Safety Valve Closed: The Removal of Non-Violent Outlets for Dissent and the Onset of Anti-Abortion Violence

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SAFETY VALVE CLOSED: THE REMOVAL OF NONVIOLENT OUTLETS FOR DISSENT AND THE ONSET OF ANTI-ABORTION VIOLENCE

“It is bad enough,” opined the New York Times two days after the murder of abortion doctor Barnett Slepian, “that conservatives in Congress and in state legislatures are working to dismantle reproductive rights by banning certain procedures, such as so-called partial birth abortion, and by requiring waiting periods and parental consent before an abortion can be obtained. But those restrictions are at least imposed by the normal give and take of political and judicial struggle in democracy. What is outrageous is the attempt to shut down abortion by illegal means — by shooting the doctors or bombing the clinics or harassing the women seeking to exercise their constitutional right."

The New York Times does not usually devote its lead editorial to murders in upstate New York. But Dr. Slepian’s killing, of course, was no ordinary street crime. In addition to the personal horrors of murder — Slepian was shot in his home, leaving his wife without a husband and his four children without a father — the slaying evoked a sense of political horror as well. As major newspapers across the country proclaimed, Slepian’s murder was especially outrageous because it was committed by an opponent of abortion trying to achieve his goals through violence, rather than through the normal give and take of democratic politics.

This normal give and take of democratic society provides dissenters with a range of peaceful methods to achieve their goals. Dissenters can vote for candidates who share their views, petition their legislatures to change laws, and distribute literature alerting other citizens of their concerns. In addition, they can conduct peaceful protests and engage in other forms of nonviolent civil disobedience. These outlets

3 See, e.g., Editorial, Fatal Terror, BOSTON GLOBE, Oct. 27, 1998, at A16 (“[D]issent is a sign of a healthy democracy. Violence is a cancer that can never be tolerated, for it threatens the life of the entire system.”); Editorial, Murder Is Not a Form of Protest, CHI. TRIB., Oct. 29, 1998, at 30 (“[Slepian’s murder] was a cowardly and contemptible act by an extremist using bullets to achieve ends that have not been attained by reasoned persuasion.”); Editorial, One More Terrorist Act, L.A. TIMES, Oct. 27, 1998, at A16 (“This violence should be seen for what it is, an effort to subvert our system of laws.”); Editorial, The Shooting of Dr. Slepian, WASH. POST, Oct. 27, 1998, at A22 (“[Slepian’s murder] marks the extent to which some objectives of the antiabortion movement are being achieved not by politics but by simple terrorism.”).
function as a "safety valve," providing a range of nonviolent options for dissent and thus reducing the likelihood that a group will choose violence to achieve its goals.4

After at least 150 years in which America's passionate abortion discourse found expression through nonviolent outlets, the past three decades have witnessed repeated incidents of anti-abortion violence. In the same period, two legal shifts have dramatically reduced the range of nonviolent avenues for abortion opposition. First, in finding a constitutional right to abortion, Roe v. Wade6 removed the option of legislative prohibitions. Second, in the early 1990s, the introduction of buffer zones7 and access laws imposing heavy penalties for nonviolent interference with clinic operations8 restricted protests and virtually eliminated the use of civil disobedience.9

This Note examines abortion opposition over the past two centuries and the extent to which recent trends toward violence have followed from the elimination of major nonviolent methods of dissent. Part I explores the history of abortion opposition prior to Roe, noting that opponents during this period relied almost exclusively on legislative action to effect change. Roe removed this principal nonviolent outlet, and the first wave of anti-abortion violence in American history en-

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4 Eisner v. Stamford Bd. of Educ., 314 F. Supp. 832, 836 (D. Conn. 1970) ("In part, the First Amendment acts as a 'safety valve' and tends to decrease the resort to violence by frustrated citizens.") (citing Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); see also Bruce Ledewitz, Perspectives on the Law of the American Sit-In, 16 WHITTIER L. REV. 499, 524 (1995) ("Civil disobedience offers... a 'safety valve' that channels the powerful emotions of disaffected groups into illegal, but more or less acceptable, forms. At least the sit-in tends toward normal politics and not toward revolutionary violence."); infra pp. 1222-25.

5 This Note will use the term "anti-abortion" to describe abortion opponents. This is not to deny those activities conducted by many abortion opponents that make their movement "pro-life" as opposed to merely "anti-abortion." See, e.g., Mary Ann Glendon, Opinion, When Words Cheapen Life, N.Y. TIMES, Jan. 10, 1995, at A19 (noting that, although given scant media attention, many abortion opponents support "financial aid to single mothers, shelters for mothers and children with AIDS, [and] parenthood classes"). However, as this Note is chiefly concerned with activities specifically directed toward eliminating legal abortion, "anti-abortion" seems more appropriate. Furthermore, as many pro-life commentators have noted, the violence that this Note addresses is simply not consistent with the pro-life ethic. See, e.g., Lynn D. Wardle, The Quandary of Pro-Life Free Speech: A Lesson From the Abolitionists, 62 ALB. L. REV. 853, 882 (1999) ("The violent fringe... discredits the entire pro-life cause because they are not pro-life, but are violent, dysfunctional, dangerous hypocrites whose acts are not representative of pro-life values.").

6 410 U.S. 113 (1973).


9 See infra p. 1219; see also Ledewitz, supra note 4, at 569 ("In the past, one did not have to be fanatically committed to a cause in order to sit-in. The protestor did not face, by and large, serious fines and jail-time... That situation is changing.").
Even within this post-\textit{Roe} violence, an examination of the rise and fall of mass nonviolent civil disobedience in the late 1980s and the dramatic increase in anti-abortion violence beginning in the early 1990s indicates that anti-abortion violence is closely related to the repression of nonviolent outlets for dissent.

