

April 1997

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Arianne K. Tepper

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Recommended Citation

Arianne K. Tepper, *In Your F.A.C.E.: Federal Enforcement of the Freedom of Access to Clinic Entrances Act of 1993*, 17 Pace L. Rev. 489 (1997)

Available at: <http://digitalcommons.pace.edu/plr/vol17/iss2/6>

Comment

In Your F.A.C.E: Federal Enforcement of The Freedom of Access to Clinic Entrances Act of 1993

I. Introduction

The Freedom of Access to Clinic Entrances Act of 1993¹ (hereinafter FACE) was introduced on March 23, 1993² in response to a nationwide extremist campaign of violence aimed at providers of reproductive health services and women seeking such services.³ FACE provides a federal response to such violence, intimidation and harassment and provides for federal civil and criminal penalties against persons engaged in violence against clinics, clinic staff or patients.⁴ The Senate, upon hearing the bill, concluded:

anti-abortion blockades, invasions, vandalism and outright violence is barring access to facilities that provide abortion services and endangering the lives and well-being of the health care providers who work there and the patients who seek their services. This conduct is interfering with the exercise of the constitutional right of a woman to choose to terminate her pregnancy, and threatens to exacerbate an already severe shortage of qualified

1. See 18 U.S.C. § 248 (1994).

2. The bill was co-sponsored by Senators Boxer, Campbell, Feinstein, Harkin, Metzenbaum, Mikulski, Simon, Robb, Wellstone, Pell, Moseley-Braun, Feingold, Murray, Packwood, Lautenberg, Riegle, Inoye, Baucus, Kerry, Kassebaum, DeConcini, Specter, Reid, Leahy, Chafee and Bryan. See S. REP. NO. 103-117 (1993).

3. See *The Freedom of Access to Clinic Entrances Act*, REPRODUCTIVE FREEDOM IN FOCUS (The Center for Reproductive Law & Policy, New York, N.Y.), July 1995, at 1.

4. See *id.*

providers available to perform safe and legal abortions in this country.⁵

Additionally, the Senate expressly stated that since violent tactics were, at the time, being used more frequently to deny women access to abortions, since and local law enforcement was inadequate to handle the situation, federal legislation was critical.⁶

This Comment will address the need for further federal enforcement of FACE and the direct connection that exists between poor law enforcement response and increased violence at clinics. Whether a person believes in a woman's right to have an abortion or is opposed to legalized abortion, the issue of the violence that surrounds persons who provide or seek to obtain abortions must be addressed. Section II of this Comment will explore the violence surrounding the abortion debate in the United States, the enactment of the federal statute and its history, the impact that violence has had on the availability and provision of medical services, and the lack of available federal remedies prior to the enactment of FACE. Section II will also address the constitutionality of FACE and the judicial challenges it has overcome. Further, section II will discuss some of the cases that have been brought under FACE by the Department of Justice.

In section III, this Comment suggests that stringent federal enforcement of FACE is necessary for the Act to accomplish the legislature's objectives. Federal law enforcement agents must be educated on the authority FACE bestows upon them in order to effectively participate in protecting clinics and assessing dangerous zones of violent activity. Despite high costs, federal enforcement of FACE must become a more operative part of the solution to ending the violence at abortion clinics nationwide.

II. Background

A. *The Violence Surrounding the Abortion Debate*

The issue of whether the Constitution awards a woman the right to terminate a pregnancy has been the subject of much

5. S. REP NO. 103-117, at 3 (1993).

6. *See id.*

controversy in this country.⁷ The 1973 United States Supreme Court decision, *Roe v. Wade*,⁸ which held that the right to terminate a pregnancy was inherent in the constitutional right to privacy,⁹ was neither the beginning nor the end of the abortion debate and the heightened sensitivities which surround it.¹⁰ In fact, the Court's decision in *Roe* motivated some of the most dissonant and sustained criticism that the American judiciary has ever confronted.¹¹ The Supreme Court's decision in *Roe* "galvanize[d] a right-to-life¹² movement that had of course, predated *Roe* in nascent form but that gained cohesion largely by virtue of the Supreme Court's ruling."¹³ The decision in *Roe* "made concrete for the right-to-life movement the evil its adherents sought to combat. They portrayed legalized abortion as government sponsored mass killing. In right-to-life literature, comparisons to the Holocaust abound."¹⁴ The Catholic Church immediately opposed the Court's decision in *Roe*.¹⁵ Within one month of the decision, the Catholic hierarchy called for civil disobedience in order to protest the decision and it commanded that any Catholic having an abortion or assisting in an abortion be excommunicated.¹⁶

The tactics that many right-to-life groups utilized to express their discontent with legalized abortion ranged from picketing clinics and setting up counselling centers to inform women of the moral consequences of abortion and the alternatives available, to more extreme acts such as blocking ingress and egress to clinic entrances, harassing clinic employees, throwing plastic replicas of fetuses at those attempting to enter clinics, and lying motionless in the streets and doorways.¹⁷ The

7. See LAURENCE H. TRIBE, *ABORTION THE CLASH OF ABSOLUTES* 229 (1992) [hereinafter TRIBE].

8. 410 U.S. 113 (1973).

9. See *id.* at 154.

10. See TRIBE, *supra* note 7, at 11.

11. See DEBORAH L. RHODE, *JUSTICE AND GENDER* 208 (1989) [hereinafter RHODE].

12. "Right-to-life," "Pro-life" and "Anti-abortion" are the names chosen by those who oppose the constitutional allowance for abortion. For purposes of this article these titles will be used interchangeably.

13. TRIBE, *supra* note 7, at 16.

14. TRIBE, *supra* note 7, at 141.

15. See Tribe, *supra* note 7, at 143.

16. See TRIBE, *supra* note 7, at 143.

17. See TRIBE, *supra* note 7, at 172.

numerous Supreme Court decisions which followed *Roe*¹⁸ and limited a woman's right to have an abortion did little to curb the violent fervor of some right-to-life activists. Pro-choice¹⁹ activists responded to the political activism of their adversaries, in part, by providing escort services and emotional support for women who attempted to enter abortion clinics.²⁰ However, the intense emotional and religious convictions of many right-to-life extremists caused them to utilize more ominous tactics.²¹ Violent stratagem were being increasingly implemented throughout the United States in order to impede a woman's access to abortion clinics.²²

The avowed purpose of many of the more extreme right-to-life groups that employ these violent and threatening tactics are to ensure that women were denied access to safe and legal abortion services.²³ "Anti-abortion activists have made it plain that this conduct is part of a deliberate campaign to eliminate access by closing clinics and intimidating doctors."²⁴ Although violent tactics have generally only been employed by the most iconoclastic right-to-life activists, in the more than twenty years fol-

18. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) (holding that the state may restrict abortion, before or after viability of the fetus, so long as such restrictions promote the health of the pregnant woman and the life of the fetus and do not impose an undue burden on the woman's freedom to obtain an abortion); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 519 (1990) (holding that the government's interest in protecting immature minors was sufficiently compelling to uphold state requirements of parental consent and involvement in order for minor to have an abortion, so long as the statute provided for judicial bypass in instances where obtaining parental consent was unreasonable); *Webster v. Reproductive Health Services*, 492 U.S. 490, 511 (1989) (upholding a state statute which restricted the performance of abortions in public institutions); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (holding that Medicaid funding may be denied for abortions that are not required to protect the health of the pregnant woman); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (holding that a city-owned public hospital which offered childbirth services was not constitutionally mandated to offer comparable services for abortions which were not necessary to protect the life of the mother); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (upholding a state requirement that a woman seeking an abortion during the first trimester of her pregnancy give her consent in writing).

19. "Pro-choice" is the name chosen by activists which support the constitutional allowance for abortion.

20. See *TRIBE*, *supra* note 7, at 172.

21. See *TRIBE*, *supra* note 7, at 172.

22. See S. REP. No. 103-117, at 2 (1993).

23. See *id.* at 9.

24. *Id.* at 11.

lowing *Roe*, the violent tactics these activists have employed have included at least 42 bombings, 102 arsons or attempted arsons, 84 assaults, two kidnappings, 327 clinic invasions, nine shootings, 95 incidents of trespass, 16 burglaries, 4 murders and countless incidents of death threats and violent confrontation and harassment.²⁵ Although the majority of people who oppose legalized abortion express their religious and political views non-violently, the violence utilized by extremists caused the federal government to examine the need for legislation to address the intensifying brutality.²⁶

The director of the anti-abortion activist group Operation Rescue National²⁷ testified at a House Subcommittee hearing regarding the enactment of FACE that "[his] desire would be to see abortion clinics stopped, closed . . . [he] would like to see them closed"²⁸ Some of the activities in which Operation Rescue participates, such as blockades of clinic entrances and harassment of clinic staff and patients, are aimed at eliminating access to clinics and ensuring that women are not provided with the abortion services they are seeking.²⁹ For many women, "Operation Rescue's blockades have turned the experience of seeking an abortion into a nightmare of jeering demonstrators, a spectacle that in turn attracts the added horror of media coverage of this intensely personal decision."³⁰ Some anti-abortion activists see any means of violence against abortion providers

25. See S. REP. NO. 103-117, at 3 (1993) (listing incidents, nationwide, from 1977-93); *A Year in Review: The "Pro-Life" Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995* (The Feminist Majority Foundation, Arlington, Va.), 1995 (detailing incidents, nationwide, between July 1994 and July 1995); *1994 Clinic Defense Affiliate Violence / Harassment Statistics* (Planned Parenthood Fed'n of Am., Inc., New York, N.Y.), 1995 (listing incidents at Planned Parenthood Clinics in 1994 and 1995).

