun as a receptionist at Buffalo’s first abortion clinic in 1972, two years after New York legalized the procedure. Before *Roe v. Wade* made abortion more widely available, women flooded into New York from other states, but by 1983, when Buckham founded her own clinic, Buffalo GYN Womenservices, “It was very low-key. The feeling at that time was that it was possible and desirable to do outpatient abortions, outside of hospitals, and do them safely.”¹⁰ Buckham, who had grown up in a Catholic family in Buffalo, had made peace with family and friends about her choice of vocation.¹¹

“It was around 1985 when the Christian Right first became quite vocal in picketing the clinic,” Buckham recalled.¹² Not one to shrink from a challenge, she was shaken to find her name and phone number plastered on a billboard outside the clinic on Elmwood Street, and that was only the beginning.¹³ Soon thereafter, protesters held the mock funeral for aborted fetuses outside the office of Buffalo obstetrician and abortion provider Dr. Shalom Press.¹⁴ Then, in 1988, the first Operation Rescue blockades came to Buffalo. “We were all amazed at the amount

⁷ EYAL PRESS, ABSOLUTE CONVICTIONS 155–56 (2006).

⁸ See *The Nation*, L.A. TIMES, Feb. 27, 1989, at 2.

⁹ Interview with Schenck, Apr. 19, 2000.

¹⁰ Interview with Marilynn Buckham, May 17, 2000.

¹¹ PRESS, *supra* note 7, at 124.

¹² Interview with Buckham, May 17, 2000.

¹³ PRESS, *supra* note 7, at 125.

¹⁴ *Id.* at 126–27.

of—” Buckham hesitated for a moment—“terrorism that was happening outside the door of a medical facility. It was very scary, we felt very isolated. We had a pro-life mayor and his police commissioner was not very helpful. He pretty much did nothing.”¹⁵

Frustrated by the inaction of local law enforcement, Buckham and her colleagues decided to take matters into their own hands, founding an organization called the Pro-Choice Network of Western New York. The Network, which later boasted a board of directors and a formidable fundraising apparatus, began as a grassroots effort intended to provide a small army of pro-choice escorts to accompany women attempting to gain access to Womenservices and other area clinics. After two years of sporadic but large-scale protests, in the fall of 1990 pro-choice groups initiated the case that would come to be known as *Schenck v. Pro-Choice Network of Western New York*. It began the day Buckham found a pamphlet announcing Operation Rescue’s intention to organize a blockade that would close down abortion providers all over the western part of the state.

Upon finding the pamphlet, Buckham immediately called Lucinda Finley, a law professor at the State University of New York at Buffalo. The daughter of a labor lawyer and a physician, Finley had graduated from Columbia Law School and taught for a time at Yale before relocating to Buffalo in 1989. Finley had been trying for months, without success, to help procure legal representation for Buckham and the Pro-Choice Network, but lawyers in the Buffalo area were reluctant to take the case. Some demanded too much money up front; others told Finley that they would love to help, but could not disregard the wishes of pro-life firm partners.

While Buckham saw the pamphlet as a frightening premonition of more clinic strife, Finley’s lawyerly instincts told her that this was the “perfect smoking gun” to take to a federal judge in pursuit of an injunction.¹⁶ One year earlier, the Court of Appeals for the Second Circuit had ruled in *New York State NOW v. Terry* that women seeking abortions constituted a protected class under the civil rights law codified as 42 U.S.C. section 1985(3), and that health care providers had standing to sue on behalf of their patients.¹⁷ The ruling suggested that pro-choice groups were on solid legal footing if they could show that anti-abortion demonstrators’ tactics were depriving women of their right to choose to terminate pregnancies. After the *Terry* decision, Finley had attended meetings with lawyers from NOW Legal Defense and Education Fund

¹⁵ *Id.*

¹⁶ Interview with Lucinda Finley, Mar. 31, 2000.

¹⁷ See *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989).

and the ACLU to discuss strategies for obtaining injunctions against anti-abortion protesters; now, as she drafted a complaint on the clinics' behalf, she relied on NOW LDEF's complaint and injunction papers to avoid "reinventing the wheel."

But Finley and her colleagues sensed that they were working within a somewhat uncharted area of the law. "Where is the line between free speech and harassment?" Finley wondered aloud to fellow attorney and law professor Isabel Marcus as they worked late one night at Finley's house drafting the complaint. Marcus replied that the law in the area was far from clear. "Do you think this will ever get to the Supreme Court?" she asked Finley. Finley scoffed at the idea, vowing, "If this ever gets to the Supreme Court, I'll go over Niagara Falls in a barrel."¹⁸

The complaint drafted by Finley and Marcus based their request for a temporary restraining order on section 1985(3) and a number of state law claims. They used the pamphlet Buckham had found, among other evidence, to argue that the planned blockade posed an imminent danger of impeding all access to reproductive services at Buffalo-area clinics. After several unsuccessful attempts at obtaining relief in state court, the plaintiffs hoped that they would find in Judge Richard Arcara of the Federal District Court for the Western District of New York a more sympathetic ear. Arcara, a former U.S. Attorney, was a Catholic Republican appointed by Ronald Reagan. But Finley and her colleagues hoped that Arcara's prosecutorial background would kindle his law-and-order instincts in favor of the pro-choice group.

They were not disappointed. On September 27, 1990, the day before the scheduled clinic blockade, Arcara issued a temporary restraining order containing four main provisions. First, the TRO enjoined the defendants from "trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities."¹⁹ The injunction provided a key exception to these "buffer zones" for "sidewalk counselors," who were permitted to hold "non-threatening" two-on-one conversations with persons coming in and out of the clinics. But Arcara also included a "cease-and-desist" provision:

Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone . . . wants to leave, or

¹⁸ Interview with Finley, Mar. 31, 2000.

¹⁹ Temporary Restraining Order, *Pro-Choice Network of W. New York v. Project Rescue of W. New York*, 90 CIV-1004A (Sept. 27, 1990) [hereinafter TRO], reprinted in Joint Appendix, *Schenck v. Pro-Choice Network of W. New York*, No. 95-1065, at 21, 23 [hereinafter Joint Appendix].

walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel shall cease and desist from such counseling of that person."²⁰

Finley was particularly fond of this provision, though attorneys at NOW LDEF, experienced in abortion clinic injunction cases, had advised her that First Amendment doctrine would not permit it. But Finley believed she could make a credible argument that, freedom of speech notwithstanding, patients and staff entering and exiting health facilities had a "right to be left alone."²¹

Among other provisions, the TRO also enjoined defendants from "attempting, or inducing, encouraging, aiding, or abetting in any manner, others" to take any of the actions prohibited by the first three sections of the TRO.²² Pro-life ministers in the Western District vocally protested this provision, announcing that they would continue to use their pulpits to further the cause of anti-abortion resistance. Arcara responded by issuing a statement of clarification on October 4, emphasizing that "it never was intended or expressed by this Court that this order prohibited any clergyman or individual from preaching from the pulpit, quoting from the Bible or practicing any rights protected by the first amendment."²³

The defendants, who had initially proceeded pro se, had begun to realize that they would need legal representation to effectively challenge the TRO and defend against the contempt motions occasioned by their violations. Serendipitously, one afternoon in early October, 1990, they happened upon James Duane, a Harvard graduate and then a thirty-one-year-old lawyer with a prominent Buffalo firm, in the clerk's office of the U.S. District Court. Shortly thereafter, Duane met with the defendants as a group and agreed to take their case.

"Compliance in Action, Defiance in Speech"

Over the next few months, the protesters deliberately tested the injunction. In a late-night meeting around Christmastime, Paul Schenck, his brother, local pro-life leader Karen Swallow Prior, and the Reverend Johnny Hunter decided that they would attempt to expose what they believed to be the unconstitutionally speech-restrictive nature of the TRO by accentuating the free expression element of their activities. "We decided that our motto would be 'compliance in action but defiance in speech,'" Schenck recalled. "My brother and I would go in front of the

²⁰ *Id.*

²¹ Interview with Finley, Mar. 31, 2000.

²² *Id.* at 24.