Part II of this Note demonstrates that the relationship between the elimination of nonviolent channels for dissent and the onset of violence has enjoyed broad and deep support in legal and social discourse. Judges, journalists, legal scholars, social scientists, and nonviolent activists have all articulated the principle that preserving nonviolent avenues of dissent helps avoid violence. This principle has been virtually ignored in our national abortion discussion and, if recognized, would have important implications for future lawmaking.

The goal of this Note is to contribute to a better understanding of the causes of anti-abortion violence. Recognition that the removal of certain nonviolent options may result in anti-abortion violence does not excuse the bombings and murders; rather, exploring a likely cause contributes to the process of ending the violence, a goal shared by citizens on both sides of the abortion debate. The \textit{Boston Globe} was correct to note that such violence is "a cancer" and a threat to our system of government; for precisely this reason, we should seek a deeper understanding of the causes of anti-abortion violence, so that it may be eliminated. Ultimately, this Note suggests that the causes of anti-abortion violence run deeper than such vogue explanations as "the incendiary statements of pro-lifers comparing abortion to murder," or "the religious fanaticism of most anti-abortion activists." Such "explanations" do well to demonize those with a different point of view.

\textsuperscript{10} See JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR \textit{6} (1998) ("[\textit{Roe}] forced Americans to add a new phrase to their political lexicon: anti-abortion violence."). Recognizing the role of \textit{Roe} in the onset of anti-abortion violence does not necessarily present an argument for its reversal; indeed this Note presents no such argument. See infra p. \textit{1226}. However, policymakers cannot seriously attempt to end or limit anti-abortion violence without delving into its causes. Understanding the role of \textit{Roe} is vital to discerning which measures might reduce the violence and which ones unwittingly exacerbate it.


\textsuperscript{12} See, e.g., Felicity Barringer, \textit{Abortion Clinics Preparing for More Violence}, \textit{N.Y. TIMES}, Mar. 12, 1993, at A1 (quoting a statement of the United States Catholic Conference that "killing in the name of pro-life makes a mockery of the pro-life cause.... In the name and in the true spirit of pro-life, we call on all in the pro-life movement to commend such violence in no uncertain terms").

\textsuperscript{13} \textit{Fatal Terror}, supra note \textit{3}, at A16.

\textsuperscript{14} See, e.g., Anthony Lewis, \textit{Opinion, Right to Life}, \textit{N.Y. TIMES}, Mar. 12, 1993, at A29 (noting "the essential truth about most anti-abortion activists" that "[t]hey are religious fanatics"); \textit{Violence Against Abortion Doctors, supra note 1}, at A30 (warning that "accusations by some anti-abortionists that abortion providers are committing murder[,] can only fuel more terrorism").
view; after more than two decades, they have done nothing to halt the violence.

I. AN OVERVIEW OF ABORTION OPPOSITION TACTICS BEFORE AND AFTER ROE V. WADE

Concerted efforts to limit or ban abortion did not begin in the United States until 1821. Prior to that time, abortion, at least early in pregnancy, was unrestricted; according to one scholar, it was “neither prohibited nor uncommon.”

A. Opposition Prior to Roe

In 1821 Connecticut passed the nation’s first anti-abortion statute, which banned the use of poisons to conduct abortions, perhaps to protect women’s health. By 1828 Missouri, Illinois, and New York had all passed similar laws. Thus, when citizens were first motivated to oppose abortion, they did so through legislative action, beginning a pattern that would last for at least 150 years.

Legislative action continued throughout the 1800s. By 1860 twenty states had enacted abortion laws; another forty statutes were passed between 1860 and 1880. The American Medical Association (AMA) launched “an aggressive campaign against abortion [ . . . ] lobbying hard in state legislatures and courts . . . to enact new restrictions.” In 1859 the AMA unanimously approved a report deeming abortion the “unwarrantable destruction of human life.” Detroit physicians excoriated abortion providers as “inhuman wretches,” and the anti-abortion crusade manifested a spirit of “gather[ing] the righteous under one banner, to seek out and destroy the foe.”

The press and religious leaders joined the medical community in this vivid rhetoric. The New York Times condemned abortion in an 1871 article titled The Evil of the Age, noting that “thousands of hu-
man beings are . . . murdered before they have seen the light of this world."23 Similarly, the New York Tribune criticized "[t]he murder of children, either before or after birth."24 In 1869, Bishop Spaulding of Baltimore stated: "The murder of the infant before its birth is . . . as great a crime, as would be the killing of a child after birth."25 A popular Congregationalist minister condemned abortion in an 1867 article titled Fashionable Murder.26 The Maine Conference of the Congregational Church described the practice as "the darkest picture that reason or taste could allow" and suggested that it was worse than "the horrors of intemperance, of slavery and of war."27

These descriptions of abortion — as murder, as the moral equivalent of killing children after birth, as a horror worse than slavery or war — brought the same response that concern for the mother's health had prompted earlier in the century: petitioning of legislatures. Abortion opponents "organized an effective media and lobbying campaign,"28 "lobb[ied] hard in state legislatures,"29 and worked to "alter[] the prevailing attitudes" about abortion30 and to "mobilize[] public opinion."31 No violence — absolutely none — is reported.