26. See 18 U.S.C. § 248 (1994); S. REP. NO. 103-117, at 1 (1993).

27. Operation Rescue National is an anti-abortion activist group based in Hampton, New York, and the largest in the United States. Founded by Randall Terry in 1986, Operation Rescue has been one of the most active groups in picketing and blockading clinics with the goal of ending the availability of abortion-related services. See Susan Faludi, *The Antiabortion Crusade of Randy Terry; Operation Rescue's Jailed Leader and His Feminist Roots*, WASH. POST, Dec. 23, 1989, at C01 [hereinafter Faludi].

28. *Hearing Before the Subcomm. on Crime and Criminal Justice of the House Judiciary Committee*, May 6, 1992, at 171-72, reprinted in S. REP. NO. 103-117, at 11 (1993).

29. See Faludi, *supra* note 27, at C01.

30. TRIBE, *supra* note 7, at 172.

as "justifiable."³¹ C. Roy McMillan, leader of Mississippi Abortion Abolition Society, has claimed:

It is justifiable to shoot abortionists. It would be immoral *not* to do so when all else has failed. The tide's been turning for the past year and a half. People are realizing that violence, violent tactics and shootings are becoming more effective. I have no problem predicting more doctors will be killed. It's the biblical mandate to protect the innocent unborn.³²

A letter to Congress authored by Reverend David Trosch³³ stated that "[t]he lives of all who speak in favor of abortion will be at grave risk. Perhaps, even probably, the lives of those politicians who fail to strongly oppose abortion will be at risk. [Anti-abortion] [a]ctivists who are killed, injured, or incarcerated will become martyrs or living heroes."³⁴ Mr. Trosch has also written that advocating justifiable homicide and defending the unborn by taking the lives of guilty murderous abortionists and their accomplices "will be seen as a necessity for the defense of innocent human life."³⁵

Violence came to a climax on March 10, 1993, when Dr. David Gunn was murdered at the Pensacola Women's Medical Services Clinic in Pensacola, Florida during a demonstration in front of the clinic conducted by the anti-abortion group Rescue

31. Extremist groups such as the Advocates for Life Ministries, Mississippi Abortion Abolition Society and The American Coalition of Life Activists (ACLA) have applauded the murder of abortion doctors as righteous acts in the defense of unborn children. See Laurie Goodstein, *Life and Death Choices: Antiabortion Faction Tries to Justify Homicide*, WASH. POST, Aug. 13, 1995, at A01. Thirty-two activists, considered by pro-choice advocates to be among the more dangerous, signed a "justifiable homicide" petition stating that killing is justifiable if it serves the purpose of saving an unborn child. See *id.* These activists see doctors who provide abortions as serial child killers, thus making killing such a doctor an act of self defense. See *id.*

32. Marc Cooper, *The Changing Landscape of Abortion*, GLAMOUR, Aug. 1995, at 251.

33. David Trosch is a Catholic Priest from Mobile, Alabama who has been stripped of his parish duties by his bishop. He is a strong advocate of justifiable homicide. See Diane Hirth, *Abortion Extremists Justify Their Violence Series: Life and Death: Violence and the anti-abortion movement*, Part 2, SUN-SENTINEL, July 24, 1995, at 1A [hereinafter Hirth]. David Trosch says that he feels there is no hypocrisy in advocating deathly violence in the name of Christianity and he often advocates such violence in his right-to-life newsletter. See *id.*

34. Letter from Reverend David Trosch, to United States Congress 3 (July 16, 1994).

35. *Id.* at 1.

America.³⁶ Shortly thereafter, on June 23, 1993, the Committee on Labor and Human Resources, by a 13-4 vote, favorably reported FACE in hopes that federal legislation would deter future violence and cause those who utilized violent tactics to protest abortion to face more stringent penalties.³⁷

B. *The Enactment of FACE*

FACE was signed into law by President Clinton and went into effect on May 26, 1994.³⁸ The avowed purpose of FACE is to avert the use of violence, blockades and other forceful stratagem against medical facilities and personnel who provide abortion-related services.³⁹ Between the time of the favorable report and the time President Clinton signed the Act into law, two more abortion providers, Dr. Robert Krist of Kansas City, Missouri and Dr. George Tiller of Wichita, Kansas were shot and wounded,⁴⁰ and Dr. Wayne Patterson, owner of the Pensacola Women's Medical Services Clinic, was murdered in August, 1993.⁴¹ Further, almost exactly two months after FACE's enactment another doctor and his volunteer escort were shot and killed in Pensacola, Florida.⁴² Both houses of Congress addressed the issue of violence at abortion clinics throughout the country by passing separate bills.⁴³ The House bill⁴⁴ was pri-

36. Rescue America is a Houston-based right-to-life activist group. See Hirth, *supra* note 33, at 1A. The leader of Rescue America, Donald Treshman, issued a press release on the day that Dr. Gunn was murdered stating that although the doctor's death was unfortunate, "the fact is that a number of mothers would have been put at risk [that day] and over a dozen babies would have died at his hands." *Id.*; see also, *Anti-Abortion Shootings and Murders, 1991-Present* (The Feminist Majority Foundation, Arlington, Va.), 1995, at 1.

37. See S. REP. NO. 103-117, at 2 (1993); Voting in favor of the bill were Senators Kennedy, Pell, Metzenbaum, Dodd, Simon, Harkin, Mikulski, Bingaman, Wellstone, Wofford, Kassebaum, Jeffords and Durenberger. See *id.* Voting against the bill were Senators Hatch, Coats, Gregg and Thurmond. See *id.*

38. See 18 U.S.C. § 248 (1994); *The Freedom of Access to Clinic Entrances Act, REPRODUCTIVE FREEDOM IN FOCUS, supra* note 3, at 1.

39. See S. REP. NO. 103-117, at 3 (1993).

40. See *Anti-Abortion Shootings and Murders: 1991-Present, supra* note 36, at 1-2.

41. See *id.* at 2.

42. See *infra* text accompanying notes 316-36; *Anti-Abortion Shootings and Murders: 1991-Present, supra* note 36, at 2.

43. See Katherine A. Hilber, Note, *Constitutional Face-Off: Testing the Validity of the Freedom of Access to Clinic Entrances Act*, 72 U. DET. MERCY L. REV. 143 (1994) [hereinafter Hilber].

marily sponsored by Representative Charles Schumer (D-N.Y.) and the Senate bill was sponsored predominately by Senator Edward Kennedy (D-Mass.).⁴⁵ The two bills contained some disparate language, but a House-Senate Committee unified the bills and President Clinton signed the joint committee bill into law.⁴⁶

As enacted, a person violates FACE when he or she, by force, threat of force or physical obstruction,⁴⁷ intentionally injures, intimidates,⁴⁸ or interferes⁴⁹ with any person because that person is attempting to obtain or provide reproductive health services or is seeking to exercise his or her First Amendment right of religious freedom at a place of religious worship.⁵⁰ FACE also prohibits the intentional damage or destruction of the property of a facility, or the attempt to cause such damage, due to the fact that the facility provides reproductive health services or is a place of religious worship.⁵¹ FACE does not prohibit picketing, leaflet distribution, demonstrations, sidewalk counselling or any other expressive conduct protected by the First Amendment.⁵²

The criminal remedies⁵³ available under FACE are, for the first offense, fines of up to \$10,000, imprisonment for not more

44. See H.R. 796, 103d Cong. (1993).

45. See S. 636, 103d Cong. (1993).

46. See 18 U.S.C. § 248 (1994); *The Freedom of Access to Clinic Entrances Act, REPRODUCTIVE FREEDOM IN FOCUS*, *supra* note 3, at 1.

47. "Physical obstruction" is defined as "rendering impassible ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship" or rendering such a passage unreasonably dangerous. 18 U.S.C. § 248(e)(4) (1994).

48. "Intimidate" is defined as that which places a person in reasonable apprehension of bodily harm to his or her person or to another. 18 U.S.C. § 248(e)(3) (1994).

49. "Interfere" is defined as restricting freedom of movement. 18 U.S.C. § 248(e)(2) (1994).

50. See *id.* § 248(a)(1)-(2) (1994).

51. See *id.* § 248(a)(3) (1994).

52. See *id.* § 248(d)(1) (1994); see also discussion *infra* Part II.D (2) and accompanying text.

53. There are also civil remedies available under FACE. See 18 U.S.C. § 248(c)(1)(A) (1994). A civil action may be brought by a person involved in providing or obtaining services at a reproductive health care facility. See *id.* The court has the authority to award appropriate relief including, but not limited to, temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as reasonable court fees. See 18 U.S.C. § 248(c)(1)(B) (1994). The plaintiff may elect, at any time before the judgment becomes final, to recover statutory

than one year, or both.⁵⁴ For the second offense, a fine of up to \$25,000, imprisonment of no more than three years, or both may be imposed.⁵⁵ If bodily injury occurs, FACE provides for fines of up to \$25,000 and/or imprisonment for not more than ten years.⁵⁶ If death results, FACE provides for imprisonment for any term of years or for life.⁵⁷

The Senate Committee on Labor and Human Resources concluded that the violent and threatening tactics being used to protest legalized abortion focused not only at deterring women from entering the clinic, but also at intimidating health care providers so they will no longer provide abortion services.⁵⁸ According to the Senate report, anti-abortion activists had made it clear that the violent and threatening activities in which they engage are part of a calculated and intentional campaign to eradicate access to abortion by closing clinics and intimidating doctors and patients alike.⁵⁹

For example, Dr. Norman Tompkins, who performs abortions as part of his private practice in Dallas, Texas, testified at a House Subcommittee hearing that he had received numerous threats at both his home and his office.⁶⁰ He testified that one caller threatened "I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off."⁶¹ A member of a Dallas anti-abortion group approached Dr. Tompkins' wife and shouted "Aren't you afraid I'm going to kill you?"⁶² An-

damages in the amount of \$5,000 per statutory violation. *See id.* The Attorney General of the United States may also bring a civil action if she has reasonable cause to believe that any person or group may be injured by conduct constituting a violation of FACE. *See* 18 U.S.C. § 248(c)(2) (1994).