²³ *Id.*

clinics and do what we had always done, approach people with literature." The brothers wished to emphasize the religious, rather than the specifically anti-abortion element of their speech, so as to demonstrate that constitutionally protected prayer and religious exhortation were the injunction's true victims.²⁴

The Schencks' activities are characterized rather differently in the court proceedings that ensued when, in early 1991, the plaintiffs instituted contempt charges against the Schencks and four other defendants.²⁵ According to Judge Arcara's findings of fact, the Schenck brothers pursued one woman from the parking lot to the alcove in front of the clinic, "exhort[ing] her not to have an abortion," telling her "with raised voices" that "she should not enter the clinic, she should not have an abortion and she should not kill her baby."²⁶ The two then stood "shoulder to shoulder" in the alcove, effectively blocking the clinic entrance.²⁷ After following another woman to the entrance, Paul Schenck continued to shout at her through the closed glass door of the clinic.²⁸ A short time later, when a car with out-of-state license plates attempted to enter the clinic driveway, Paul "placed himself directly in front of the vehicle on the driver's side of the hood in order to block the vehicle from entering."²⁹ Other Project Rescue demonstrators crowded around the driver's door, exhorting her to open the window. The vehicle was forced to slow down almost to a complete stop so as not to run over Schenck. In general, requests by patients and their "pro-choice escorts" to cease and desist apparently fell on deaf ears as the Schencks pursued several more women to the door of the clinic.³⁰

Judge Arcara did not rely solely upon eyewitness testimony for these findings: the demonstrators themselves had captured them on videotape as part of their strategic challenge to the injunction and, pro-choice advocates believed, as part of their campaign of intimidation against clinic patients and staff. The Schenck brothers did not give an entirely ingenuous on-camera performance. Exploiting their virtually identical features, the twins at one point switched eyeglasses and neckties, and

²⁴ Interview with Schenck, Apr. 19, 2000.

²⁵ Judge Arcara had ordered that the TRO remain in place until he reached a decision on granting a preliminary injunction.

²⁶ Decision and Order (relating to contempt proceedings against Robert and Paul Schenck), *Pro-Choice Network of W. New York v. Project Rescue of W. New York*, 90 CV-1004A (Sept. 14, 1992) reprinted in Joint Appendix at 121, 129.

²⁷ *Id.*

²⁸ *See id.* at 130.

²⁹ *Id.* at 131.

³⁰ *See id.* at 132-33.

Paul Schenck held an umbrella between himself and the camera as he impeded the car's ingress to the parking lot.³¹ Arguing pro se in the contempt proceedings, the Schencks denied the switch and claimed they could not remember which one of them had obstructed the vehicle.³² Arcara was having none of this: "[T]he Court finds the Schencks' inability to recollect the incident to be totally incredible,"³³ he wrote in an order finding both Schenck brothers in contempt of court. "In fact, the Court finds that Paul Schenck made false statements under affirmation."³⁴

The contempt hearings attracted attention in the Buffalo press and in the legal community. The Schencks' trial was particularly noteworthy for the brothers' pro se argument, which substituted eloquent pronouncements on constitutional principle for legal expertise. "I'm not a lawyer, but I have read the First Amendment," Paul Schenck told the judge. "And this fifteen foot floating zone doesn't sound like the First Amendment to me." Schenck argued that the TRO was analogous to a hypothetical injunction prohibiting atheists from approaching within fifteen feet of his own parishioners. "Arcara didn't buy that argument," Schenck recalls dryly.³⁵

But many pro-life observers did. When the contempt proceedings drew public notice, Duane received several phone calls from local lawyers offering their support. One of them was Laurence Behr of the Buffalo firm Barth Sullivan Behr, who had made headlines in Buffalo a few years earlier when he successfully defended the right of local students to hold an after-hours bible study group on public school grounds.³⁶ Behr had recently founded Western New York Lawyers for Life, and, in 1992, when anti-abortion leaders were gearing up for the "Spring of Life" demonstrations, Behr had already assembled a dedicated cadre of lawyers who stood ready to defend the protesters.³⁷

For Behr, representing the pro-life demonstrators was something of a personal mission. A Catholic whose faith had lapsed in his young adult years, Behr remembers vividly his elation when abortion was legalized in New York in the late 1960s. "It was the revolution," he says, a bit ruefully. "We all thought making abortion legal was the best thing that

³¹ *See id.* at 132-34.

³² *See id.*

³³ *Id.* at 132.

³⁴ *Id.* at 133.

³⁵ Interview with Schenck, Apr. 19, 2000.

³⁶ That case was brought under the Federal Equal Access Act.

³⁷ Interview with Laurence Behr, Apr. 20, 2000.

had ever happened." But as Behr witnessed the upheaval of the '60s and '70s—the Vietnam War, the riots, the Attica prison massacre, "one devastation after another"—he became increasingly despondent. "I gradually came to realize that there is no meaning in life without God," he says, "that Jesus is the savior of the world, and that there is no way that He would condone taking life from the womb of a mother. Life is not a choice; no one chooses to be born. Once you have had a close encounter with God, it's impossible to be pro-choice."³⁸

"The Need to Protect These Young Vulnerable Women"

In early 1992, anti-abortion groups husbanded their resources in preparation for a renewed campaign to shut down abortion clinics in western New York as they had successfully done in Wichita, Kansas, the preceding summer. The pro-life mayor of Buffalo, Jimmy Griffin, had publicly invited Operation Rescue to his city, energizing anti-abortion activists anew.³⁹ As plans for the Spring of Life demonstrations began to percolate, Judge Arcara was again contemplating the legal contours of the pro-choice groups' complaints against the pro-life protesters. After hearing twelve additional days of testimony from both sides, the judge issued a preliminary injunction. In addition to the fifteen-foot "floating" buffer zone, the injunction included a new provision added at Finley's behest: a "fixed" buffer zone protecting the clinic entrances themselves.

Arcara's opinion was unambiguous in its condemnation of the protesters' tactics. Findings that the demonstrators had physically obstructed clinic entrances—at times by chaining themselves together—and had "constructively blockaded" health care facilities by behaving in a noisy and disruptive manner were only the beginning.⁴⁰ Arcara also found that the practice of "sidewalk counseling," even if initiated peacefully, "often erupts into a charged encounter" in which counselors "turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering."⁴¹ Arcara chastised the anti-abortion protestors for using video cameras "as offensive weapons to intimidate patients seeking abortions."⁴² The judge found that the defendants had "attempted to hinder and interfere with local law enforcement by harassing" police officers, patients, and clinic staff.⁴³

³⁸ *Id.*

³⁹ See Andrew Duffy, *Why Abortion Fight Moved to Buffalo*, TORONTO STAR, Apr. 24, 1992, at A1.

⁴⁰ See *Pro-Choice Network of W. New York v. Project Rescue of W. New York*, 799 F. Supp. 1417, 1423–24 (W.D.N.Y. 1992).

⁴¹ *Id.* at 1425.

⁴² *Id.*

⁴³ *Id.*

But the most dire effects of the demonstrations were visited upon patients attempting to enter the health clinics, according to Judge Arcara. Elevated blood pressure, hyperventilation, and agitation were among the symptoms suffered by patients exposed to sidewalk counseling. Women were often too upset to undergo scheduled procedures, and the resulting delays increased the risks associated with abortion. The presence of video cameras aggravated the damage: "Defendants are well aware," Arcara wrote, "that women seeking abortions, especially younger women, are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion, and that the presence of cameras increases patients' fear that their identities might be revealed."⁴⁴ In determining whether the plaintiffs were entitled to a preliminary injunction, the court, Judge Arcara declared, "must balance the need to protect these young vulnerable women from defendants' harassment against defendants' First Amendment rights."⁴⁵ By intimidating patients entering the clinics, the defendants had created medical risks for which damage awards could not compensate.

Perhaps most devastatingly, Arcara drew an analogy between the defendants' behavior and the intimidation tactics of southern segregationists in the 1960s:

During the civil rights movement, segregationists congregated in front of schools and polling places with attack dogs and clubs in order to intimidate blacks into foregoing their constitutional rights to an integrated education and to vote. Here defendants are attempting to prevent women from exercising their constitutional right to choose to have an abortion. . . . [I]nstead of using dogs and clubs, defendants use cameras and the threat of exposure to scare and intimidate women into foregoing their constitutional rights.⁴⁶

Arcara's rhetoric was a blow to the defendants, who depicted themselves—not the plaintiffs—as the true heirs to the mantle of the civil rights movement.