The consistent pattern of abortion opposition through legislative action continued and grew through the end of the nineteenth century, bringing a significant increase in the number of abortion-related statutes.32 Ultimately, "Victorian-era morals" virtually eliminated legal acceptance of abortion at the close of the nineteenth century, with lawmakers "craft[ing] ever-tighter abortion restrictions."33 While abortion was the subject of considerable legislative action, historical records again indicate no anti-abortion violence.

The legislative action of the late 1800s gave way to a first half of the twentieth century "remarkably free from debate about abortion."34

23 The Evil of the Age, N.Y. TIMES, Aug. 23, 1871, at 6.
24 MOHR, supra note 15, at 180 (quoting N.Y. TRIB., Jan. 27, 1868) (internal quotation marks omitted).
25 Id. at 186 (quoting Pastoral Letter of the Most Reverend Archbishop and Suffragan Prelates of the Province of Baltimore, at the Close of the Tenth Provincial Council 9–11 (May 1869)).
26 See id. at 187 (citing John Todd, Fashionable Murder, 52 CONGREGATIONALIST & BOSTON RECORDER 45 (1867)).
27 Id. at 188–89.
29 RISEN & THOMAS, supra note 10, at 8.
31 Id. at 34; see also MOHR, supra note 15, at 199 (deeming legislation "[t]he chief manifestation" of abortion opposition).
32 See RISEN & THOMAS, supra note 10, at 9. Despite increasing restrictions, abortion appears to have been fairly common throughout much of the nineteenth century; one 1871 study by the American Medical Association suggests that as many as one million abortions were performed per year. See BLANCHARD, supra note 16, at 15.
33 RISEN & THOMAS, supra note 10, at 9, 10.
34 TRIBE, supra note 15, at 34.
Abortion returned to national prominence in the 1950s, with a push to liberalize or repeal America's abortion laws driven largely by Planned Parenthood and the population control movement. Pro-reform forces and the wholesale social changes of the 1960s coalesced for a "[l]egislative [c]rescendo" that began in 1967. That year, the AMA issued a statement favoring liberalization of abortion laws, and twenty-eight state legislatures considered liberalization bills. A 1968 Presidential Advisory Council on the Status of Women called for the repeal of all abortion laws. By 1970 twelve states had passed liberalization laws, and four states — Hawaii, New York, Alaska, and Washington — had repealed their abortion restrictions entirely.

The anti-abortion response to these developments once again focused almost exclusively on legislative action. Some groups also offered support for pregnant women and alternatives to abortion, and others offered counseling about the dangers of abortion. In addition, abortion opponents distributed pamphlets with "grisly" pictures of aborted fetuses (much as they would in later decades), and the Roman Catholic church attacked abortion from the pulpit, holding days of mourning for legislators who supported "murder." Even during this period in which abortion was "a fiercely controversial issue," not a single act of violence is reported.

B. The Court Closes a Door and Anti-Abortion Violence Begins

When the Supreme Court decided Roe v. Wade in 1973, abortion opponents who had previously sought change through their legislatures could no longer use that outlet to prohibit abortion. The majority

35 See RISEN & THOMAS, supra note 10, at 10. Of course, these reforms occurred in an era characterized by dramatic changes in American culture. See, e.g., BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 5 (1993) (deeming Roe v. Wade to have "registered an ongoing political struggle by women for equal rights and self-determination").
36 TRIBE, supra note 15, at 42.
37 See id. at 38, 42.
38 See id. at 46.
39 See id. at 42.
40 See BLANCHARD, supra note 16, at 25.
41 See RISEN & THOMAS, supra note 10, at 20 (noting the "emergence of state level anti-abortion lobbying campaigns").
43 See TRIBE, supra note 15, at 50.
44 See id. at 47–48; see also RISEN & THOMAS, supra note 10, at 21 (recounting a single sit-in, which ended quietly "without any arrests, after Planned Parenthood obtained a court order and the demonstrators complied with a police request to leave").
45 Warren Weaver, Jr., High Court Rules Abortion Legal the First 3 Months, N.Y. TIMES, Jan. 23, 1973, at 1.
46 To be sure, the legislative process remains available for debates about limits on abortion in the third trimester, dilation and extraction abortion (also known as "partial-birth abortion"), parental notification provisions, and waiting periods. For a detailed and up-to-date account of the
premised its recognition of a constitutional right to abortion on its inability to determine when life begins. To Roe's critics, of course, this seemed exceedingly uncertain ground upon which to remove abortion from the realm of ordinary legislative politics.

Professor Tribe describes the result best: "Roe's recognition of a constitutionally protected right to decide whether or not to terminate a pregnancy shut the door to direct political action to restrict abortion...." Abortion opponents felt they had been stripped of their political power to effect democratic change.

Shortly after this removal of abortion from the political process, the first incidents of anti-abortion violence occurred. The National Abortion Federation (NAF) reports that, between 1977 and 1983, 149 inci-

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states in which these types of restrictions have been passed, please see The Alan Guttmacher Inst., The Status of Major Abortion-Related Laws and Policies in the States (visited Feb. 7, 2000) <http://www.agi-usa.org/pubs/abort_law_status.html> (on file at the Harvard Law School Library). While these sorts of legislative battles certainly allow for political action, these restrictions seem more symbolic than substantive because they do not apply to the vast majority of abortions. Even those critical of efforts to end abortion have recognized that these provisions are mainly a substitute for the legislative determinations abortion opponents desire. See, e.g., Hope Clinic v. Ryan, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, C.J., dissenting) ("These statutes, remember, are not concerned with saving fetuses, with protecting fetuses from a particularly cruel death, with protecting the health of women, [or] with protecting viable fetuses.... They are concerned with making a statement in an ongoing war for public opinion...."); Ellen Goodman, Abortion Politics Won't Go Away, BOSTON GLOBE, Oct. 31, 1999, at E7 ("Frankly, I preferred the old days when the right-to-life strategy was at least principled. Prolifers lobbied for a flat-out ban on abortions. They were out front about their goals. But having lost this argument with the public, the strategy has shifted from trying to make abortion illegal to trying to make it impossible.").

