

CIVIL LIBERTIES *By Harvey A. Silverglate*

Open this rule with care!

Justice Antonin Scalia, in dissent, railed against the Supreme Court's approval of Colorado's "bubble zone" statute, which regulates people entering and leaving an abortion clinic or any medical facility from exposure to unwanted and intrusive speech and leaflets. Justice Scalia attacked what he deemed the hypocrisy and double standards of the majority's holding: "I have no doubt that this regulation would be deemed content-based in an instant if the case before us involved antiwar protests, or union members seeking to 'educate' the public about the reasons for their strike."

However, one interested group—the AFL-CIO—was not so sure that a loss for anti-abortion protesters would not end up abridging the speech and protest rights of other interest groups. Instead, organized labor feared that in its zeal to protect women who use an abortion clinic's services from being hounded by the ubiquitous protesters found outside such facilities, the court would cut back generally on the First Amendment right to picket and leaflet.

This explains what otherwise might seem a bit puzzling—the filing of an amicus curiae brief by the AFL-CIO in what, on the

surface, appeared to be just another "abortion case," urging that the Colorado statute be voided.

In *Hill v. Colorado*, No. 08-1856, the court dealt with a statute making it unlawful for any person within 100 feet of a health care facility to "knowingly approach" within eight feet of someone without that person's consent in order to pass "a leaflet or handbill" to that person or engage in "oral protest, education, or counseling."

Uneasy feelings

Civil libertarians, even those committed to the right to choose abortion, had qualms about a "bubble zone" law to protect people entering and leaving a clinic, that would make it difficult, if not impossible, to hand such people leaflets. Unlike Justice Scalia, the union feared that the court, were it to uphold the statute, might alter First Amendment law so as to cut back generally on the right to picket.

The labor union, in its brief, urged the court to strike down the Colorado statute because it would be deadly to labor picketing as it is, in reality, conducted. The statute, warned the AFL-CIO, "precludes normal hand-billing and leafletting." Explained the amicus brief, "Ordinarily, a handbill or leaflet does not stand in a location and wait to be approached by pass-

ersby." Instead, the picketer "walks a few steps toward individuals making their way to [the] location.... Since few people have arms that are four feet long, the eight-foot limitation here precludes handbilling in its normal sense."

The union need not have worried. In the majority opinion written by Justice Stevens, the court did indeed cut back on the First Amendment rights of anti-choice protesters, but it did so not by making a general change in First Amendment jurisprudence that would impact all groups seeking to communicate with passersby on public streets. Instead, the court focused narrowly on what it deemed "the unique concerns that surround health-care facilities."

"Hospitals," intoned the majority, "after all, are not factories or mines or assembly plants." Instead, they are places "where human ailments are treated (and) where patients and relatives alike often are under emotional strain and worry...and...need a restful, uncrowded, relaxing, and helpful atmosphere."

Sanable self-protection

Organized labor was wise to take the precaution of filing a brief supporting the anti-choice protesters in order to protect its own lifeblood—the right to engage in labor picketing. However, rather than aiding the cause of all protesters including the anti-choice movement, the union's argument appears to have resulted in the court's having exempted both labor picketing and certain other public protest activity from the logic that allowed the creation of a protest-free "bubble zone" at abortion clinics.

Notwithstanding Justice Scalia's sometimes intemperate tone ("Does the deck seem stacked? You bet."), he seems to have understood that the court majority was going to bend over backward to protect women who choose abortion not only from criminal penalties, but from the aggressive protest activity for which the anti-choice movement has now become famous.

While anti-choice protesters were suppressed, organized labor benefited from the double standard discerned by Justice Scalia. ☐

LAW AND LAUGHTER