Indeed, the next issue facing Judge Arcara was the validity of the plaintiffs' section 1985(3) claim, the only federal cause of action in the complaint. The key question—yet to be resolved by the Supreme Court—was whether women seeking an abortion constituted a protected class under the civil rights statute. Drawing an analogy to *Griffin v. Breckinridge*, where the defendants' assault upon black civil rights workers on an interstate highway was ruled a conspiracy to deprive them of their

⁴⁴ *Id.* at 1426.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1439.

right to travel, Arcara found that the defendants were indeed engaged in a conspiracy to infringe upon women's right to travel and upon their right to choose abortion. Arcara concluded that the plaintiffs had satisfied the Fourteenth Amendment's state action requirement, finding that "defendants have acted to render local law enforcement officials incapable of keeping the clinics readily accessible to women who choose to have an abortion."⁴⁷

After determining that the plaintiffs were also likely to succeed on the merits of their state law claims, Arcara proceeded to address the defendants' First Amendment challenge to the injunction. The judge ruled that women seeking abortions should be considered a captive audience for the purposes of First Amendment analysis. Though the captive audience doctrine was generally inapplicable to speakers in traditional public fora like a public street or sidewalk, here "[d]efendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears. . . . The only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion."⁴⁸ Finding that the defendants retained "ample alternative channels of communication," Judge Arcara summed up his rejection of every single one of the pro-life side's contentions and issued a preliminary injunction reaffirming the restrictions contained in the TRO.

"You're Not in Kansas Anymore"

This legal setback notwithstanding, Operation Rescue and its local counterparts soldiered on toward the Spring of Life demonstrations, announcing their intention to picket the homes of individual physicians and clinic staff, and to close down abortion facilities in the Greater Buffalo area.⁴⁹ The pro-choice forces were determined to prevent another Wichita, where forty-six days of demonstrations in the summer of 1991 had closed down clinics despite the arrest of almost three thousand anti-abortion protesters. They enlisted hundreds of abortion rights activists to form human chains around the clinics to protect access, and consulted with national coordinators at the Feminist Majority Foundation about their experience in defending clinics against blockades.⁵⁰ Kit Bonson, a spokeswoman for Buffalo United for Choice, extolled the pro-choice groups' nonviolent clinic defense training, and expressed the hope that

⁴⁷ *Id.* at 1431.

⁴⁸ *Id.* at 1436.

⁴⁹ See Catherine Manegold, *Protesters Set for Collision on Abortion*, N.Y. TIMES, Apr. 21, 1992, at B1.

⁵⁰ See Catherine Manegold, *Abortion War, Buffalo Front: Top Guns Use Battle Tactics*, N.Y. TIMES, Apr. 25, 1992, at 1.

damage done by Operation Rescue to clinic access could be minimized. "If they're not able to succeed here, they're less likely to go to another city," Bonson predicted.⁵¹ Even before the protests were scheduled to begin in earnest, pro-choice advocates met before dawn to surround the Buffalo GYN Womenservices clinic in a protective ring.⁵² Events seemed to prefigure an impending violent confrontation, as Paul Schenck was shoved and spat upon when he knelt in front of the entrance to the Womenservices clinic, his Bible knocked from his hands and cigarette ashes sprinkled on his head.⁵³ "We'll defend the clinic doors—You're not in Kansas anymore!" the pro-choice demonstrators chanted.⁵⁴

On April 20, over one thousand anti-abortion advocates gathered for an opening rally in a local church, where the Reverend Keith Tucci read the names of local physicians who performed abortions and exhorted his audience to beg the doctors to stop. Robert Schenck told the *New York Times* that the pro-life groups had hired private investigators to investigate the "backgrounds, private lives and financial profiles of the doctors" who performed abortions locally.⁵⁵ Later that night, Operation Rescue organizers held a news conference at which they displayed a twenty-five-week-old fetus they claimed had been aborted. The following day, Robert Schenck was arrested for brandishing a fetus in the faces of abortion rights demonstrators, and charged with disorderly conduct.⁵⁶ The police also arrested Paul Schenck when he boarded a police bus where his brother was being held.⁵⁷

Nevertheless, despite strong turnout by both sides, the demonstrations remained relatively peaceful. The police were out in force, erecting barriers between abortion rights and anti-abortion protesters. Pro-choice advocates, armed with radios to monitor the movement of the pro-life demonstrators, announced in cautious triumph that clinic schedules remained undisrupted.⁵⁸ On the third day of the campaign, two hundred anti-abortion protesters were arrested when they defied police orders

⁵¹ David Treadwell, *Abortion-Issue Activists Clash in Buffalo*, L.A. TIMES, Apr. 22, 1992, at A1.

⁵² See *id.*

⁵³ See *Abortion Rights Activists Attack Praying Minister*, ATLANTA JOURNAL-CONSTITUTION, Apr. 19, 1992, at A10.

⁵⁴ See Manegold, *supra* note 50.

⁵⁵ *Id.*

⁵⁶ See *Clerics Arrested After Fetus Waved at Buffalo Protest*, ASSOCIATED PRESS, Apr. 22, 1992.

⁵⁷ See *id.*

⁵⁸ See Catherine Manegold, *Rallies Held, Peacefully, Over Abortion*, N.Y. TIMES, Apr. 22, 1992, at B2.

and knelt in the road thirty yards from a clinic entrance, but pro-choice and police barricades kept the clinics open.⁵⁹ Both sides compared themselves to civil rights protesters and their opponents to Nazis,⁶⁰ but the violent rhetoric rarely spilled into action.

By the third day of protests, pro-life demonstrators seemed increasingly desperate to make headway toward their goal of shutting down clinics. As the Supreme Court was hearing arguments in *Planned Parenthood v. Casey* hundreds of miles away in Washington, in Amherst, New York, protesters attempted to break through a police line outside the Women's Center. Police wrestled them to the ground, using handcuffs to bind the feet of demonstrators like Rev. Johnny Hunter, who had broken through a cluster of abortion rights guards and run toward the clinic door.⁶¹ At the end of the day, Linda Stadler, office manager for Dr. Press, reported that all patients with appointments kept them and were seen by health care providers.⁶² After ten days of protests, both sides were declaring victory. "They didn't accomplish a single one of their goals," Marilyn Buckham said, echoing a *Time* magazine story that ridiculed the Spring of Life demonstrations as "Operation Fizzle."⁶³ Robert Schenck disagreed, delivering a triumphant speech to a standing-room-only crowd at his suburban church.⁶⁴ According to Operation Rescue, most of the six thousand demonstrators at Spring of Life were local supporters protesting for the first time. And, they said, at least twenty women changed their minds about terminating their pregnancies. One, sixteen-year-old Stephanie White, the mother of a two-year-old, told whomever would listen that she had decided to "keep her twin babies" after reading a pamphlet distributed by the demonstrators.⁶⁵

For many pro-choice activists, what was at stake in the Buffalo demonstrations was the right of women to control their reproductive destinies. To them, the fiery rhetoric about mangled fetuses and eternal damnation was inextricably intertwined with the "pro-family" ideology promoted by ministers like the Schenck brothers. What was perhaps most alarming to many feminists about anti-abortion rhetoric—besides

⁵⁹ See David von Drehle, *Amid Mass Arrests, Counter-Protests, Buffalo Abortion Clinics Stay Open*, WASH. POST, Apr. 23, 1992, at A14.

⁶⁰ See *id.*

⁶¹ See *Nearly 200 Arrested as Buffalo Abortion Showdown Continues*, ATLANTA JOURNAL-CONSTITUTION, Apr. 23, 1992, at A4.

⁶² See Catherine Manegold, *194 Arrested in Protests at Buffalo Abortion Clinics*, N.Y. TIMES, Apr. 23, 1992, at B9.

⁶³ Quoted in *All Claim Victory in Abortion Fight*, BALTIMORE SUN, MAY 3, 1992.