47 See Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

48 See, e.g., ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 28 (1975) ("Moral philosophy, logic, reason, or other materials can give no answer to the question when the individual's interests should trump society's.... Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?").

49 TRIBE, supra note 15, at 16 (emphasis added). In her comparative study of abortion law in 20 Western nations, Professor Glendon notes that this removal of abortion from the legislative arena is unique to American law: "From the comparative point of view abortion policy in the United States appears singular,.... because our abortion policy was not worked out in the give-and-take of the legislative process." MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 24-25 (1987).

50 Cardinal Cooke expressed this sense of disempowerment:
Whatever their legal rationale, seven men have made a tragic utilitarian judgment regarding who shall live and who shall die. They have made themselves a 'super legislature[.]' They have gone against the will of those American people who spoke their minds in favor of life as recently as last November in referendums in Michigan and North Dakota. They have usurped the powers and responsibilities of the legislatures of 50 states to protect human life.

dents of violence against abortion providers occurred,* including eight bombings and thirteen arsons. This wave of anti-abortion violence reached its peak between 1984 and 1986. In 1984 alone, there were eleven bombings and fourteen arsons at abortion clinics. The violence continued to rise, with 148 incidents in 1985, the highest single-year total in the 1980s. It remained high in 1986, with 133 incidents.

The wave of violence receded sharply between 1987 and 1990. The violence dropped precipitously from a high of 148 incidents in 1985 to a low of 53 incidents in 1988, a decline of almost seventy percent in only three years. The average number of violent incidents per year from 1984 to 1986 was 138, while the average level between 1987 and 1990 was barely half that, at 70 incidents per year. This drop preceded the well-documented explosion of anti-abortion violence that began in the early 1990s and continues today.51


Despite plummeting violence in the late 1980s, statistics from the NAF suggest that radical anti-abortion activists had not disappeared; rather, they had merely altered their tactics. In 1987 abortion opponents began using mass nonviolent civil disobedience. Operation Rescue, the group that orchestrated these demonstrations, was founded in 1987 by Randall Terry, an activist who had spent much of 1986 mustering support for his “proposed national campaign of civil disobedience.”52 By the summer of 1987, Terry had “astonished other activists by successfully attracting significant numbers of Protestant fundamentalists” to join his campaign.53 The large-scale civil disobedience against abortion clinics that began in 1987 represented a test-run for

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* Unless otherwise noted, all statistics on anti-abortion violence are from the NAF’s Incidents of Violence and Disruption Against Abortion Providers, 1999, which can be found at <http://www.prochoice.org/violence/extreme.htm> (visited Feb. 7, 2000). The NAF tracks “incidents of anti-choice violence and harassment against abortion providers.” National Abortion Federation, Clinic Violence (visited Feb. 15, 2000) <http://www.prochoice.org/violence/index.htm>. In addition, “NAF also acts as an advocate for provider protection with all levels of law enforcement; issues timely information alerts about anti-choice violence; maintains a data bank of research on militant anti-choice groups and individuals; and serves as an information clearinghouse for abortion providers seeking assistance with safety and security.” Id.


52 RISEN & THOMAS, supra note 10, at 181, 205.

53 Id. at 181.
that tactic;\(^5^4\) with its emergence, the rate of anti-abortion violence fell by more than forty percent in just one year.\(^5^5\)

By 1988 mass civil disobedience had become even more common — the NAF reports that 188 clinic blockades and more than 11,000 associated arrests occurred that year. The blockades brought with them another dramatic decline in clinic violence, with only 53 incidents in 1988. The rise in nonviolent civil disobedience and the corresponding decline in violence also coincided with what was then an all-time high of 1,590,750 abortions performed in 1988.\(^5^6\) Large-scale demonstrations continued in 1989 — the NAF reports 201 clinic blockades — as did the reduced level of violence — 77 incidents in 1989 and 74 in 1990. That year, more than 1.6 million abortions were performed, breaking the record set just two years earlier.\(^5^7\)

Operation Rescue’s civil disobedience campaign, however, would be short-lived. In 1989 and 1990, abortion-rights supporters began to win large court judgments against Operation Rescue for their blockades.\(^5^8\) Protesters began receiving longer jail terms, and police began using “pain-compliance techniques” to remove uncooperative activists.\(^5^9\) By 1990 the New York office of Operation Rescue owed $450,000 in fines; the national office closed the same year, unable to pay a similar amount.\(^6^0\) In 1991 alone, the National Organization of Women won injunctive and monetary awards against the group in California, Massachusetts, Oregon, Pennsylvania, New York, and Florida.\(^6^1\)

In addition to this increased litigation, large-scale civil disobedience faced a new threat: clinic access laws. In the spring of 1989, Maryland passed the nation’s first such law, prohibiting interference with entry or exit from a medical facility by “physically detaining the individual

\(^{54}\) See Anti-Abortion Protesters Close New Jersey Clinic, CHI. TRIB. WIRE SERVICE, Nov. 30, 1987, at 4, available in 1987 WL 3000206 (noting that “[m]ore than 200 anti-abortion demonstrators were arrested . . . on minor trespassing charges during a peaceful sit-in” that Operation Rescue deemed “a warmup for larger protests planned in other areas); RISEN & THOMAS, supra note 10, at 261 (describing a Pro-Life Action Network meeting as a “field test planning meeting”).