A complete recital of all of the available remedies available under FACE is beyond the scope of this article. For a full discussion of civil penalties imposed under FACE, see, e.g., 18 U.S.C. § 248(c) (1994); *The Freedom of Access to Clinic Entrances Act*, REPRODUCTIVE FREEDOM IN FOCUS, *supra* note 3, at 7-8.

54. *See* 18 U.S.C. § 248(b)(1) (1994).

55. *See* 18 U.S.C. § 248(b)(2) (1994).

56. *See id.*

57. *See id.*

58. *See* S. REP. No. 103-117, at 3 (1993).

59. *See id.* at 11.

60. *See id.* at 10.

61. Abortion Clinic Violence, 1993: Hearings on H.R. 796 before the Subcomm. on Crime and Criminal Justice, Comm. on the Judiciary, 103d Congress 1 (1993) (written testimony of Norman T. Tompkins, M.D.).

62. S. REP. No. 103-117, at 10 (1993).

other physician, Dr. Curtis Boyd, who also performs abortions, submitted one of many threatening letters he had received, some of which have been hand-placed in his home mailbox. The letter read:

Hey, . . . Boyd. Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very very soon—and you won't know when—like the babies don't. GET READY YOUR [sic] DEAD.⁶³

United States Attorney General Janet Reno testified before a subcommittee:

This is a problem that is national in scope. It is occurring throughout the country; on the doorstep of the Nation's capital in Alexandria and Falls Church in Northern Virginia; in Pensacola and Melbourne in Florida; in West Hartford, Connecticut; in Wichita, Kansas; in Fargo, North Dakota; and in Dallas, Texas, just to name a few of the more visible incidents.⁶⁴

Numerous incidents of violence across the country were brought to Congress' attention in the course of several subcommittee hearings regarding the enactment of FACE.⁶⁵ Another example of the violence became apparent in the testimony of the director of a Detroit clinic who testified that she was dragged out of the clinic by her ankle and crushed by blockaders as she attempted to free the clinic's assistant director, who was pinned against the door by protestors.⁶⁶ The Director of a clinic in Tennessee testified that she was hit, pinched, grabbed, kicked and jammed against the clinic door repeatedly during a protest at the clinic.⁶⁷ Enraged activists have chained themselves to medical equipment and to clinic doors, blocked clinic parking lots

63. Statement of Fairmont Center, Senate Comm. on Labor and Human Resources Comm., June 2, 1993 reprinted in S. REP. NO. 103-117, at 10 (1993).

64. *Freedom of Access to Clinics Act, 1993: Hearing on S. 636 Before the Senate Labor and Human Resources Comm.*, May 12, 1993, reprinted in S. REP. NO. 103-117, at 12 (1993) (statement of Janet Reno, Attorney General of the United States).

65. See S. REP. NO. 103-117 (1993).

66. Brief of 29 Organizations Committed to Women's Health and Women's Equality as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic* at 58a-59a, 506 U.S. 263 (1993) (No. 90-985) cited in S. REP. NO. 103-117, at 5 (1993).

67. *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 221 (6th Cir. 1991), cited in S. REP. NO. 103-117, at 4 (1993).

and sabotaged clinic locks.⁶⁸ These are some of the less violent tactics extremist groups have utilized. There have also been arsons, chemical attacks, invasions, assaults, stalkings, shootings and murder.⁶⁹

After hearing testimony regarding these acts of violence, Congress concluded that drastic steps had to be taken to avert such violence and harassment.⁷⁰ Congress recognized that these incidents demonstrate that all health care personnel who are involved in providing services related to reproductive health, including physicians, assistant nurses, nurse practitioners, administrators and counselors, confront the risk of violent attack on a daily basis.⁷¹ Congress also recognized that many of the activities orchestrated by activists were organized across state lines making enforcement by state and local authorities complex and often ineffective.⁷² Congress considered that clinics purchase medicine, medical supplies, surgical instruments and other products from other states and transport them across state lines.⁷³ Further, violence often forced doctors and patients to travel from one state to another to provide or receive clinic services.⁷⁴

The senators who were opposed to the enactment of FACE⁷⁵ responded that the proposed legislation was an inappropriate reaction to the problem of violence outside abortion clinics.⁷⁶ The objections to the legislation stemmed partially from the fact that FACE does not differentiate between legal and illegal abortion services,⁷⁷ and the fear that the statute would hinder regulation of abortion procedures, including that regulation which is intended to protect the health and welfare of those seeking

68. See Brief for The National Abortion Federation and Planned Parenthood as Amici Curiae in Support of Respondents, Bray at 10, 15, 506 U.S. 263 (1993) (No. 90-985) cited in S. REP. NO. 103-117, at 8 n.16 (1993).

69. See *A Year in Review: The "Pro-Life" Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995*, supra note 25.

70. See S. REP. NO. 103-117, at 3 (1993).

71. See *id.*

72. See *id.* at 13, 20.

73. See *id.* at 31.

74. See *id.* at 14-17.

75. Senators Coats, Gregg, Thurmond and Hatch signed the minority view to the Senate committee report. See S. REP. NO. 103-117, at 39 (1993).

76. See *id.* at 40-41.

77. See *id.* at 47.

abortion related services.⁷⁸ Additionally, it was feared that enactment of FACE would chill the free speech of those who oppose abortion.⁷⁹ Several senators expressed concern that the bill would allow pro-choice activists to provoke and harass pro-life activists since the pro-choice activists would know that their adversaries would be subject to severe penalties were they to retaliate.⁸⁰

The language of FACE was challenged as “abortion-centric” and discriminatory.⁸¹ Further, it was feared that those protestors who chose to sit in front of a clinic door and non-violently express their political beliefs to those who attempted to enter, would be subject to the same penalties as more extreme activists who participated in violent acts such as arson and murder.⁸² The senators in the minority felt that the statute did not adequately differentiate between those who chose to participate in acts of civil disobedience and those who take part in acts of violent lawlessness.⁸³ It was their contention that “acts of peaceful civil disobedience—mass sit-ins, for example, that draw on the tradition of Ghandi and Martin Luther King, Jr.—should not be subjected to such steep penalties.”⁸⁴

Lastly, the senate minority stated that the proposed legislation was unconstitutional because it discriminated against a pro-life viewpoint.⁸⁵ Although the statute appeared to be neutral, the hostility towards the pro-life movement was simply masked, and the chilling effect the legislation would have on free speech would be profound.⁸⁶ The minority opinion stated that the legislation “elevates the right of abortion above the First Amendment. As the hearing testimony amply demonstrates, violence and abuse at abortion clinics come from both sides. If this problem is to be dealt with, it must be dealt with evenhandedly.”⁸⁷

78. *See id.* at 45.

79. *See id.* at 47.

80. *See id.* at 48.

81. S. REP. NO. 103-117, at 48 (1993).

82. *See id.* at 49.

83. *See id.*

84. *Id.* at 46.

85. *See id.* at 48.

86. *See id.* at 48-49.

87. S. REP. NO. 103-117, at 47 (1993).

To ensure that the statute was to be applied to both pro-choice and pro-life activists who chose to employ violent tactics to express their religious and political viewpoints on abortion, the language of the statute was changed to prohibit interference with "reproductive health services"⁸⁸ rather than "abortion related services."⁸⁹ It was the term "abortion related services" which caused several senators to feel that facilities that do not offer abortions, but rather offer information and counseling regarding the alternatives thereto, would not be protected by FACE.⁹⁰

C. *The Statutory Blueprint*

FACE was modeled after the Civil Rights Act of 1968.⁹¹ The civil rights law was enacted for the purpose of prohibiting force or the threat of force against persons attempting to exercise their constitutional rights.⁹² Federal legislation was necessary in light of the fact that local law enforcement had proven incapable or unwilling to protect persons who were attempting to exercise their civil rights, such as the right to vote, from harassment, intimidation, and racial violence.⁹³ A federal statute was needed to compensate for the lack of both enforcement and prosecution at the local level.⁹⁴

The federal civil rights statute prohibits any person from unlawfully interfering, by force or threat of force, with another person attempting to exercise his or her constitutional rights.⁹⁵ Additionally, the statute prohibits any person from willfully intimidating, injuring, or attempting to do any of the same on the basis of race, color, religion or national origin.⁹⁶

Historically, racist groups, such as the Ku Klux Klan, used violent tactics such as murders, whippings, intimidation, and threats thereof in an attempt to further their political objec-

88. 18 U.S.C. § 248(a)(1) (1994).

89. S. REP. NO. 103-117, at 40 (1993).

90. *See id.*

91. 18 U.S.C. § 245 (1968); *see also* S. REP. NO. 103-117, at 21 (1993).