⁶⁴ See *id.*

⁶⁵ See Jeannie Ralston & Barbara Maddux, *The Great Divide*, LIFE, July 1992, at 55.

its violent overtones—was its conception of appropriate gender roles. When Paul Schenck extolled a renaissance of pro-family values in America, he called for "overt leadership exercised by the father/husband" and "covert leadership exercised by the mother/wife."⁶⁶ At one Operation Rescue rally, when women stood to give testimonials, twenty-one-year-old Toni Denver prayed before a crowd of over one thousand, "Oh please, Lord, break the curse on women's hearts that says we don't need our men. Break that independence. Help men rise up to take positions of leadership and authority that we might submit to them."⁶⁷ Katherine Spillar of the Feminist Majority spoke for many women's rights advocates when she called Operation Rescue's ideology a thinly disguised brand of antifeminism. "They want women to put their aprons back on and retreat to the kitchens," she said. "They are very threatened."⁶⁸

Meanwhile, the mostly male abortion providers in the Greater Buffalo area found themselves labeled "baby-murderers" and received constant threats of physical harm and even death. They declared themselves motivated by medical duty and compassion for women who faced difficult and painful choices. Dr. Parviz Taefi had only to remember the horror of OB/GYN practice before legalized abortion to reaffirm his commitment to providing abortion services. "Not a night went by when I didn't see someone in the emergency room dying from a botched abortion," he remembered of the pre-*Roe* era.⁶⁹ In 1992, Taefi was performing about twenty abortions per week, a small fraction of his practice. Most of his time was devoted to check-ups, surgeries, and childbirth; among Dr. Taefi's regular patients were the sisters of Robert and Paul Schenck.⁷⁰ "The moral question of abortion is a valid one," Taefi acknowledged. "I would always rather deliver a baby. But that's idealistic. Reality is different."⁷¹

"We Knew What the Truth Was"

Reality in the coming year proved unsettling to both sides in the *Schenck* case. In June, the Supreme Court reaffirmed the central holding of *Roe* in *Planned Parenthood v. Casey*. In November, Paul Schenck

⁶⁶ Manegold, *supra* note 50.

⁶⁷ Quoted in Ralston & Maddux, *supra* note 65.

⁶⁸ Manegold, *supra* note 50.

⁶⁹ Quoted in Ralston & Maddux, *supra* note 65.

⁷⁰ In fact, when Taefi suffered a heart attack in 1993, Robert Schenck appeared in his hospital room, declaring he would pray for the doctor's recovery out of gratitude for his delivery of his baby niece. See *Off Main Street*, BUFFALO NEWS, Jan. 17, 1993.

⁷¹ Quoted in *id.*

served time in jail for harassing obstetrician and abortion provider Dr. Barnett Slepian the previous year.⁷² In January 1993, the pro-choice side suffered its own legal blow when the Supreme Court ruled in *Bray v. Alexandria Women's Health Center* that women seeking abortions did not constitute a protected class under section 1985(3). Over three dissents, Justice Scalia's opinion for the court rejected the pro-choice groups' contention that anti-abortion activities reflected "class-based animus" analogous to the racially motivated hostility targeted by the Ku Klux Klan Act.⁷³ The decision was a significant defeat, symbolically and strategically, for abortion rights supporters, who could no longer invoke federal civil rights law against groups who attempted to prevent women from seeking abortions.

The Pro-Choice Network had more immediate concerns, however. Following the decision in *Bray*, as pro-life groups announced a new round of protests in western New York, Finley told the U.S. marshal's office that federal assistance might be required to enforce the injunction.⁷⁴ In March, to the horror of pro-choice activists and physicians around the nation, abortion provider Dr. David Gunn was shot dead outside a health care facility in Pensacola, Florida. The Schencks and other Buffalo-area pro-life activists immediately issued a joint statement condemning the violence, but clinic staff and physicians admitted they were rattled by the murder. "I've never been this afraid," Marilyn Buckham told a local reporter.⁷⁵ Dr. Barnett Slepian spoke with the *Buffalo News* for the first time about the enormous strain associated with performing abortions in a hostile and potentially violent climate. Dr. Gunn's death "hits home," Slepian said, "because it could have been me. For years I've felt, and I still feel, it could happen to me."⁷⁶

Meanwhile, increasingly frustrated with what he perceived as Judge Arcara's personal bias, Behr filed a motion asking the judge to disqualify himself from the *Schenck* case for accepting a Citizen of the Year award from the pro-choice *Buffalo News*. Arcara, in an eight-page decision, rejected the motion, suggesting that the pro-life demonstrators were seeking his recusal "merely to avoid unwelcome rulings."⁷⁷ Behr was not

⁷² See *Rev. Schenck Released from Jail*, BUFFALO NEWS, Nov. 21, 1992.

⁷³ See *Bray v. Alexandria Women's Health Ctr.*, 506 U.S. 263, 268-74 (1993).

⁷⁴ See Jerry Zremski, *Ruling Doesn't Give Abortion Foes Free Rein*, BUFFALO NEWS, Jan. 13, 1993, at 3.

⁷⁵ Gene Warner, *Killing of Doctor at Abortion Clinic Spurs Drive for Tougher Laws*, BUFFALO NEWS, Mar. 20, 1993, at 4.

⁷⁶ Gene Warner, *Slepian Discusses Pressures Faced in Abortion Work*, BUFFALO NEWS, Apr. 19, 1993.

⁷⁷ Quoted in Dan Herbeck, *Arcara Rejects Pro-Life Plea, Won't Step Aside in Abortion Case*, BUFFALO NEWS, Mar. 31, 1993.

the only one losing patience; the Schencks' frustration with the on-the-ground anti-abortion struggle was growing by the day. In April, the brothers announced their intention to abandon the Buffalo battle and step onto the national stage—into the mainstream, so to speak. "For the time being," Paul Schenck said, "the effectiveness of blockades is minimal. Therefore, new approaches need to be employed."⁷⁸ Those approaches would include addressing public rallies, writing books, and lobbying public officials in the hopes of effecting changes in national policy.

But the Schencks would not be able to escape Buffalo so easily. In April, Amherst Town Justice Sherwood Bestry sentenced Robert Schenck to nine months in jail for disorderly conduct and resisting arrest during the Spring of Life protests.⁷⁹ In July, Arcara dismissed the Pro-Choice Network's section 1985(3) claim in light of *Bray*, but to no one's surprise, decided to exercise pendent jurisdiction over their state law claims.⁸⁰ That fall, a federal magistrate judge ordered the Buffalo pro-life activists, including the Schencks, to pay over \$100,000 in legal fees incurred by physicians and abortion providers as a result of pro-life demonstrations at the Womenservices clinic.⁸¹ Robert Schenck was fined an additional \$25,000 for his role in displaying a fetus to then-Governor Bill Clinton during the 1992 Democratic National Convention in violation of a federal court order.⁸² Finally, Paul Schenck found himself facing perjury charges for falsely denying under oath the apparel switch with his twin during the videotaped 1990 protests.⁸³

For Paul Schenck, the courts' repeated refusals to recognize his heartfelt protests as legitimate, protected expression under the First Amendment was deeply disillusioning. "We were naïve," he says. "We knew what the truth was . . . I think we had a very accurate view about what the framers of the constitution had in mind. But we were up against a court that had a view of constitutional rights that included

⁷⁸ Quoted in Gene Warner, *Schencks Taking Pro-Life Pursuits to National Level*, BUFFALO NEWS, Apr. 2, 1993.

⁷⁹ See Carl Allen, *Minister Gets Jail in Protest Case*, BUFFALO NEWS, Apr. 20, 1993; see also Editorial, *A Just Sentence for Schenck: He'll Pay for What He Did, Not for His Beliefs*, BUFFALO NEWS, Apr. 21, 1993, at 2; Gene Warner, *Pro-Life Minister, On National TV, Targets Amherst Judge, His Family*, BUFFALO NEWS, May 13, 1993.

⁸⁰ See *Pro-Choice Network of W. New York v. Project Rescue of W. New York*, 828 F. Supp. 1018 (W.D.N.Y. 1993).

⁸¹ See Dan Herbeck, *Pro-Lifers Ordered to Pay Legal Fees*, BUFFALO NEWS, Oct. 2, 1993, at 1.