\(^{55}\) See also BLANCHARD, supra note 16, at 54 (noting that Operation Rescue emerged at the same time as a “leveling off of bombings and arsons” occurred); Karen Swallow Prior, Symposium: Special to Insight, 15 INSIGHT MAG., Feb. 15, 1999, at 25 available in 1999 WL 8673654 (noting that the lull in violence occurred “exactly at the height of Operation Rescue’s demonstrations”).

\(^{56}\) See RISEN & THOMAS, supra note 10, at 376.


\(^{58}\) See BLANCHARD, supra note 16, at 93, 94; see also RISEN & THOMAS, supra note 10, at 301-08 (reporting that in 1989 “Operation Rescue was beginning to lose the initiative both to the courts and its abortion-rights opponents”).

\(^{59}\) BLANCHARD, supra note 16, at 92. Pain compliance involves “inflicting pain to compel compliance with arrest.” Id.

\(^{60}\) See id. at 94.

\(^{61}\) See id.
or obstructing, impeding or hindering the individual's passage. This "Interference with Access to Medical Facilities Act" was the first of many similar laws passed at the local and national levels in direct response to the mass protests led by Operation Rescue.

Clinic access laws and courtroom losses spelled an end to mass nonviolent civil disobedience aimed at abortion providers. Some demonstrations continued, but the total number of blockades never again reached even half of the levels of 1988 and 1989. Since Congress passed the Freedom of Access to Clinic Entrances Act in 1994, clinic blockade protests have been in single digits every year but one.

D. A "More Serious Explosion": The Deadly Violence of the 1990s

The civil disobedience that disappeared as a primary tactic of anti-abortion radicals did not go unreplaced. On the heels of the lower levels of violence of the late 1980s, the early 1990s saw a change in tactics and a rise in anti-abortion violence. Violence rose slightly from 74 incidents in 1990 to 95 in 1991.

In addition to the stifling of nonviolent civil disobedience, abortion opponents faced another setback in 1992 when the Supreme Court decided Planned Parenthood v. Casey. Casey technically concerned Pennsylvania’s restrictions on abortion (such as a 24-hour waiting period and mandatory husband notification) and became a vehicle for the reconsideration of Roe. After nineteen years of being unable to achieve their goal through the legislative process, abortion opponents

62 Robert Barnes, Schaefer Signs Bill for Clinics; Law Prohibits Blocking Entries, WASH. POST, May 26, 1989, at B1 ("[Blocking clinic entries] is punishable by a fine of up to $1,000 or a jail term of not more than 90 days.").


64 See Robert J. Hirn, Close To Home: New Protection for a Basic Right — Access to Medical Care, WASH. POST, July 2, 1989, at C8 (noting that the law was suggested "after several hundred demonstrators from a group calling itself 'Operation Rescue' effectively closed an abortion clinic ... for a day last winter by blockading the doors").

65 See BLANCHARD, supra note 16, at 97 (noting the "quieting of 'extreme' activism following a federal judge's injunctions and jailings of Operation Rescue workers in Wichita Kansas"); RISEN & THOMAS, supra note 10, at 314 (quoting one of the group's leaders as saying that "Operation Rescue went from overnight success to overnight failure").

66 Clinic blockade numbers, according to NAF, went from 201 in 1989 to 34, 41, 83, 66, 25, and 5 in 1990 to 1995.

67 According to the NAF, 1997 witnessed 25 such disturbances nationwide.

68 See, e.g., Deborah Epstein & Barbara Weiss, 76 MED. ECON. 51, Will Violence End Patients' Access to Abortions?, available in 1999 WL 9935623 (quoting Maureen Paul, Medical Director of Planned Parenthood in Boston as saying "[w]e've seen an evolution in tactics from big demonstrations in front of clinics to acts of terrorism, such as shooting doctors or bombing clinics").

69 See BLANCHARD, supra note 16, at 54 (noting that the rate of violence increased in 1991).


71 See id. at 844.
believed the Court might return abortion to the "normal give and take" of democracy. In the days before oral arguments, the New York Times reported that the appeals court in Pennsylvania "effectively pronounced Roe dead" with abortion opponents "cheering the . . . trend."

These cheers were stifled, however, when a divided Court reaffirmed the central holding of Roe, with four Justices dissenting. The dissenters were cognizant of the relationship between the availability of democratic outlets and the avoidance of civil strife:

[By foreclosing all democratic outlets for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.]

Casey thus added to the disappearance of nonviolent civil disobedience the assurance that abortion would remain outside the realm of ordinary politics. Roe was reinforced: abortion was not only legal, but could not be made illegal without amending the Constitution.

Anti-abortion violence surged to unprecedented levels, a response that was foreseen not only by the Casey dissenters, but also by abortion-rights advocates themselves. There were 196 reported acts of violence against abortion providers in 1992, more than twice the number reported in the year before Casey. In 1993, the number of incidents surged to 437, including the killing of Dr. David Gunn in Florida, the first murder victim of anti-abortion terrorism. As Dr. Gunn's murder illustrates, the nature of the violence, as well as the

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72 As several scholars have noted, one goal of the anti-abortion movement was to change the federal judiciary to facilitate the overturning of Roe. See, e.g., Tribe, supra note 15, at 17. Immediately following Casey, this strategy was still discussed. See Adam Clymer, Top Lawmakers Vow to Push Abortion Rights Bill, N.Y. Times, June 30, 1992, at A17 (noting the anti-abortion strategy of "support[ing] a constitutional amendment outlawing abortion as well as the appointment of anti-abortion Federal judges"); Gina Kolata, Ruling inspires groups to fight harder, N.Y. Times, June 30, 1993, at A17 (quoting an abortion opponent as saying that "I really think we need a new Supreme Court justice or a new constitutional amendment").