92. *See* S. REP. NO. 103-117, at 21 (1993).

93. *See id.*

94. *See id.*

95. *See* 18 U.S.C. § 245 (b)(1) (1994).

96. *See* 18 U.S.C. § 245 (b)(2) (1994).

tives.⁹⁷ However, such acts were generally considered a matter of state, rather than federal, concern.⁹⁸ The Civil Rights Act of 1968 made such violence a federal crime and allowed the federal government to use its power to punish those who used violent tactics to prevent any person from exercising his or her civil rights.⁹⁹ Congress stated that the circumstances which abortion providers and clinic patients face, the obstruction of constitutional rights, and the inability and reluctance by law enforcement officials to adequately respond, closely paralleled those that led to the enactment of the Civil Rights Act of 1968.¹⁰⁰

The Civil Rights Act specifically addressed not only the use of force, but also the threat thereof to ensure that violent and intimidating threats could be criminalized.¹⁰¹ Congress used comparable considerations and adopted similar wording when it enacted FACE.¹⁰² Congress believed that making such conduct a federal offense and, therefore, subjecting such behavior to federal investigation and enforcement, and making it punishable by substantial penalties, would act as a deterrent and force violators to take their conduct more seriously.¹⁰³

D. *Constitutional Challenges to FACE*

1. *Congressional Power to Enact FACE*

a. *The Commerce Clause*¹⁰⁴

The constitutionality of FACE and the congressional power to enact the statute have been challenged on a number of occasions by the protestors charged under its provisions.¹⁰⁵ The leg-

97. See Randolph M. Scott-McLaughlin, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1364 (May 1992).

98. See S. REP. NO. 90-721 (1968), cited in S. REP. NO. 103-117, at 17-18 (1993).

99. See S. REP. NO. 103-117, at 18 (1993).

100. See *id.* at 17.

101. See *id.*

102. See *id.*; see also 18 U.S.C. § 248 (1994).

103. See S. REP. NO. 103-117, at 22 (1993).

104. U.S. CONST. art. 1 § 8, cl. 3. "Congress shall have the power to . . . regulate commerce with foreign nations and among the several States and with Indian Tribes." *Id.*

105. See *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995); *United States v. Dinwiddie*, 885 F. Supp. 1286 (W.D. Mo. 1995), *aff'd* 76 F.3d 913

islative record of the Act supports congressional findings that the authority to enact FACE stems from the Commerce Clause and the Fourteenth Amendment of the United States Constitution.¹⁰⁶ United States Attorney General Janet Reno and Professor Laurence Tribe testified before Congress that both the judicial findings and the legislative history make clear that patients seeking abortion services, and the physicians and staff who provide such services, are involved in interstate commerce.¹⁰⁷

To determine whether Congress has acted within the confines of its power under the Commerce Clause, the court must find that there is a rational basis for concluding that the regulated activity substantially affects interstate commerce.¹⁰⁸ In *American Life League, Inc. v. Reno*,¹⁰⁹ the Court of Appeals for the Fourth Circuit rejected the claim raised by plaintiff, an organization which conducts various activities to protect the rights of unborn children, that Congress lacked the authority to enact FACE.¹¹⁰ The court held that Congress had the power under the Commerce Clause¹¹¹ and the Necessary and Proper Clause¹¹² of the United States Constitution to regulate interstate commerce and intrastate commerce which has an effect on interstate commerce.¹¹³ The court, after examining the congressional record, concluded that Congress had ample evidence that medicine, medical supplies, surgical instruments and other supplies are often brought to reproductive clinics from other states; clinics employ staff who travel across state lines to get to the clinic; and clinics own and lease office space and generate in-

(8th Cir. 1996); *Riely v. Reno*, 860 F. Supp. 693 (D. Ariz. 1994); *Cook v. Reno*, 859 F. Supp. 1008 (W.D. La. 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994); *United States v. Brock*, 863 F. Supp. 851 (E.D. Wis. 1994), *aff'd sub. nom. United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996).

106. U.S. CONST. art. I § 8, cl. 3; U.S. CONST. amend. XIV.

107. *See* S. REP. NO. 103-117, at 13 (1993).

108. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981). *See also United States v. Lopez*, 115 S. Ct. 1624 (1995).

109. 855 F. Supp. 137, 141 (E.D. Va. 1994), *aff'd* 47 F.3d 642 (4th Cir. 1995).

110. *See id.* at 141.

111. U.S. CONST. art. I, § 8, cl. 3.

112. U.S. CONST. art. I, § 8, cl. 18.

113. *See American Life League*, 855 F. Supp. at 141; *see also United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

come, thus engaging in the stream of commerce.¹¹⁴ Furthermore “[t]he legislative history of FACE shows that Congress had evidence both of numerous women crossing state lines to obtain reproductive services no longer available in their home states and of anti-abortion organizations crossing state lines in order to orchestrate violence against abortion providers and patients.”¹¹⁵ The court found that “Congress had ample evidence of the impact upon interstate commerce of myriad threats, bombings, stalkings, blockades and assaults inflicted on reproductive health services providers and patients, and that the prohibitions in FACE are a reasonable and appropriate means to address the problem.”¹¹⁶

In *United States v. Wilson*,¹¹⁷ District Court Judge Rudolph T. Randa held that the portion of FACE which prohibits non-violent physical obstruction exceeded Congress’ authority under the Commerce Clause.¹¹⁸ The defendants were charged with intentionally intimidating or interfering with persons obtaining reproductive health services by obstructing a clinic’s entrance.¹¹⁹ The District Court for the Eastern District of Wisconsin dismissed the charges against the defendants. On appeal, Judge Randa’s decision was reversed.¹²⁰

The United States Court of Appeals for the Seventh Circuit held that the congressional findings that reproductive health service facilities are engaged in interstate commerce were rational.¹²¹ The appellate court held that Judge Randa had erred in failing to give the congressional findings adequate deference.¹²² “Obstruction of [health care] facilities, which [FACE] proscribes, essentially brings the interstate commercial activity at the targeted facility to a halt. Congress has authority under

114. *American Life League*, 855 F. Supp at 141; see also *Woodall v. Reno*, 47 F.3d 656, 657 (1995); S. REP. NO. 103-117, at 13 (1993).

115. *American Life League*, 855 F. Supp. at 141 (citing S. REP. NO. 103-117 (1993)).

116. *Id.*

117. 880 F. Supp. 621 (E.D. Wis. 1995), *rev’d.*, 73 F.3d 675 (7th Cir. 1995).

118. *See id.*

119. *See id.*

120. *See United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995).

121. *See id.* at 688.

122. *Id.* at 681.

the Commerce Clause to proscribe activity that interferes with interstate commerce."¹²³

In *Wilson*, the appellate court further held that the district court had failed to recognize the essence of the congressional findings.¹²⁴ Although Congress recognized that the problem of violence at abortion clinics was national in scope, the crux of the findings confirmed that, based on the travel of clinic staff, patients and medical supplies, FACE addresses an interstate crisis and not a "multi-state intrastate problem."¹²⁵ The United States Court of Appeals for the Eleventh Circuit came to the same decision in *Cheffer v. Reno*,¹²⁶ upholding the constitutionality of FACE and stating that by protecting the commercial enterprises in which a reproductive health clinic engages, FACE regulates a commercial activity in the stream of interstate commerce.¹²⁷

However, recently the United States District Court for the Western District of North Carolina granted plaintiffs, anti-abortion protestors, declaratory relief stating that FACE was unconstitutional in that its enactment was beyond the power of Congress.¹²⁸ In *Hoffman v. Hunt*,¹²⁹ the court stated that the fact that Congress had recognized the violence at abortion clinics as a problem that was national in scope did not sustain a finding that the activity had a substantial effect on commerce as required by the United States Supreme Court decision in *United States v. Lopez*.¹³⁰ The court opined that other crimes such as breaking and entering, burglary, rape, assault and murder are also problems which seem to be national in scope, and apparently exceed the ability of any single state jurisdiction to effectively solve, and, yet, regulation of such crimes remains a traditional state function.¹³¹

123. *Id.* at 680-81 (citing *United States v. Coombs*, 37 U.S. (12 Pet.) 72 (1838)).

124. *See id.* at 683.

125. *Wilson*, 73 F.3d 675, 683 (7th Cir. 1995).

126. 55 F.3d 1517 (11th Cir. 1995).

127. *See id.* at 1520.

128. *See Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996).

129. *Id.*

130. 115 S. Ct. 1624 (1995).

131. *See Hoffman*, 923 F. Supp. at 807.

In *Lopez*,¹³² the Court held that the enactment of the Gun-Free School Zones Act of 1990¹³³ was beyond the scope of congressional power under the Commerce Clause.¹³⁴ The Court held that the regulated activity, possession of a gun in the vicinity of a school, did not substantially affect interstate commerce and was not part of a larger commercial activity which, when taken in the aggregate, has an effect on commerce.¹³⁵ Additionally, the Court in *Lopez* held that the absence of a jurisdictional provision that would ensure the statute was only applied to those activities which might have an explicit connection or effect on commerce, could render the statute void.¹³⁶

In *Hoffman v. Hunt*, the court stated there was no significant difference between FACE and the statute struck down in *Lopez* for purposes of a Commerce Clause analysis.¹³⁷ Protestors' activities outside clinics, like the gun possession at issue in *Lopez*, were not considered commercial or economic activities.¹³⁸ Rather, the court held that FACE was a criminal statute that had little or nothing to do with any economic enterprise.¹³⁹

The court in *Hoffman* further stated that violent acts at abortion clinics such as destruction of property, assaults and blockades, are traditionally state crimes and are adequately addressed by already existing state criminal statutes.¹⁴⁰ Again, relying on *Lopez*, the court found that such statutes were suspect, especially where the statute was found to have no recognizable relationship to interstate commerce.¹⁴¹ Additionally, according to the court, such statutes cloud the lines of the United States' established federalist system.¹⁴² The Court feared that "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state

132. *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995).