⁸² See *Federal Judge Fines Schenck \$25,000 in Fetus-Display Incident*, BUFFALO NEWS, Oct. 14, 1993, at 7.

⁸³ See *Paul Schenck Charged With Perjury*, BUFFALO NEWS, Nov. 5, 1993, at 1.

abortion trumping the First Amendment. . . . It was extremely frustrating and discouraging.”⁸⁴

The *Schenck* defendants appealed Judge Arcara’s injunction to the Second Circuit, where Vincent McCarthy, a long-time First Amendment lawyer with a successful record in other abortion protest cases, took over the case from James Duane, who had accepted a position at the Regent University School of Law in Virginia Beach. McCarthy, as it turned out, would argue the *Schenck* case before an unusually sympathetic panel that included Judges Thomas Meskill and Frank Altimari, as well as Senior Judge James L. Oakes. McCarthy made a straightforward argument to the panel, contending that the sidewalks outside abortion clinics were traditional public fora, requiring a compelling state interest to restrict speech, and that under the established test for content-neutral time, place, and manner restrictions, the injunction’s bubble zones and cease-and-desist provisions impermissibly burdened speech.

Three months after the panel heard oral arguments from McCarthy and Finley, the Supreme Court decided *Madsen v. Women’s Health Services*, a challenge to an abortion clinic protest injunction in Florida. Chief Justice William Rehnquist’s majority opinion for a divided Court established a new test for injunctions: “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”⁸⁵ It found portions of the Florida injunction, which provided for a thirty-six-foot buffer zone and restricted the extent to which protesters could approach persons coming in and out of the clinic, constitutional, and struck down others as too speech-restrictive. Contrasting the majority’s decision with prior rulings in labor picketing and civil rights cases, Justice Antonin Scalia’s vitriolic dissent ridiculed the indeterminacy of the *Madsen* test and urged strict scrutiny of injunctions.⁸⁶ He decried the “ad hoc nullification machine” he believed to operate in abortion cases and lamented its latest victim, the First Amendment.⁸⁷

Justice Scalia’s protestations notwithstanding, it was the *Madsen* test that the appellate panel applied to the *Schenck* injunction, and the very indeterminacy of the new standard worked in favor of the defendants. Judge Meskill, writing for himself and Judge Altimari over Judge Oakes’s dissent, struck down both of the buffer zones and invalidated the cease-and-desist provisions. With the panel’s decision, Paul Schenck had something to celebrate beyond his recent release from prison. But

⁸⁴ Interview with Schenck, Apr. 19, 2000.

⁸⁵ *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 765 (1994).

⁸⁶ *Id.* at 793 (Scalia, J., dissenting).

⁸⁷ *Id.* at 785 (Scalia, J., dissenting).

the protesters’ victory was short lived. Chief Judge Jon O. Newman stayed the panel’s decision pending en banc review. Meanwhile, the willingness of the U.S. Attorney’s office to bring criminal charges against some of the demonstrators for their illegal activities “changed our strategy to a large degree,” according to Paul Schenck. “Most pro-life people range from poor to middle-income, so an economic penalty had been more symbolic than anything else. But then the question became, should I risk my children losing their father in their most formative years, or take another approach?”⁸⁸

Legally, the *Schenck* case was temporarily stalled as the parties waited seven months for the rehearing, and another five for the en banc court’s decision. It was not an uneventful year in the larger abortion debate, however. The Freedom of Access to Clinic Entrances Act (FACE), signed into law by President Clinton the previous May, went into effect, making it a federal crime to physically block access to clinics, damage their property, or injure, interfere with or intimidate patients or clinic staff. On the other hand, after the Republican victory in the 1994 mid-term elections helped elect Dennis Vacco, the pro-life candidate for New York attorney general, the year ended on a terrifying note for those committed to preserving women’s reproductive choices. Two days before the New Year, twenty-two-year-old John Salvi, an anti-abortion militant, opened fire at a Boston women’s clinic, killing two staff members and wounding seven others. Although advocates on both sides expressed horror at the tragedy, they offered different interpretations of the violence. To pro-choice leaders, the murders were a chilling reminder of their own vulnerability, and an affirmation of the need for more stringent restrictions like FACE. To some anti-abortion sympathizers, the violence was a predictable result of suppressing more peaceful forms of dissent. The Schenck brothers’ father, Henry Schenck, had eerily predicted three months before the Boston killings that pro-choice advocates would have “to contend with the more violent residue who, in their frustration, step forward and fill the void left by the nonviolent advocates.”⁸⁹

“The Timid Have a Right to Go About Their Business”

The Second Circuit’s en banc ruling, authored by Judge Oakes, reversed the panel’s decision in an opinion that essentially recapitulated Oakes’s earlier dissent.⁹⁰ The court upheld both the buffer zones and the

⁸⁸ Interview with Schenck, Apr. 19, 2000.

⁸⁹ *Schenck Brothers’ Father Says Sons Following Tradition*, BUFFALO NEWS, Sept. 11, 1994, at 8.

⁹⁰ *Pro-Choice Network of W. New York v. Schenck*, 67 F.2d 377 (2d Cir. 1995) (en banc).

cease-and-desist provision, and in a particularly vehement concurrence, Judge Ralph Winter defended injunctions targeted at “even isolated threats or obstructions,” declaring, “The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.”⁹¹ Only Judges Meskill and Altimari dissented, with Meskill echoing Scalia’s condemnation of the “abortion ad hoc nullification machine,”⁹² and Altimari stressing the indeterminacy and overbreadth of the “floating” bubble zone.⁹³

McCarthy’s petition for certiorari similarly accused the Second Circuit majority of bias against anti-abortion protesters. “[T]he Pro-Choice En Banc Panel flatly and arrogantly in its haste to jump aboard the abortion bandwagon, flouts all constitutional precedent,” the protesters’ petition charged.⁹⁴ In her response, Finley was somewhat constrained by the procedural posture of the *Schenck* case as it reached the Supreme Court. Because the protesters were challenging the preliminary injunction, issued in February of 1992, she was limited to presenting the facts as they stood at that time, even though some of the protesters’ most obstructionist activities had occurred later. “It was so frustrating,” Finley exclaims. “Because right after the preliminary injunction they went out and blockaded!” Still, Finley continued to emphasize the substantial factual record she did have. The other thorn in Finley’s side was the necessity of defending the “floating” bubble zone, a provision that she believed “clutter[ed] up the injunction,” and in fact had unsuccessfully petitioned to modify in 1994.⁹⁵

By the time the Supreme Court granted certiorari in *Schenck*, on March 18, 1996, the Schenck brothers themselves had finally managed to leave their Buffalo lives as rabble-rousers behind them and relocate to the nation’s capital. As the justices began to examine the injunction that had restrained their protest activities in western New York, Robert Schenck was comfortably installed as the general secretary of the National Clergy Council, and Paul Schenck—despite his status as a convicted felon—had become executive vice president and chief of operations at the American Center for Law and Justice (ACLJ), the Pat Robertson-sponsored public interest law firm helping to represent him before the Court.⁹⁶ Having been feted at a national Christian Coalition conference

⁹¹ *Id.* at 396 (Winter, J., concurring).

⁹² *Id.* at 404 (Meskill, J., dissenting).

⁹³ *Id.* at 409–11 (Altimari, J., dissenting).

⁹⁴ Petition for a Writ of Certiorari, *Schenck v. Pro-Choice Network of W. New York*, No. 95–1065, at 14 (hereinafter Petition for Cert.).

⁹⁵ Interview with Finley, Mar. 31, 2000.

⁹⁶ See Zremski, *supra* note 74.

only a few months before as “completed Jews,”⁹⁷ the Schencks had joined the religious conservative mainstream.