74 Casey, 505 U.S. at 1002 (Scalia, J., dissenting). Justice Scalia was joined in his dissent by Chief Justice Rehnquist and Justices White and Thomas. Any hopes of adding a fifth anti-Roe Justice were dashed in November, when Bill Clinton, a supporter of abortion rights, won the presidency.

75 See Felicity Barringer, Abortion Clinics Prepare for More Violence, N.Y. Times, Mar. 12, 1993, at A1 (quoting a clinic administrator as indicating that "[w]e've all been saying and worrying that the violence was going to escalate"); Felicity Barringer, Abortion Clinics Said to Be in Peril, N.Y. Times, Mar. 6, 1993, at 6 (quoting Eleanor Smeal of the Fund for Feminist Majority as saying that "[a]t a meeting right after the election, we predicted there would be an upswing in clinic violence as a result of shift in Administration").

76 See Editorial, The Death of Dr. Gunn, N.Y. Times, Mar. 12, 1993, at A28 (calling the murder "the latest escalation in a crescendo of violence by anti-abortion activists").
numbers, began to change. From 1991 to 1992, arsons more than doubled from 8 to 19; vandalism almost tripled from 44 incidents to 116; hate mail and harassing phone calls jumped from 142 to 469. From 1992 to 1993, stalking of clinic employees became prevalent enough to warrant maintenance of statistics for the first time; in an ominous precursor to Gunn’s murder, death threats increased to nine times their previous level. The post-Casey, post-Operation Rescue era witnessed more frequent and more deadly violence than ever before.

This increased violence continues to this day. Since 1993 seven abortion clinic employees have been murdered, and “[a]ttempts have been made on the lives of more than a dozen others . . . ; clinic bombings and fires are no longer unusual events.”

Last year, the Clinton Administration proposed $4.5 million in security spending in response to “the escalating components of the wave of abortion-related violence over the last decade — 733 cases of vandalism, 146 arsons, 38 bombings and seven murders.”

Thus the history of abortion opposition — and within it, the history of anti-abortion violence — indicates that the current strategy of increased restrictions of nonviolent outlets may be tragically miscalculated as a means of preventing violence. As courts and legislatures have foreclosed nonviolent outlets for dissent, violence has increased. Continuing to impose and multiply such restrictions on nonviolent abortion opposition threatens to place more lives in danger and to exacerbate, rather than eliminate, the violence of the 1990s.

II. THE REPRESSION OF NONVIOLENT AVENUES OF DISSENT AND THE ONSET OF VIOLENCE

The understanding that the removal of nonviolent outlets and the onset of violence are closely related has deep roots in the United States and elsewhere. In this Part, I will explore these roots and discuss some reasons why this relationship has been virtually ignored in our national abortion debate.

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78 One More Terrorist Act, supra note 3, at A16.
80 Governments continue to multiply the penalties for nonviolent abortion dissent. See Opinion of the Justices to the Senate, No. SJC-08145, 2000 WL 108886 (Mass., Jan. 24, 2000) (describing a proposed Massachusetts law which would impose jail terms of up to two and a half years for protesting twice within 15 feet of an abortion provider).
A. Broad and Deep Support for Safety Valve Theories

The notion that nonviolent action provides a safety valve is often traced to Justice Brandeis's 1927 concurrence (joined by Justice Holmes) in *Whitney v. California.* Brandeis and Holmes suggested that the Founders understood this important function of providing nonviolent outlets for dissent: "[T]hose who won our independence knew that order cannot be secured merely through fear of punishment for its infraction; . . . that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . ."

The theory that nonviolent manifestations of dissent reduce the likelihood of violence did not, however, originate with Justice Brandeis. Rather, the idea became prominent in 1919 and 1920, with the nation in the throes of "anti-Bolshevik hysteria," as liberal journals such as *The Nation* and *The New Republic* were warning that repression makes violent outbursts more likely. The likelihood that repression of nonviolent outlets would fuel violence was perhaps best stated by a writer in *Century,* who analogized repression to a dam about to burst — invariably resulting in the "banking up of a menacing flood of sullen anger behind the walls of restriction." Suppression frequently "drives the passions of the situation underground, there to gather fresh strength for an even more serious explosion six months or a year later."

Permeating this "free speech as safety valve" literature is a particular emphasis on the relationship between free speech and the democratic process. That is, free speech provides a safety valve because our system allows dissident speech to have an effect by influ-

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81 274 U.S. 357 (1927).
82 Id. at 375 (Brandeis, J., concurring).
83 See Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom,"* 1909–1931, 40 WM. & MARY L. REV. 557, 561 (1999) ("[O]ur present way of thinking about free speech did not spring from the foreheads of clever jurists. Ordinary people nurtured it, wrote about it, experimented with it, and argued over it endlessly in dealing with real problems they found urgently in need of resolution.").
84 Id. at 609–10 (citing *Danger Ahead,* NATION, Feb. 8, 1919, at 186, 186 (noting that repression "is turning thoughtful working people into dangerous radicals"); and *Freedom of Speech: Whose Concern?* NEW REPUBLIC, Feb. 22, 1919, at 102, 103 (suggesting that repression is only "for those whose desire is revolution").
86 Id. This view of free expression is still widely accepted today. See, e.g., THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 12 (1963) ("[S]uppression drives opposition underground, leaving those suppressed either apathetic or desperate. It thus saps the vitality of the society and makes resort to force more likely."); GERALD GUNThER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW,* 1027 (13th ed. 1997) ("[F]ree speech promotes political stability by providing a safety valve for dissent.").
encing the democratic process. Thomas Emerson, for example, notes that free expression "is particularly significant for political decisions." Professor Zechariah Chafee, whose first edition of *Freedom of Speech* became influential as the safety valve theory was gaining recognition in the 1920s, described "the great strength of our argument against violent-talking radicals" as follows:

> [W]e could say to them: "It is true that in the countries that you came from you naturally resorted to violence because you had no vote and could not abolish the abuses to which you objected. It is not so in this country. If you want a change, go and vote for it, vote for men who have promised to bring it to pass."