133. 18 U.S.C. § 922(q)(1)(A) (1990).

134. *See Lopez*, 115 S. Ct. at 1631.

135. *See id.*

136. *See id.* at 1630-31.

137. *See Hoffman*, 923 F. Supp. at 812.

138. *See id.* at 813.

139. *See id.*

140. *See id.* at 810.

141. *See id.*

142. *See id.* at 811.

authority would blur and political responsibility would become illusory."¹⁴³

The court was not convinced by the congressional findings or the testimony of Attorney General Janet Reno that violent abortion clinic protests did in fact have an affect on interstate commerce.¹⁴⁴ The court felt that the evidence of the purchase of medical supplies from other states and the interstate travel of patients, doctors, staff and the protestors themselves was insufficient to support a finding that the activity had a substantial effect on commerce.¹⁴⁵ First, the court stated that although it may be true that clinics purchase medical supplies and other products from other states and often employ staff who travel from state to state, the regulatory target of FACE is not the abortion clinics themselves, but rather the protestors' activities.¹⁴⁶ The court held that the statute's terms were not aimed at removing any obstruction to individuals' interstate travel to secure or provide abortions, but rather the statute was focused on the protests that occur in the immediate vicinity of abortion clinics which may impede traffic.¹⁴⁷ Additionally, the court held that the fact that many clinic patients travel interstate to seek the services of abortion clinics was irrelevant because the acts of protestors at the clinics did not interfere with the patient's right to travel.¹⁴⁸

[T]he notion that Congress can enact FACE because the activities of protestors result in fewer abortions as well as less interstate movement of people and goods is really straining at gnats. In fact, FACE is not aimed at the commercial activity of abortion clinics. It is aimed at the basic freedom of individuals to engage in civil protest.¹⁴⁹

The court in *Wilson* differentiated FACE from the Gun-Free School Zones Act at issue in *Lopez*.¹⁵⁰ The court in *Wilson* stated that reproductive clinics do engage in interstate com-

143. *Hoffman v. Hunt*, 923 F. Supp. 791, 811 (W.D.N.C. 1996) (citing *New York v. United States*, 505 U.S. 144, 154-63 (1992)).

144. *See id.* at 813-16.

145. *See id.* at 813.

146. *See id.* at 807.

147. *See id.* at 818.

148. *See id.*

149. *Hoffman v. Hunt*, 923 F. Supp. 791, 809 (W.D.N.C. 1996).

150. *See Wilson*, 73 F.3d 675, 683-84 (7th Cir. 1995).

merce by purchasing, using and dispensing goods that have travelled within the stream of commerce as well as owning, leasing and renting office space, employing staff and generating income.¹⁵¹ Therefore, FACE regulates a commercial activity by preventing the obstruction which prevents the carrying on of such activity.¹⁵² Further, the court stated that *Lopez* was distinguishable because when enacting FACE the legislature had made specific findings regarding the substantial effect on interstate commerce.¹⁵³ The Court in *Lopez* had failed to make any such findings, and the court held that had such findings existed in *Lopez*, if found to be reasonable, *Lopez* may have been a very different case.¹⁵⁴

The court in *Cheffer v. Reno* agreed and again referred to the specific legislative findings regarding the staff, patients and supplies which travel across state lines to reproductive health clinics to differentiate FACE from the Gun-Free School Zones Act.¹⁵⁵ The court held that "in protecting the commercial activities of reproductive health providers, [FACE] protects and regulates commercial enterprises operating in interstate commerce."¹⁵⁶ The court held that the absence of legislative findings to substantiate the claim that Congress had the power to act under the Commerce Clause, as was the case in *Lopez*, would make it more difficult to uphold the action as a regulation of an activity which had a substantial effect on interstate commerce.¹⁵⁷

Yet, again following *Lopez*, the court in *Hoffman* stated that the absence of a jurisdictional provision in FACE to limit the reach of the statute to that activity which had a substantial effect on interstate commerce made the statute void.¹⁵⁸ Such a provision was deemed necessary to ensure that only those activities which did in fact affect interstate commerce were subject to

151. *See id.*

152. *See id.* at 684.

153. *See id.*

154. *See id.*

155. *See Cheffer*, 55 F.3d at 1520 (11th Cir. 1995).

156. *Id.* (citing *Lopez*, 115 S. Ct. at 1630).

157. *Id.* at 1520 (citing *Lopez*, 115 S. Ct. at 1631).

158. *See Hoffman*, 923 F. Supp. at 816 (citing *Lopez*, 115 S. Ct. at 1631 (1995)).

federal regulation.¹⁵⁹ Without such a provision the court feared the creation of a federal police power.¹⁶⁰

b. *Section Five of The Fourteenth Amendment*¹⁶¹

FACE is intended to protect the exercise of the constitutional right to terminate a pregnancy.¹⁶² This constitutional right has been upheld as a valid exercise under many provisions of the Constitution, including the provisions of the Fourteenth Amendment.¹⁶³ Although the Fourteenth Amendment restricts only state action which deprives persons of due process or equal protection, it has been held that congressional power to enforce the provisions of the Fourteenth Amendment is broader than that of the judiciary based on Congress' superior fact-finding ability and broad range of remedial options.¹⁶⁴ Accordingly, the United States Supreme Court has held that legislation enacted under section five of the Fourteenth Amendment will be upheld as long as the Court can reasonably find that it was intended to enforce the provisions of the Fourteenth Amendment and is consistent with "the letter and spirit of our Constitution."¹⁶⁵

The Supreme Court, in *United States v. Guest*,¹⁶⁶ suggested that Congress could regulate some private conduct under the Fourteenth Amendment.¹⁶⁷ Justice Brennan's opinion in *Guest* stated that section five of the Fourteenth Amendment authorizes Congress to enact legislation which it feels is reasonably

159. *See id.*

160. *See id.*

161. The Fourteenth Amendment to the United States Constitution states: [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV, § 1. It continues to state, in section five, that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

162. *See* S. REP. NO. 103-117, at 27 (1993).

163. *See* *Roe v. Wade*, 410 U.S. 113, 152-56 (1973).

164. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966).

165. *City of Richmond v. J.A. Croson Co.*, 4 U.S. 469, 528 (1989).

166. 383 U.S. 745 (1966).

167. *See id.*

necessary to protect a right arising from the Fourteenth Amendment.¹⁶⁸ Under such authority, Congress has the power to punish private criminal activity which interferes with the exercise of any such right.¹⁶⁹ This analysis has led the Court to state, in dicta, that “[t]he Fourteenth Amendment itself erects no shield against merely private conduct . . . is not to say . . . that Congress may not proscribe purely private conduct under section five of the Fourteenth Amendment.”¹⁷⁰

When enacting FACE, the Senate Committee stated that Congress did in fact have the power under the Fourteenth Amendment to legislate purely private action on the grounds that state and local government had been incapable of adequately protecting individuals from purely private acts which threaten the “full enjoyment of Federal constitutional rights such as the right to terminate a pregnancy. . . .”¹⁷¹ The district court in *Hoffman* disagreed with this assertion and stated that the Congress could only take steps to legislate private action under the Fourteenth Amendment when there is either a symbiotic relationship between the individual and state action, or the government was entangled in the action, or had encouraged or advanced it in some way.¹⁷²

2. *First Amendment*¹⁷³ *Challenges to FACE*

A principle function of the freedom of speech is to allow dispute on political issues on which American citizens may differ.¹⁷⁴ The United States Supreme Court has stated that the function of the First Amendment of the United States Constitution may be best served when it allows those dissatisfied with

168. *See id.* at 782.

169. *See id.*

170. *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973), *cited in S. REP. NO. 103-117*, at 28 (1993).

171. *S. REP. NO. 103-117*, at 28 (1993).

172. *See Hoffman*, 923 F. Supp. at 819.

173. The First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or protecting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition to the Government for a redress of grievances.” U.S. CONST. amend. I.

174. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag burning was a form of expressive conduct protected by the First Amendment of the United States Constitution).

the political atmosphere in which they find themselves, to express themselves in a way that "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."¹⁷⁵ Primarily for that reason, protestors have historically been granted broad First Amendment protection.¹⁷⁶ Picketing and other forms of peaceful protest have been considered some of the most effective means to educate the public to the protestor's views.¹⁷⁷ Protests, even when disruptive, are generally considered an exercise of the protestor's constitutional rights to free speech.¹⁷⁸

Recently, the Court specifically addressed pro-life demonstrations in *Madsen v. Women's Health Center, Inc.*¹⁷⁹ in which the Court held that an injunction could only be issued to restrict abortion related protests if it were content-neutral, and burdened no more speech than necessary.¹⁸⁰ If legislation or a judicial act is thought to restrict speech, especially speech criticizing the government or politics, it is likely to be challenged on constitutional grounds.¹⁸¹

Right-to-life groups have argued that FACE prohibits and penalizes their constitutional right to free expression.¹⁸² The primary argument, similar to those made by the minority vote of senators before enactment, is that the provisions of FACE are unconstitutionally overbroad so as to include activity protected by the First Amendment.¹⁸³ Protestors fear that the use of words like "injure," which is not specifically defined in the stat-

175. *Id.* at 408 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 (1949)).

176. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940).

177. *See id.* at 97.

178. *See Edwards v. South Carolina*, 372 U.S. 229 (1962); *Cox v. Louisiana*, 379 U.S. 536 (1965).

179. 512 U.S. 753 (1994).

180. *See id.*

181. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

182. *See, e.g.*, *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995); *United States v. Lucero*, 895 F. Supp. 1419 (D. Kan. 1995); *Cook v. Reno*, 859 F. Supp. 1008 (W.D. La. 1994).

183. *See, e.g.*, *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995); *United States v. Lucero*, 895 F. Supp. 1419 (D. Kan. 1995); *Cook v. Reno*, 859 F. Supp. 1008 (W.D. La. 1994). If a statute or regulation chills expression protected by the First Amendment of the United States Constitution and the statute or regulation was adopted to avoid the content of such speech, it must be proven to be narrowly tailored to a compelling government interest. *See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

ute, may include emotional or psychological injury resulting from a protestor's pure speech.¹⁸⁴

In *American Life League, Inc. v. Reno*,¹⁸⁵ plaintiffs asserted that, in the framework of abortion protests, speech is intended to have an austere emotional impact.¹⁸⁶ Despite plaintiff's contentions, the Court held that FACE did not infringe on First Amendment rights, but rather criminalized only the use of force, threat of force and physical obstruction.¹⁸⁷ These acts have long been beyond the scope of First Amendment protection.¹⁸⁸ Protestors are not prohibited from carrying signs, passing out fliers and informative literature, or attempting to orally persuade patients from entering the clinics.¹⁸⁹ "[T]he statute directs its attention to violent, obstructive and threatening activity, but it in no way implicates the rights of speech and assembly."¹⁹⁰

The court in *Hoffman* again disagreed with precedent and held that FACE was impermissibly vague and overbroad.¹⁹¹ The court found that although the ultimate goal of the plaintiffs in *Hoffman* was to end abortion in the United States,¹⁹² none of the plaintiffs had participated in any form of violence or any sit-ins since the enactment of FACE.¹⁹³ "None of the protestors [at

184. A protestor's conduct, as opposed to speech, may be protected by the First Amendment of the United States Constitution if the conduct is clearly intended to be expressive. *See Texas v. Johnson*, 491 U.S. 397 (1989); *see also American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995).

185. 47 F.3d 642 (4th Cir. 1995).

186. *See id.* at 141.

187. *See id.*

188. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (holding that conduct does not become speech which is entitled to First Amendment protection whenever the actor intends to convey a message through his or her conduct); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (stating that fighting words are excluded from First Amendment protection not based on the content of the message conveyed, but rather because it is an intolerable mode of expression repugnant to the Constitution).

189. *See Cook v. Reno*, 859 F. Supp. 1008, 1010 (W.D. La. 1994).

190. *Id.*; *see also Feiner v. New York*, 340 U.S. 315, 321 (1951). "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when . . . the speaker passes the bounds of argument or persuasion . . . they are powerless to prevent a breach of the peace." *Id.*

191. *See Hoffman*, 923 F. Supp. at 821.

192. *See id.* at 799.

193. *See id.* at 801.

the North Carolina clinics], including the plaintiffs, have in any way engaged in anything more than speech which did not involve threats, force or obstruction or physical impediment, but did interfere with abortion patients through peaceful persuasion.”¹⁹⁴ Yet, despite their lawful activity, the protestors were regularly threatened with arrest and such threats have had a chilling effect on their desire to continue and has intimidated them from exercising their constitutional rights.¹⁹⁵

The court’s finding that the statute was unconstitutionally vague and overbroad was based, in part, on the fact that local law enforcement officials were having difficulty determining whether the protestors’ activities were in violation of statute¹⁹⁶ or constitutionally protected free speech.¹⁹⁷ One protestor testified that the four police districts in North Carolina all had different interpretations of “interfere,” “impede,” “obstruct” and “intimidate” and police officers would often “‘huddle’ like referees in a football game and debate among themselves on what expressive activities will be permitted that day under those words.”¹⁹⁸

The plaintiffs asserted that terms such as “force or threat of force,”¹⁹⁹ as used in FACE, could include sit-ins, threatening a person, or warning a person, in connection with a protestors religious and moral beliefs, that he or she might go to hell for entering a clinic for reproductive health services;²⁰⁰ that despite the statutory definitions, the term “physical obstruction”²⁰¹ might be interpreted to include requiring a patient or doctor to walk through a picket line or sit-in;²⁰² the term “bodily injury”²⁰³ might include emotional distress or medical complica-

194. *Id.*

195. *See Hoffman*, 923 F. Supp. at 800.

196. Also at issue in *Hoffman* was the constitutionality of a state statute, N.C. GEN. STAT. § 14-277.4, which, like FACE, criminalizes certain forms of obstructive protest at health care facilities. *See Hoffman*, 923 F. Supp. 791. The court declared this statute unconstitutional as well. *See id.* at 823.

197. *See Hoffman*, 923 F. Supp. at 823.

198. *Id.* at 796.

199. 18 U.S.C. § 248(a) (1993).

200. *See Hoffman*, 923 F. Supp. at 820.

201. 18 U.S.C. § 248(e)(4) (1994); *see supra* note 47.

202. *See Hoffman*, 923 F. Supp. at 820.

203. 18 U.S.C. § 248(b) (1994).

tions resulting from an encounter with protestors;²⁰⁴ and the term “intimidate”²⁰⁵ might also include emotional distress and the definition of such intimidation was dependant upon the subjective reaction of the listener.²⁰⁶ Although the court conceded that some of these issues had been disposed of in *American Life League*, it did not feel that the intervening decision in that case disposed of the plaintiffs’ claims.²⁰⁷ The court held that the plaintiffs’ claims that the statute was unconstitutionally overbroad were valid because the statute had been applied to the obstruction in which the plaintiffs participated which was incidental to their exercise of free speech.²⁰⁸ Furthermore, the court held that the statutory prohibition of acts which “interfere” with access to a reproductive clinic or make access unreasonably difficult was vague and overbroad, despite statutory definition.²⁰⁹ The court felt that these issues had not been adequately disposed by the earlier case law and the chance that free speech may be chilled by the statute was significant enough to render it unconstitutional.²¹⁰

FACE has also been challenged as a content-based restriction which applies only to anti-abortion activists.²¹¹ If a statute is found to be content-based, there is a presumption that it is unconstitutional, and to rebut this presumption the government has the burden to prove that the legislation is narrowly tailored to a compelling government interest.²¹² Right-to-life protestors have argued that the language of FACE is intended only to apply to those who oppose abortion and not those pro-choice activists who use similar tactics to express their political views on abortion.²¹³

204. *Hoffman*, 923 F. Supp. at 820.

205. 18 U.S.C. § 248(e)(3) (1994); *see supra* note 48.

206. *See Hoffman*, 923 F. Supp. at 821.

207. *See id.* at 821.

208. *See id.*

209. *See id.*

210. *See id.*

211. *See id.* at 820.

212. *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992).

213. *See American Life League, Inc. v. Reno*, 855 F. Supp. 137, 143 (E.D. Va. 1994), *aff'd.*, 47 F.3d 642 (4th Cir. 1995).

However, the court in *Cook v. Reno*²¹⁴ held that the statute is “completely neutral in all respects;”²¹⁵ any person seeking reproductive health services such as fertilization treatment and prenatal care is protected with the same vigor as those seeking abortion-related services.²¹⁶ “The statute is therefore not aimed at one side of the abortion controversy, but applies to anyone searching for or providing reproductive health services, regardless of social philosophy or ideology.”²¹⁷ The appellate court in *American Life League* stressed that Congress could choose to legislate only those actions it felt to be most serious, and a statute is not content-based or view-point based solely because one “ideologically defined group” is more likely to participate in the conduct which the statute criminalizes.²¹⁸ The wording of the statute was altered to specifically address this concern, and the legislative history supports the argument that FACE can be applied to either pro-life or pro-choice activists who interfere with a person attempting to obtain or provide reproductive services.²¹⁹

Although the court in *Hoffman* disagreed with judicial findings that the statute was content-neutral, and stated that FACE was not generally applicable and, therefore, posed a threat of discriminatory application and censorship, the court was bound by the earlier decision in *American Life League*.²²⁰

E. *The Impact of Anti-Abortion Violence on The Provision of Medical Services*

Congress recognized that the ongoing violence and threat of violence have caused clinics to close and have “caused serious and harmful delays in the provision of medical services, and increased health risks to patients. It has also taken a toll on prov-

214. 859 F. Supp. 1008 (W.D. La. 1994).

215. *Id.* at 1010.

216. *See id.*

217. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753 (1994), *cited in Cook*, 859 F. Supp. at 1010.

218. *American Life League*, 47 F.3d at 651 (citing *United States v. O’Brien*, 391 U.S. 367 (1968) (upholding a statute which prohibits burning draft cards despite the fact that most of those punished by the statute were likely to oppose the Vietnam War)).

219. *See supra* notes 88-90 and accompanying text.