“Peaceful Protesters,” “Intimidating Mobs”

Finley was shocked to hear that the Supreme Court had granted “cert.” Immediately, her “phone was ringing off the hook with people trying to offer help.” Finley accepted NOW LDEF’s offer to join her as co-counsel and to coordinate the hordes of amicus curiae interested in filing briefs. Finley and her NOW LDEF colleagues were particularly concerned about attracting the support (or, at least, forestalling the opposition) of two key organizations—the AFL–CIO and the ACLU—whose interests in protecting free speech were at odds with their reliably pro-choice stance on reproductive rights.⁹⁸

The Pro-Choice Network’s attorneys knew the AFL–CIO’s brief could exert a decisive influence on the outcome of *Schenck*. In *Madsen*, where the group had filed a brief in support of neither party, the Supreme Court had more or less adopted the standard proposed by the labor unions’ lawyers.⁹⁹ Finley was relieved to discover that Marsha Berzon, then a distinguished San Francisco labor lawyer and longtime women’s rights advocate, would author the brief. Finley felt that hours on the phone with Berzon paid off in the end, for while the brief was highly critical of the Second Circuit’s reasoning in upholding the injunction, its text and footnotes also acknowledged the strength of the factual record of obstruction compiled by the plaintiffs.¹⁰⁰

If disaster had been averted on the labor front, the pro-choice side could be even more pleased with the ACLU national office’s contribution to the amicus effort. Despite dissent from several state and local ACLU affiliates, the brief submitted by the national ACLU along with other free speech groups and Jewish organizations emphasized both the stringency of the First Amendment standard to which the injunction was subject, and the gravity of the obstruction and harassment that were its target.¹⁰¹ Amicus support for the Pro-Choice Network more predictably

⁹⁷ See Stephen Henderson, *Family Weekend: Christian Coalition’s Faith and Freedom ’95 Conference*, 112 *CHRISTIAN CENTURY* 1102 (1995).

⁹⁸ Interview with Finley, Mar. 31, 2000.

⁹⁹ See Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Neither Party, *Madsen v. Women’s Health Ctr.*, No. 93–880.

¹⁰⁰ Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Neither Party, *Schenck v. Pro-Choice Network of W. New York*, No. 95–1065.

¹⁰¹ See Brief of the American Civil Liberties Union, New York Civil Liberties Union, American Jewish Congress, American Jewish Committee, and People for the American Way as Amicus Curiae in Support of Respondents, *Schenck*, No. 95–1065.

included numerous women's rights organizations, a coalition of physicians' groups and reproductive health service providers, and the attorneys general of eighteen states. On the protesters' side were the Rutherford Institute, the Family Research Council, and the Life Legal Defense Foundation.

Putting aside their different doctrinal emphases, the most striking differences between the two sides' positions were their contrasting characterizations of the factual record. The protesters maintained that the fixed and floating buffer zones, which designated areas off limits to protesters, were "factually unjustifiable" and that the "cease-and-desist" provision was indistinguishable from the "no-approach" provision struck down in *Madsen*.¹⁰² In response, the Pro-Choice Network provided a detailed refutation of petitioners' factual discussion, what the brief called a "stark[] dramatiz[ation]" of "the problems posed to law and order when a passionate mob is intent on preventing other people from exercising their constitutional rights, or intimidates and harasses them for doing so."¹⁰³ "Part of our strategy," NOW LDEF attorney Yolanda Wu recalled, "was to talk a lot about how non-abortion health services were affected, since several of our clients were facilities that treated patients for all kinds of medical problems, cancer, you name it."¹⁰⁴ The Pro-Choice Network's brief implemented what had been Finley's approach all along—to depict in compelling terms the medical harm suffered by women harassed and threatened by anti-abortion protesters determined to obstruct their access to necessary health services.

Just over six years after Finley filed the original complaint in the *Schenck* case, she was to argue before the Supreme Court, an eventuality she had often quipped would send her over Niagara Falls in a barrel. Her opponent before the Court would be Jay Alan Sekulow, the forty-year-old chief counsel for the ACLJ. Sekulow had risen to prominence in conservative circles after victories in several Supreme Court cases. He was a well-known speaker on the religious right's lecture circuit, making frequent appearances on the Christian Broadcasting Network's "700 Club," and launching his own syndicated radio show, Jay Sekulow Live. In some ways, Sekulow's path to Christian activism was not unlike that of the Schenck brothers. Raised in a Reform Jewish household "very culturally committed" to Judaism, Sekulow converted to Christianity as an undergraduate at Mercer University, a Baptist institution in Atlanta. As he described his religious awakening to the *New York Times* in 1995, "When I really understood [the New Testament] intellectually, and when it translated into my heart—which is the most important part—my

¹⁰² Brief for Petitioners at 16, *Schenck*, No. 95-1065.

¹⁰³ Brief for Respondents at 20, *Schenck*, No. 95-1065.

¹⁰⁴ Interview with Yolanda Wu, Mar. 15, 2000.

life has never been the same."¹⁰⁵ Now overseeing a staff of almost two dozen lawyers and five hundred attorney-affiliates throughout the country, with an annual budget in the tens of millions and a caseload of almost one thousand cases, Sekulow felt he was beginning to fulfill a moral obligation to restore religious values to American public life. But his goal, ultimately, was "far, far away. . . . It's a constant struggle. If you let your guard down for a moment, you'll get clobbered."¹⁰⁶

Sekulow was evidently determined not to let that happen in the *Schenck* oral argument, where he insisted that both the floating and fixed buffer zones squelched protected speech. Despite tough questioning from Justice Ruth Bader Ginsburg about his characterization of the factual record, and an onslaught of queries from the other justices pressing him to explain exactly how the buffer zones limited speech, Sekulow did manage to insert a reference to the petitioners' favorite case, *NAACP v. Claiborne Hardware*, driving home the analogy between anti-abortion protesters and civil rights demonstrators. Finley, too, faced an immediate and unrelenting barrage of questions. Inquiries from Justice Scalia and others about the underlying legal basis for the injunction threatened to devolve into a debate over the proper use of medical evidence as a basis for restricting speech. Justice Anthony Kennedy declared at one point, "I would say that persons who walk through a picket line in order to work despite a strike face extreme stress. . . . [but labor picketing] cases do not talk about stress to the individual. That's somewhat antithetical to very, very essential First Amendment values." Finley also fielded questions about the implementation of the "floating" bubble zone, the provision she was least enthusiastic about. Finally, Solicitor General Walter Dellinger took the podium to present the Government's case for the injunction's constitutionality. The Court pressed Dellinger to distinguish the *Schenck* case from *Claiborne Hardware*, and to clarify the propriety of using medical evidence as a justification for enjoining protesters.

Overall, the justices seemed skeptical of the floating bubble zone, but the oral argument had barely touched upon the core of the injunction—the fixed buffer zone and the cease-and-desist provision. Finley remained optimistic, believing that a successful challenge to the floating zone might actually work in her clients' favor by justifying a much larger fixed buffer zone. "It may turn out to be a case where the defendants should have been careful what they wished for," Finley told reporters after the argument.¹⁰⁷ The Schenck brothers also emerged from the

¹⁰⁵ Quoted in Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at 1.

¹⁰⁶ Quoted in *id.*

¹⁰⁷ Quoted in Jerry Zremski, *Abortion Protesters May Lose By Winning*, BUFFALO NEWS, Oct. 17, 1996, at 7A.

courtroom confident. Robert Schenck told his brother's former congregation at New Covenant Tabernacle that he felt "the Justices were with us," singling out Justice Scalia for special praise as "our angel on the Court."¹⁰⁸

The Court's decision, issued on February 19, 1997, earned praise from many commentators for its embrace of the often-elusive middle ground. The ruling upheld the pro-choice groups' precious fixed buffer zone but struck down the provision most offensive to the protesters, the floating bubble zone.¹⁰⁹ On the "cease-and-desist" provision, the Court also found a middle way, upholding the restriction but refusing to endorse the more capacious "right to be left alone" that respondents had urged. Evenhandedness aside, the decision was splintered, with Justices John Paul Stevens, Sandra Day O'Connor, Ginsburg, and David H. Souter in agreement with the Chief Justice on the permissibility of the fixed zone and the unconstitutionality of the floating bubble; Justices Scalia, Kennedy, and Clarence Thomas proclaiming the unconstitutionality of the fixed zone as well as the floating bubble; and Justice Stephen Breyer voting to uphold the entire injunction. Scalia's dissent echoed his screed in *Madsen*, chastising the majority for its "effort to recharacterize th[e] responsibility of special care imposed by the First Amendment as some sort of judicial gratuity."¹¹⁰

In the wake of the Supreme Court's decision in *Schenck*, both sides proclaimed victory. Sekulow called the Court's invalidation of the floating bubble a "tremendous victory for free speech,"¹¹¹ while Marilyn Buckham declared she was "thrilled about the decision," since the "heart and soul of the injunction remain[ed] in place."¹¹² Paul Schenck characterized the ruling as "a victory for all people of conscience who object to the wanton killing of innocent human beings."¹¹³ Schenck still maintained three years later that he "felt thoroughly vindicated. Many who support me did not feel that it was a clear win and technically it wasn't. But for what was in my heart it was."¹¹⁴ Yolanda Wu and Martha

¹⁰⁸ See Barbara O'Brien, *Schenck Confident of Victory in Abortion Case*, BUFFALO NEWS, Oct. 21, 1996, at 1B.