Chafee argued that, by depriving dissidents of the opportunity to enact change through the legislature, this powerful argument evaporates, rendering violence more likely to occur.

The notion that preserving nonviolent channels for dissent reduces violence has also received support from several social science studies of domestic conflict. Like legal theorists, many conflict scholars agree that free expression and political participation serve as outlets for passionate opposition. Within this literature, scholars view activists as having a "repertoire of action"; their choice of what type of action to employ depends, at least in part, on government actions:

> It is also widely recognized that the occurrence of violence depends on the actions of both parties to the conflict. Groups in conflict with rivals, or with authorities, have choices about how to press their claims. Their opponents similarly have choices about how to respond. The shape and extent of violence depend on the kinds of choices made by both groups. This implies a third point, that authorities have substantial responsibility for violence . . .

This emphasis on the impact of alternative outlets on the incidence of violence is also described in Harry Eckstein's review of conflict literature, in which Eckstein observes that, under at least one theory of collective violence, "a clear relationship would show up between the incidence of collective political violence and the availability of alterna-

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88 THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); see also EMERSON, supra note 86, at 9 (noting that the power of free expression to influence political action is important because "[i]t is through the political process that most of the immediate decisions on the survival, welfare and progress of a society are made.").
89 See Bobertz, supra note 83, at 609 ("If any one source of ideas had the greatest impact, however, it was Zechariah Chafee's book, *Freedom of Speech*.").
90 ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 281-82 (2d ed. 1941).
91 See id. at 281.
92 THEODORE GURR, 2 VIOLENCE IN AMERICA 13 (1989).
tive channels of making and realizing 'claims.'

Eckstein notes that this theory is supported by the fact that civil conflict is much less deadly in democratic nations than in other regimes, which "must be due to a toleration in democracies of protests that, in repressive regimes, never surface, or else are forced to take virulent forms."

Similarly, Mark Irving Lichbach has noted that, while there is support for the idea that repression deters dissident activity, "[r]epression frustrates demands and fosters a sense of injustice," perhaps causing "[a] hard core of the opposition group [to] become highly dedicated, organized, and deadly." Analyzing choices among violent and nonviolent avenues of dissent, Lichbach found that "an increase in government's repression of nonviolent activities may reduce the level of nonviolent activities of an opposition group but increase the level of its violent activities" because "the relative costs of nonviolent activities to the opposition group have been raised."

The recognition of a causal connection between repression of nonviolent action and the onset of violence is not confined to the academic arena. Rather, the most successful and revered nonviolent political activist in United States history, Martin Luther King, Jr., subscribed to the very same principle. In *Why We Can't Wait*, King writes that, in 1963, "[f]or the first time in the long and turbulent history of the nation, almost one thousand cities were engulfed in civil turmoil, with violence trembling just below the surface." King believed that "the knife of violence was . . . close to the nation's aorta" and that only the presence of nonviolent outlets for dissent prevented "the dark threat of violence [from] erupt[ing] in blood." He explained:

The Negro has many pent-up resentments and latent frustrations, and he must release them. So let him march; let him make prayer pilgrimages to the city hall; let him go on freedom rides — and try to understand why he must do so. *If his repressed emotions are not released in nonviolent ways,*


94 Id. at 151.


96 Id. at 293. A recent study in the *American Journal of Political Science* tested Lichbach's conclusions against observed acts of intranational conflict and concluded that, among available theories to explain reaction to government coercion, the Lichbach explanation "is the most promising" and "fares very well when put to the test." Will H. Moore, *Repression and Dissent: Substitution, Context, and Timing*, 42 AM. J. POL. SCI. 851, 870 (1998).


98 Id. at 2.

99 Id. at 4-5.
they will seek expression through violence; this is not a threat but a fact of history.  

B. The Abortion Debate: A Failure to Learn From History and Theory

After the murder of Dr. David Gunn, the New York Times suggested that former Presidents Reagan and Bush had encouraged the violence through their “noisy commitment to overturning Roe v. Wade.” One columnist for the Times went even further and blamed the violence on “the essential truth about most anti-abortion activists,” that “[t]hey are religious fanatics.” Similar explanations dominated the mainstream press six years later when Dr. Barnett Slepian was murdered, as both the CBS Evening News and the New York Times suggested that the violence was attributable to the strong rhetoric of the anti-abortion movement. Considering that the morally charged debate over abortion has continued for at least a century and a half, these “explanations” appear more bluster than substantive analysis; they tell us little about why a subject that has always been fiercely but nonviolently contested suddenly turned violent.

One reason that policymakers have not seriously and openly considered the role of government restrictions in anti-abortion violence may be a fear that doing so would assign blame in a politically unpopular way. When Professor Tribe was presented with the safety valve argument as set forth by civil libertarians such as Harvey Silverglate, Nat Hentoff, and Professor David Cole, he deemed the argument to be “blaming the victim in the most perverse way.”