220. *See Hoffman*, 923 F. Supp. at 822. *See also American Life League*, 855 F. Supp. 137.

iders, intimidated some into ceasing to offer abortion services and contributed to an already acute shortage of qualified abortion providers."²²¹ Doctors have been forced to use drastic means to protect themselves from violence. Doctor Tom Tucker, who works at clinics in both Mississippi and Alabama stated: "We are in a constant state of fear. . . . We all have to wear bulletproof vests, and we carry guns. I've had to hire two bodyguards."²²² In Colorado, Dr. Warren Hern installed four layers of bulletproof glass at his clinic after shots were fired into the front of his office in 1988.²²³ The murder of two clinic workers and the shooting of five other people in a clinic in Massachusetts on December 30, 1994, intensified fear among staff and clinic workers around the country.²²⁴ A 1995 survey shows that of the clinics contacted, sixty percent of those who stated they had suffered staff losses as a result of violence, claimed that those staff members had quit as a direct result of the murders in Brookline, Massachusetts.²²⁵

The Committee on Labor and Human Resources found that anti-abortion activities have had an adverse impact, not only on abortion providers and patients, but also on the delivery of a wide range of health care services.²²⁶ Many of the facilities targeted by anti-abortion activists provide a vast scope of health care services as well as abortions.²²⁷ The more dramatic protests held outside these facilities, and the ensuing violence, caused the clinics to close down, at least temporarily.²²⁸ Protestors in Washington were found to have interfered with "ill patients, placing a woman possibly suffering from toxemia in acute medical danger, and delaying a patient who was miscarrying a wanted pregnancy and bleeding heavily."²²⁹

221. S. REP. NO. 103-117, at 3 (1993).

222. James Risen, *As Anti-Abortion Violence Grows, Clinics Seek Federal Shield Responding to Demands for More Protection, House and Senate Each Pass Bills Broadening Government Powers*, LOS ANGELES TIMES, Nov. 23, 1993, at 5.

223. *See* S. REP. NO. 103-117, at 17 (1993).

224. *See 1995 Clinic Violence Survey Report* (The Feminist Majority Foundation, Arlington, Va.), 1995, at 7.

225. *See id.* For a discussion of the shootings in Brookline, see *infra* notes 408-19 and accompanying text.

226. *See* S. REP. NO. 103-117, at 14 (1993).

227. *See id.*

228. *See id.*

229. *Bering v. SHARE*, 721 P.2d 918, 923 (Wash. 1986).

Most clinics provide a variety of health care services in addition to performing abortions.²³⁰ Clinics generally provide birth control, cancer screening, menopause counseling, Pre-Menstrual Syndrome treatment, pre-natal care and H.I.V. screenings.²³¹ A number of clinics also provide adoption services, and even these are not immune from anti-abortion violence.²³² Clinics in St. Albans, Vermont, Brainerd and Cloquet, Minnesota, Sydney, Ohio and Rapids City, South Dakota were all firebombed in the summer of 1994, following the enactment of FACE.²³³ All of these clinics provide family planning services and do not provide abortions.²³⁴

For patients seeking abortion related services, the detrimental effects of clinic blockades and invasions can be particularly grave.²³⁵ After confronting a blockade the patient may be too anxiety-ridden to undergo the procedure that day, and if the procedure is delayed, the health risks to the patient are often increased.²³⁶ Some abortion procedures take more than one day and the patient runs a high risk of complications if she is not able to receive the follow-up procedure. One example of such a procedure is the insertion of laminaria which dilates the cervix overnight.²³⁷ If the patient does not return the next day to have the laminaria removed, she faces a severe threat of infection, bleeding and other serious complications.²³⁸ In 1989, a court found that as a consequence of the closing of a Washington D.C. clinic for eleven hours by anti-abortion activists, five women who had commenced the abortion process at the clinic by having laminaria inserted were later endangered when they were pre-

230. See S. REP. NO. 103-117, at 14 (1993).

231. See *id.* at 5.

232. See *1994 Clinic Violence Survey Report* (The Feminist Majority Foundation, Arlington, Va.), 1994, at 3.

233. See *id.* at 11.

234. See *id.*

235. See *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992), *aff'd in part, rev'd in part*, 117 S. Ct. 855 (1997).

236. See *id.*

237. See *id.*

238. See *id.*

vented by protestors from entering the clinic to undergo timely laminaria removal.²³⁹

Anti-abortion tactics have resulted in the closing of numerous clinics nationwide.²⁴⁰ Some proponents of FACE have said "[a]bortion may remain a legal option in this country, but there will be so few providers that access will be limited and in some cases unavailable. . . . [P]hysicians are discontinuing the provision of a needed medical service simply out of fear."²⁴¹ The American Medical Association has emphasized the critical nature of the problem facing health care professionals:

Due to the growing violence against physicians and health care professionals generally, the A.M.A. believes that [FACE] represents a critical step in permitting dedicated health care professionals to deliver lawful medical services without fear of harassment, threats or violence. . . . Unless the issue of continued violence at health care facilities is directly confronted, the practice of medicine will be severely affected.²⁴²

Nationwide, eighty-three percent of counties have no abortion provider.²⁴³ South Dakota has only one abortion provider for the entire state, and in North Dakota, the only doctor who performs abortions commutes from Minnesota in order to make such services available.²⁴⁴ As a result, some patients are forced to travel over one hundred miles in order to seek medical attention.²⁴⁵ When the procedure takes more than one day, or access

239. *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1490 (E.D. Va. 1989), *aff'd.*, 914 F.2d 582 (4th Cir. 1990), *rev'd. on other grounds sub. nom.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

240. See S. REP. NO. 103-117, at 14 (1993).

241. *Freedom of Access to Clinic Entrances Act: Hearing on S. 363 Before the Senate Labor and Human Resources Comm.*, May 12, 1993 (statement of Dr. Pablo Rodriguez Medical Director of Planned Parenthood of Rhode Island), *reprinted in* S. REP. NO. 103-117, at 17 (1993).

242. Testimony of Dr. James S. Todd, Executive Vice President, American Medical Association, *Senate Labor and Human Resources Comm.*, May 11, 1993 *reprinted in* S. REP. NO. 103-117, at 16 (1993).

243. See Stanley K. Hensaw and Van Vort, *Abortion Services in the United States, 1987 and 1988*, FAMILY PLANNING PERSPECTIVES, Vol. 22, no. 3 (May/June 1990), *cited in* S. REP. NO. 103-117, at 17 n.29 (1993).

244. See *id.*

245. See *Freedom of Access to Clinic Access Act: Hearings on S. 636 Before the Senate Labor and Human Resources Comm.*, May 12, 1993 (statement of Willa Craig, Executive Director of Blue Mountain Clinic Missoula, MT), *reprinted in* S. REP. NO. 103-117, at 17 n.29 (1993).

to the clinic is obstructed by any means, such travel can be especially burdensome.²⁴⁶

F. *Lack of Available Remedy*

Federal, state and local laws in place prior to the enactment of FACE were inadequate to curtail violent conduct.²⁴⁷ In the past, injunctive relief could be sought under the Ku Klux Klan Act,²⁴⁸ which prohibits conspiracies for the purpose of depriving persons of equal protection of the law.²⁴⁹ However, in January 1993, the Supreme Court held that this statute was not applicable to present day anti-abortion activities.²⁵⁰ It was argued that the Ku Klux Klan Act, although designed to remedy the denial of rights guaranteed under the Constitution to all classes of citizens targeted by the Ku Klux Klan or other racist organizations, was not intended to be limited in its application to conspiracies motivated by racial enmity.²⁵¹ However, the Supreme Court in *Bray v. Alexandria Women's Health Clinic*,²⁵² in a six-three decision, held that opposition to abortion does not qualify along with racial discrimination, as class-based, invidious discrimination which is required by the statute.²⁵³

Once the Ku Klux Klan Act was deemed inapplicable, there was no federal relief available which was aimed specifically at anti-abortion violence.²⁵⁴ When Representative Charles Schu-

246. See Cooper, *supra* note 32, at 25.

247. See Cooper, *supra* note 32, at 25.

248. 42 U.S.C. § 1985(3).

249. See *id.*

250. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

251. See, e.g., Randolph M. Scott-McLaughlin, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1371 (May 1992).

252. 506 U.S. 263 (1993).

253. See *id.*

254. Although between *Bray* and the enactment of FACE there was no specific federal criminal remedy for violence aimed at abortion clinics, civil law provided some remedy. For example, the Racketeer Influenced and Corrupt Org. Act (commonly referred to as RICO), 18 U.S.C. § 1961, may provide some relief against violent groups of protestors. See *National Org. for Women v. Schiedler*, 25 F.3d 1053 (7th Cir. 1994); *The Freedom of Access to Clinic Entrances Act*, REPRODUCTIVE FREEDOM IN FOCUS, *supra* note 3, at 8; *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (upholding the use of a civil RICO claim over the defendants' assertions they had been motivated by political and moral grounds and, therefore, insulated from liability).

mer (D-N.Y.) and Representative Constance Morella (R-Md.) introduced the House version of FACE, Representative Schumer specifically stated that the Supreme Court's decision in *Bray* was a catalyst for the new bill.²⁵⁵ As Attorney General Janet Reno testified before Congress, there was no federal law that applied to private interference with a woman's right to terminate her pregnancy.²⁵⁶ She testified that FACE was "necessary to fill the gap in the law left by the *Bray* decision, and to ensure that federal remedies, including injunctive relief, will be available to victims of anti-abortion violence and intimidation."²⁵⁷ The national reach of the aggressive conduct, and the fact that a great deal of such conduct had been organized by groups which function across state borders, was evidence that the problem surmounts the ability of any lone local jurisdiction to properly address its magnitude.²⁵⁸

FACE, however, specifies that the statute should not be construed to provide exclusive remedies for conduct which impedes access to women's health care facilities.²⁵⁹ Depending on the factual situation surrounding each incident, conduct prohibited by FACE may also give rise to other federal prosecutions; violators may also be subject to prosecution for arson, kidnapping, mail fraud or other federal crimes.²⁶⁰ FACE was intended to ensure that those targeted by extremist violence could turn to the federal government in the face of inadequate local protection.²⁶¹ FACE does not, however, preempt state or local laws.²⁶²

255. See Hilber, *supra* note 43, at 149 (citing Representative Charles E. Schumer, D-N.Y., Representative Constance Morella, R-Md., News Conference Feb. 3, 1993 available in LEXIS, Nexis Library, Federal News Service File).