¹⁰⁹ *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997).

¹¹⁰ *Schenck*, 519 U.S. at 391 (Scalia, J., dissenting).

¹¹¹ Quoted in Linda Greenhouse, *High Court Upholds 15-foot Buffer Zone at Abortion Clinics*, N.Y. TIMES, Feb. 20, 1997, at A1.

¹¹² Quoted in Jerry Zremski, *High Court Voids Part of Order on Buffer Zones*, BUFFALO NEWS, Feb. 19, 1997, at 1A.

¹¹³ Quoted in David Savage, *Justices Rule Abortion Protest is Free Speech*, L.A. TIMES, Feb. 20, 1997, at A1.

¹¹⁴ Interview with Schenck, Apr. 19, 2000.

Davis of NOW LDEF applauded the Court for its balanced ruling, noting that the "proof of victory" would "ultimately rest[] . . . on the impact of the decision on women's access to reproductive choice." They believed pro-choice groups could "take comfort that, in the long term, the decision in *Schenck* will be a win."¹¹⁵ For her part, Finley saw the decision as "an invitation to ask for a larger fixed buffer zone," since the Court had credited a factual record compiled before many of the largest demonstrations and blockades had occurred. "They were laying the seeds of their own future destruction by acknowledging that evidence of TRO violations would have warranted expanded restrictions," she says. "I thought, that plays right into my hands when we go back to district court."¹¹⁶ For Finley, the true test of victory would be how expansive an injunction she could win from Judge Arcara. "The Supreme Court was really the tip of the iceberg in all this," she says. "The district court record-building work was 90 percent of it, and the Supreme Court about ten. Well, maybe 80–20."¹¹⁷

For the pro-life side, the most cherished triumphs of the *Schenck* case were symbolic. "This decision clearly means that the First Amendment applies to the pro-life message, and there is no longer an exception to the free speech clause when the issue is abortion," Sekulow declared, in tones echoed by other religious conservatives. Pro-choice leaders were not unconcerned about the anti-abortion forces' interpretation of the decision as a moral victory. A California NOW officer expressed a typical worry when she said, "Patients are at risk of being ambushed by zealots."¹¹⁸ A clinic director in Seattle also had misgivings, saying, "This just gives anti-choice activists more tools to harass women."¹¹⁹ Davis and Wu noted that the *Schenck* decision left many questions unanswered, including the status of statutes and ordinances creating buffer zones around medical clinics.¹²⁰ But those were questions for another day, and another case.

The *Schenck* case, however, was not over. Back in district court, Judge Arcara encouraged the parties to settle their differences. "Although the court fully recognizes that the parties strongly and sincerely believe in the righteousness of their respective causes," Arcara wrote in

¹¹⁵ Martha Davis & Yolanda Wu, *The Schenck Decision: A Solomonic Solution*, NAT'L L.J., Mar. 10, 1997, at A18.

¹¹⁶ Interview with Finley, Mar. 31, 2000.

¹¹⁷ *Id.*

¹¹⁸ Quoted in Savage, *supra* note 109, at A1.

¹¹⁹ Quoted in Richard Carelli & Ferdinand M. De Leon, *Court Gives Abortion Foes Partial Victory*, SEATTLE TIMES, Feb. 19, 1997, at A1.

¹²⁰ See Davis & Wu, *supra* note 111.

an April 1998 ruling, "it strongly urges them to take a hard, realistic look at their positions and to consider carefully the cost of continuing this litigation."¹²¹ Before any settlement could be reached, however, a tragedy of unprecedented proportions shook the beleaguered and divided Buffalo community.

On Friday, October 23, 1998, Barnett Slepian was standing in the kitchen of his Amherst home with his wife Lynn and two of his four young sons. They had just returned from Sabbath services at a nearby synagogue, where the family had marked the anniversary of Slepian's father's death. Without warning, a bullet shattered the kitchen window, striking the fifty-two-year-old physician in the back. "Did you hear that?" the doctor asked his wife. "Lynn, I think I've been shot." His other two sons rushed into the room as he collapsed to the floor. It was the last time they would see their father; Dr. Slepian died ninety minutes later at a nearby hospital.

"These People Are Ruthless Murderers"

"Please don't feign surprise, dismay, and certainly not innocence," Dr. Slepian had written in an open letter to anti-abortion demonstrators four years before his death, "when a more volatile and less restrained" protester "decides to react to inflammatory rhetoric . . . by shooting an abortion provider."¹²² After his death, many in the pro-choice community came to agree with him. "This horrendous assassination . . . cannot be separated from the virulent and inflammatory language of radical right-wing ideologues who demonize women, abortion and medical providers without regard to the real-life consequences," said Janet Benshoof, president of the Center for Reproductive Law and Policy.¹²³ "What I feared most had happened," Buffalo clinic director and close Slepian friend Marilyn Buckham said simply. "I can't tell you how deeply sad I am."

Local pro-life leaders were quick to condemn the murder. "For anyone to take it upon himself to be judge, jury, and executioner is nothing but sheer evil," said Karen Swallow Prior, the longtime anti-abortion activist.¹²⁴ The Schenck brothers issued a statement "unequivocally condemn[ing] any violence used to end abortion."¹²⁵ More radical

¹²¹ Quoted in Dan Herbeck, *Judge Urges Parties to Settle Abortion-Demonstration Issues*, BUFFALO NEWS, Apr. 2, 1998, at 9C.

¹²² Quoted in *Abortion Doctor Had Warned of Violence*, ASSOCIATED PRESS, Oct. 26, 1998.

¹²³ Quoted in Gene Warner, *Activists on Both Sides of Issue Express Horror about Shooting*, BUFFALO NEWS, Oct. 25, 1998, at 11A.

¹²⁴ Quoted in *id.*

¹²⁵ Quoted in *id.*

anti-abortion spokesmen expressed no such horror, however. Virginia minister Donald Spitz called the killer "a hero" who ended Slepian's "bloodthirsty" practice. "We as Christians have a responsibility to protect the innocent from being murdered. . . . Whoever shot the shot protected the children," Spitz declared.¹²⁶ Others created resentment when they offered condolences. A bouquet of roses left by Robert Schenck on the steps of the slain doctor's office was returned by Lynn Slepian several days after the murder with an angry note questioning his sincerity and his motives.¹²⁷

In retrospect, Paul Schenck saw Dr. Slepian's death as doubly tragic for the pro-life movement. "First of all, our objective was never to take out an abortionist," he says. "Our objective was to convict him of his sins and bring about his conversion. . . . As Christians we are committed to peace. The very thought of taking up a firearm even to defend yourself, let alone to bring about vigilante justice was horrific. When you get to know someone, even your opponent, you develop a relationship. . . . For us it was a profound tragedy." The second element of tragedy for the anti-abortion cause, Schenck said, was that it "gave so much ammunition to the other side. They could say, these people are ruthless murderers—which is what we had been saying about the abortion industry. . . . I think it scared people away, it made them feel that violence was a potential, that maybe what we were doing was inciting people. I don't think that's true, but some people did."¹²⁸

Marilynn Buckham was one of those who believed that the protesters' speech was an incitement to violence, at least indirectly. "Dr. Slepian's death was not only a dreadful tragedy, I think it made people realize how terrible these people really are . . . I think in some ways the protests and the murder are very much connected. If there weren't protests here, no attention would have been brought to this clinic in the first place." If anything positive could be said to come from Dr. Slepian's death, Buckham said, it was to alert federal and local law enforcement to the need for much more vigilant protection of abortion clinics. "The murder of Dr. Slepian was definitely a catalyst," she thought, for more vigorous efforts to control the parameters of anti-abortion protest.¹²⁹

One of these efforts was a new lawsuit, filed by Finley with the help of New York State Attorney General Eliot Spitzer, who had run on a platform promising stricter enforcement of laws against clinic obstruc-

¹²⁶ Quoted in Carolyn Thompson, *Abortion MD Had Deadly Premonition*, TORONTO STAR, Oct. 26, 1998, at A22.