This focus on the blame value of anti-abortion violence suggests a half-hearted consideration of its causes, with politically unpopular ones.
eliminated without serious consideration. To the extent that lawmakers share this approach, our failure to arrive at a solution is unsurprising.

Furthermore, policymakers may fear undermining their own positions on *Roe*. Those who favor the decision are naturally loath to consider that the decision may have had negative consequences. Moreover, abortion-rights advocates benefit from the opportunity to characterize the opposition as fanatical and gain both popular and political strength from the rallying point provided by violence that can be characterized as the result of anti-abortion views.\(^{107}\)

A fear of undermining *Roe* by recognizing the relationship between nonviolent and violent dissent might be misplaced. While this Note presents evidence that *Roe* spurred anti-abortion violence by removing the primary nonviolent outlet for opposition, constitutional decisions cannot be evaluated solely on whether a violent reaction is likely to occur. Consider, for example, *Brown v. Board of Education*, which contributed to violence by mandating the desegregation of public schools, and yet is widely considered a wise and just decision. Furthermore, the majority in *Roe* removed abortion from the “normal give and take” of legislative politics because of a view that the Constitution required them to do so; regardless of one’s opinion of *Roe*, the fact that some members of society will violently disapprove is not, in itself, a sound basis on which to interpret the Constitution.

However, when considering the ongoing tide of access laws and buffer zones, the correlation between the removal of nonviolent outlets and the onset of violence is critical. Access laws restrict nonviolent protest and civil disobedience with the explicit goal of preventing violence and increasing access to abortion.\(^{108}\) The patterns of anti-abortion violence, however, suggest that further limiting nonviolent protests — either by increasing penalties for interfering with access or by establishing buffer zones within which activists cannot demonstrate or distribute literature — is counterproductive; such limits appear to have contributed to the increase of violence. Moreover, evidence suggests that access was actually better *before* access laws, and that the drastic rise in anti-abortion violence in the 1990s has reduced access

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\(^{107}\) *See* Stephen L. Carter, Civility, Manners, Morals, and the Etiquette of Democracy 215 (1998) (noting that in the context of buffer zones, “the practical effect of this tactic is to enlist the aid of the state in making one side’s protests ineffective”); Amy Waldman, Killing of Doctor Who Performed Abortions Becomes a Factor in Political Races, N.Y. Times, Oct. 27, 1998, at B5 (suggesting that publicity from the shooting was particularly beneficial for Charles Schumer’s Senate campaign against abortion opponent Alfonse D’Amato).

\(^{108}\) *See*, e.g., 18 U.S.C. § 248 (1994) (setting forth the congressional purpose in enacting FACE as follows: “to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive, and destructive conduct that is intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services”).
more than the nonviolent protest behavior that gave rise to access laws. In the early 1990s, fewer doctors were learning to perform abortions, and observers noted that "this trend may become more pronounced if violence continues.”

Between 1992 and 1996, when the violence reached unprecedented levels, more than fourteen percent of abortion providers stopped providing services. The NAF has noted that "a shortage of trained providers and continued threats of violence are important barriers to access.” Furthermore, by 1996 there were roughly fifteen percent fewer abortions performed than in 1990, and the number dropped even further in 1997, to its lowest level since 1975.

Observers across the country have suggested that the recent wave of anti-abortion violence has played a role in reducing access.

CONCLUSION

However policymakers react to the relationship between nonviolent outlets and violent dissent, one thing is clear: further restrictions on nonviolent dissent should be avoided. Governments at all levels possess the power to direct existing abortion opposition toward outlets that are more acceptable than bullets and bombs. Our legal institutions are capable of channeling violent dissent into more civil behavior; for them to do so, our leaders must resist the temptation toward squelching all dissent, even that which is nonviolent. As politically popular and seemingly innocuous as access laws and buffer zones may be, by preventing nonviolent dissent, they contribute to a climate in which violent dissent is more likely. Such policies ignore what Martin Luther King, Jr., called "a fact of history," and risk "driving the passions of the situation underground, there to gather fresh strength for an even more serious explosion." As the casualty numbers continue to rise, and as citizens on all sides of the abortion issue seek an end to the violence, a more responsible public policy is needed.

109 Carol J.C. Maxwell, Introduction: Beyond Polemics and Toward Healing, in PERSPECTIVES ON THE POLITICS OF ABORTION 13 (Ted G. Jelen ed., 1995); see also Warren M. Hern, Hunted By the Right, Forgotten by the Left, N.Y. TIMES, Mar. 13, 1993, at 21 (noting that the rise in violence and the increased costs of security may mean that "skilled practitioners become scarce").

110 See Epstein & Weiss, supra note 68, at 51 (suggesting that violence is ending access).

111 Id.

112 See Alan Guttmacher Inst., supra note 57.

113 See U.S. Abortion Rate Is Lowest Since '75, N.Y. TIMES, Jan. 7, 2000, at A15 (citing reduced access as a factor).

114 See Murder is Not a Form of Protest, supra note 3, at 30 (observing that “militant anti-abortion activists have discouraged many physicians from doing the procedure”); One More Terrorist Act, supra note 3, at A16 (“The mostly quiet protesters . . . have become snarling and confrontational . . . . The tactic has worked. More than 80% of U.S. counties have no abortion providers.”); Fatal Terror, supra note 3, at A16 (“The brutality sends a chill through every women’s clinic in the country and may be responsible for a decrease in services.”).

115 Frank, Is Free Speech Dangerous?, supra note 85, at 359.