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The war against abortion protesters

By Paul R. Scholle

Congress has now sent to the president a bill which singles out anti-abortion protesters from among all others and imposes special fines and jail terms for pro-life protests at clinics. The legislation is a response to the claim that federal law must be used in order to protect the right to abortion from protesters who picket abortion clinics.

Specifically, the idea is that the abortion clinics are under siege from violent protesters and that federal law must be used to quell the violence. About which several things might be said:

First, the amount of violence perpetrated by pro-lifers is extremely small. Many abortion clinics across the country have been the subject of weekly protests for well over a decade, yet in order to find instances of violence against clinics the proponents of the law must dig deep into history. In all of the thousands of hours logged by protesters over the years, there has been a grand total of one murder, one shooting that did not result in death and several fire-bombings which memory strains to recall. I defy anyone to show me one other protest movement of the scope and duration of the pro-life movement with as good a record of passive civil disobedience.

Indeed, most of the violence associated with anti-abortion protests has been committed by police against protesters, as witness the protests at the 1988 Democratic Convention in Atlanta. (If you cannot remember the circumstances surrounding those protests, you are hereby absolved: They were deliberately ignored by the major news media in spite of miles of available videotape chronicling police maltreatment of the protesters.)

Second, assuming for the sake of argument that anti-abortion violence is burgeoning, why is there a need for a new federal law? There are plenty of laws in every state which are perfectly capable of handling the putative crisis of violence against abortionists: laws against trespass, assault, illegal use of handguns, malicious mischief, arson, murder, to name but a few. The proponents of the federal legislation have failed to offer plausible reasons why those state laws are incapable of handling the problem. That is because there is no reason — other than the creation of another pretext for the use of federal power further to entrench and federalize the pro-abortion agenda.

The proponents of abortion, I would wager, do not care as much about whether this law is ever enforced as they do about its pedagogical significance. It is axiomatic that the public mind equates legality with morality: When an act is deemed to be illegal, the common assumption is that it is immoral. The mere presence of the statute in the U.S. Code is far more important to abortion proponents than anything else, since it enshrines in federal law the so-called right of abortion.

Before the advent of the Clinton administration, the proponents of abortion had failed to get much in the way of statutory law to support their moral position. The Hyde Amendments have, over the years, denied federal funding for abortion. Many, if not most, state legislatures have been less than ardent in transforming the pro-abortion agenda into legislation.

It was thought necessary, then, to get abortion rights into the federal statute books. What better way than to make the right of abortion superior to the rights of free speech and free assembly (which, by the way — unlike the supposed right to abortion — are right there in the Constitution in black and white)? For there can be no doubt that this legislation is in derogation of those First Amendment rights and, as such, is unconstitutional.

The Supreme Court has long held that the First Amendment protects the kind of speech and conduct at stake here.

Government is permitted only to make reasonable "time, place and manner" restrictions, but is unequivocally forbidden to restrict speech based on its point of view or its contents. What else is this legislation than a law aimed at a specific viewpoint and speech with particular contents?

The least its sponsors could have done to disguise its blatant unconstitutionality would be to draft it in such a way that its pro-abortion bias would not be so obvious. They could have called it the "End to Violent Protests Act."

So drafted, it might have had a slim chance of passing constitutional muster (although, in that case, it would likely be subject to constitutional attack for "overbreadth"). But assuming the Supreme Court's acquiescence, it would have the same effect that its proponents allegedly desire: to guarantee access to abortion clinics.

But there's the rub. A broader, more reasonable statute would not place the federal stamp of approval on abortion rights. That, and little else, is what its proponents so ardently desire.

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