¹²⁷ Press, *supra* note 7, at 209.

¹²⁸ Interview with Schenck, Apr. 19, 2000.

¹²⁹ Interview with Buckham, May 17, 2000.

tion than that provided by his incumbent opponent, Dennis Vacco. Just one week after Dr. Slepian's death, Operation Rescue leaders Revs. Philip "Flip" Benham and Bob Behn announced that a "Spring of Life Reunion" would take place the following April in Buffalo, bringing anti-abortion demonstrators back to the city where they had convened seven years earlier. A new coterie of pro-life enthusiasts was in charge in Buffalo, smaller but no less determined than their predecessors.

Behr, the *Schenck* attorney representing the new defendants, attempted to settle with Finley and Spitzer, to no avail. A heated meeting in a local church basement with the pro-life protesters exposed the divisions among defendants. "Many of those folks—some of whom were clients in both the *Spitzer* and *Schenck* cases—are just morally opposed to agreeing to anything that would limit their advocacy for the unborn," Behr said. "Even though they might see something as advantageous in a legal sense, they just won't do it. . . . Some of the most dedicated people wanted to settle so they would have greater access, but others, especially several pastors, inveighed against reaching any agreement."¹³⁰ Behr and his clients finally decided that those who urged settlement would be let out of the lawsuit, and the rest would continue to oppose any and all injunctions.

In April 1999, after a twenty-three-day trial, Judge Arcara issued a temporary restraining order establishing a sixty-foot buffer zone around western New York abortion clinics. The ruling gave Finley "what was probably my best moment ever as a lawyer." Marilyn Buckham called her the day the TRO took effect, in tears. "She said, I just had my first normal experience going to work in ten years."¹³¹ One year later, Buckham maintained that "the new injunction made all the difference in the world. The patients don't come in crying, they are much less traumatized, the noise problems we had in the operating rooms are greatly diminished, it has made a huge difference for the staff in terms of running a medical facility." But the death of Dr. Slepian and the cumulative horror of years of anti-abortion violence had taken their toll, Buckham said in 2000. "Because of all the protests, the intimidation, the murders, there are many, many fewer doctors who are willing to take the risks involved in providing abortions. You can have all the laws in the world, but without the providers, you cannot get an abortion." On the other hand, Finley said several years later, the murders of physicians and clinic staff seem to have strengthened the resolve of the intrepid few who do brave threats of violence and often travel long distances to ensure the continued availability of abortion.¹³²

¹³⁰ Interview with Behr, Apr. 20, 2000.

¹³¹ Interview with Finley, Mar. 31, 2000.

¹³² Interview with Finley, Aug. 24, 2006.

As it turned out, the Spring of Life reunion drew scarcely more than one hundred protesters. Reproductive health clinics also garnered additional protection from FACE. The injunction issued by Judge Arcara in 2000 removed the exception for "sidewalk counseling" after Finley presented extensive evidence that allowing protesters to approach and "counsel" women coming in and out of the clinic had resulted in widespread abuses and obstruction of clinic entrances. A Second Circuit ruling in 2001 scaled back Arcara's new injunction to some degree, and a small but dedicated cadre of picketers still regularly appear at the Buffalo GYN Womenservices clinic, now housed in a new location. Nationally, though, almost a decade after the Supreme Court ruled in *Schenck*, the anti-abortion movement had largely shifted its focus from street-level protest to lobbying, seeking abortion-restrictive legislation at the state and national levels and the appointment of judges who oppose *Roe v. Wade*. Ultimately, the outcome of these legal battles will likely determine the future of on-the-ground abortion protest.

Conclusion

For both sides, the *Schenck* case presented a question of basic civil rights, as advocates for and against reproductive choice struggled to define themselves as the natural heirs to the civil rights movement. For abortion rights proponents, the initial challenge was to frame women seeking reproductive health services as citizens attempting to exercise legitimate constitutional rights in the face of violence, intimidation, and obstruction, and to depict anti-abortion demonstrators as a modern day version of the Ku Klux Klan. Bringing suit under section 1985(3), the civil rights statute aimed at racial violence and intimidation, virtually required the Pro-Choice Network and other reproductive rights organizations to draw this analogy explicitly or implicitly. The rhetorical problem they faced was that while white supremacists acted out of hatred for African Americans and other nonwhites, pro-life demonstrators—many of whom were themselves women—were motivated by what they felt to be love and concern for women and their families. As a legal matter, in *Bray v. Alexandria Women's Health Clinic*, the Supreme Court rejected the notion that anti-abortion demonstrators possessed the kind of "invidious, class-based, discriminatory animus" required under section 1985(3). Justice Scalia wrote, "Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for such harsh description, and for such derogatory association with racism."¹³³

Anti-abortion demonstrators, meanwhile, sought to portray themselves as heirs to the legacy of Martin Luther King, Jr.'s movement of

¹³³ *Bray*, 506 U.S. at 274.

civil disobedience, which had established many of the free speech precedents that redefined First Amendment law in the postwar period. Schenck, his compatriots, and their attorneys believed that the courts disregarded pro-life protesters' First Amendment prerogatives purely based on the content of their speech, that a pro-choice bias infected judges' assessments of the parameters of free expression. At a more visceral level, many pro-life demonstrators felt themselves to be fighting an injustice every bit as profound and inhumane as racial oppression. Like the abolitionists of the nineteenth century, whose religious conviction led them to place their bodies in harm's way for the sake of ending slavery, pro-life protesters manipulated and even disregarded legal rules and injunctions. If abortion was murder, then the obstruction of reproductive health clinics was a moral imperative, whether or not it was a violation of the law. But the legitimacy of the civil rights movement was grounded in non-violence, and the shootings and bombings at clinics in the 1990s undermined the anti-abortion movement's claim to occupy the moral high ground. In upstate New York, the murder of Dr. Slepian left some dedicated anti-abortion activists shaken and others rhetorically compromised.

In the end, both sides turned to politics. The passage of FACE and the escalation of clinic violence enabled pro-choice advocates to assert the illegality of obstructing clinic access and call upon law enforcement actively to protect women's right to enter health facilities unmolested. The election of George W. Bush and a Congress dominated by conservative Republicans allowed anti-abortion activists to hope that their dream of transforming the courts into allies rather than enemies would be realized, and that legal change would obviate the need for street-level protest and obstruction. Whose vision of civil rights prevails will depend on the outcome of these political battles.

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By Samuel R. Bagenstos*

US Airways v. Barnett and The Limits of Disability Accommodation

In 1990, Congress adopted the Americans with Disabilities Act by overwhelming margins, and the first President Bush signed it into law.¹ The statute was the result of an extensive and savvy lobbying campaign by a still relatively new social movement—the disability rights movement. Beginning in earnest in the late 1960s and early 1970s, the disability rights movement turned, much more quickly than had the black civil rights movement before it, “from protest to politics.”²

The ADA, which represented the achievement of the movement's major political goal, appeared to be revolutionary. Not only did it extend antidiscrimination protection to people with disabilities, but it also seemed to expand the notion of discrimination itself.³ Like earlier civil rights statutes, the ADA prohibits intentional discrimination and the use of facially neutral selection criteria that unjustifiably screen out protected class members as a group.⁴ But it goes beyond those statutes. The

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¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

² Cf. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY, Feb. 1965, at 25.

³ See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996).

⁴ See 42 U.S.C. § 12112(b)(1)-(3), (5) (2006). For a summary of the law under earlier civil rights statutes, see *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 & n.15 (1977).