256. See Testimony of United States Attorney General Janet Reno, Senate Labor and Human Resources Committee, May 12, 1993, *reprinted in* S. REP. NO. 103-117, at 18-19 (1993).

257. See *id.* at 19.

258. See *id.* at 19-20.

259. See Freedom of Access to Clinic Entrances Act of 1993, Hearing on S. 636 before the Comm. on Labor of the Senate Comm. on Human Resources, 103d Cong. 1 (1993) (statement of Janet Reno, Attorney General, DOS).

260. See *The Freedom of Access to Clinic Entrances Act*, REPRODUCTIVE FREEDOM IN FOCUS, *supra* note 3, at 8.

261. See S. REP. NO. 103-117, at 20 (1993).

262. See 18 U.S.C. § 248(d)(3) (1994).

G. *Problems with the Enforcement of FACE*

Federal legislation was considered essential in light of the inability and unwillingness of some local law enforcement agencies to protect those exercising their right to terminate a pregnancy as it was in 1968 to protect African-Americans from the ongoing violence inflicted by the Ku Klux Klan and other racially biased organizations.²⁶³ Yet, federal agencies still often refer clinic administrators, who are looking to file a complaint, to their local enforcement agencies.²⁶⁴ When one clinic administrator called, federal enforcement agencies, including the Bureau of Alcohol, Tobacco and Firearms (ATF), the Federal Bureau of Investigations (FBI), and the Justice Department, to complain of violent anti-abortion activities outside the Ladies Center in Pensacola, she was offered no assistance.²⁶⁵ The protestor's activities clearly violated the provisions of FACE, which had been enacted just a week earlier.²⁶⁶ The protestor was blocking access to the clinic and attempting to prevent patients from entering by screaming at the patients and into the clinic's windows.²⁶⁷ Despite this illegal activity, the federal enforcement agencies told the clinic administrator that, although they were familiar with this particular protestor and his activities at the Ladies Center, "this was not the time to arrest him. . . ."²⁶⁸ The administrator was also told that such problems had always been a matter for the local police, and they would continue to be so.²⁶⁹ Less than two months later two men were killed and one woman was wounded by this same protestor, Paul Hill, at The Ladies Center.²⁷⁰

In certain circumstances, state and local law enforcement agencies may be hesitant to arrest and prosecute those who vio-

263. See *supra* notes 91-103 and accompanying text.

264. See 1994 *Clinic Violence Survey Report*, *supra* note 232, at 14.

265. Implementation of the Freedom of Access to Clinic Entrances Act, 1994: Hearings before the Subcomm. on Crime and Criminal Justice of the Senate Comm. of the Judiciary, 103d Cong. 2, (1994) (statement of Linda Taggart, Administrator, Ladies Center, Pensacola, Florida).

266. See *id.*; see *infra* notes 316-36 and accompanying text.

267. See Testimony of Linda Taggart, Clinic Administrator, Subcomm. on Crime and Criminal Justice, Sept. 21, 1994 reprinted in 1994 *Clinic Violence Survey Report*, *supra* note 232, at 14.

268. *Id.*

269. See *id.*

270. See *supra* notes 316-36 and accompanying text.

late FACE because they may oppose abortion themselves and, therefore, may side with the blockaders.²⁷¹ This point is best illustrated by the testimony of James T. Hickey, Sheriff of Nueces County, Texas, before a House Subcommittee. Mr. Hickey testified that because he opposes abortion himself, he did not believe that the law should be enforced against those attempting to stop abortions.²⁷² When Mr. Hickey was asked if he would enforce FACE, he testified that he would not enforce the law and that his refusal did not conflict with his law enforcement duties in any way.²⁷³ Similarly, when Operation Rescue staged a large protest in Buffalo, New York in April 1992, the mayor of Buffalo commented “[i]f they close down one abortion mill. . . then I think they’ll have done their job.”²⁷⁴

Even when local law enforcement is willing to pursue FACE claims against blockaders, often these protests are organized and staged across state lines, limiting the jurisdictional authority of local enforcement agencies. State police powers are “inherently inadequate to address what is a nationwide, interstate phenomenon.”²⁷⁵ Thus, it is often that the perpetrators of these crimes cannot be reached by state police and injunctive relief can not be granted. Former New York Attorney General Robert Abrams noted that attacks on New York clinics have been planned and carried out by activists from Georgia, California, Virginia and elsewhere.²⁷⁶ In these circumstances, local law enforcement efforts are impeded by the difficulties in shar-

271. See S. REP. NO. 103-117, at 19 (1993).

272. Clinic Blockades, 1992: Hearing before Subcomm. on Crime and Criminal Justice of the House Comm. of the Judiciary, 102d Cong. 2 (1992) (statement of James T. Hickey, Sheriff, Nueces, Tex.).

273. See *id.*

MR. HICKEY: The law of The Supreme Court, and in this case the United States of America and any other state in the Union that makes it legal to murder babies, is wrong.

MR LEVINE: And you will not enforce it ?

MR HICKEY: I will not.

MR LEVINE: You do not find that to be in any conflict with your oath of office as the chief law enforcement officer of your county ?

MR HICKEY: Certainly not.

Id.

274. David Treadwell, *Buffalo Braces for Massive Abortion Protests*, LOS ANGELES TIMES, Apr. 21, 1992.

275. S. REP. NO. 103-117, at 19 (1993).

276. See *id.* at 20.

ing information and coordinating effective responses.²⁷⁷ Federal agencies could more effectively intervene in a systematic fashion.²⁷⁸ Another clinic administrator testified that “[l]ocal police will not arrest picketers—[it] is up to clinic staff/clients/escorts. The excuse given by local police is that ‘we’ are the victims and so we must do [a] citizen’s arrest!”²⁷⁹

Further, local authorities in smaller counties are often overwhelmed by the large number of protestors who come from surrounding areas to bombard the clinics.²⁸⁰ One Virginia city, with a total police force of thirty uniformed officers, was barged by approximately 240 anti-abortion protestors, and the city was not capable of effectively combatting the military-style tactics employed.²⁸¹ A clinic in New York City, which, according to right-to-life activists, typically does one hundred abortions on a given Saturday, was able to see only twelve patients on a weekend when demonstrators blocked the entrance.²⁸² Although a number of arrests were made by local officials, federal agents were not present at the scene and most of those arrested were sentenced to time served.²⁸³

Similarly, in West Hartford, Connecticut, forty police officers were called out to confront over 200 violent blockaders.²⁸⁴ The need for increased protection at the clinic required the town to transfer officers from their other scheduled duties in order to attempt to effectively protect the clinic.²⁸⁵ Therefore, the police were unable to provide the customary level of visibility and protection to other citizens of the town and, had another emergency situation erupted, the police department would not have been

277. See *Freedom of Access to Clinic Entrances Act: Hearing on S. 636 Before the Senate Labor and Human Resources Comm.*, May 12, 1993, reprinted in S. REP. NO. 103-117, at 20 (1993) (statement of Janet Reno, United States Attorney General).

278. See *id.*

279. Clinic Director as quoted in the *1994 Clinic Violence Survey Report*, *supra* note 232, at 11.

280. See S. REP. NO. 103-117, at 20 (1993).

281. See *id.*

282. See Cathy Ramey, *Taking on Goliath . . . 350 Rescued, 189 Arrested for Closing Dobbs Ferry Mill*, LIFE ADVOCATE, Nov. 1993, at 14.

283. See *id.* at 13.

284. See *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 374 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990).

285. See *id.*

able to promptly respond.²⁸⁶ Even when the police are given adequate warning that a blockade is scheduled to occur, getting forces to the clinic and organizing them in such a way as to be effective, rather than counter-productive, takes many hours.²⁸⁷ "In short, and despite the City's best efforts, for a substantial period the blockade effectively closes the clinic and women are denied their state and federal rights."²⁸⁸

Clinics that experience moderate to high levels of violence are more likely to report that local, state and federal enforcement response to their complaints of violence is poor.²⁸⁹ Clinics have noted that the more the federal government is present, the less violence they are subjected to.²⁹⁰ A national survey,²⁹¹ conducted by the Feminist Majority Foundation,²⁹² concluded that law enforcement response is correlated with the commission of certain acts of clinic violence: poor law enforcement response creates a climate in which anti-abortion violence flourishes and effective law enforcement prevents the intense expansion of violence aimed at clinics.²⁹³

Nearly twenty-five percent of clinics responding to the Feminist Majority Foundation's 1994 Clinic Violence Survey reported that since FACE was enacted federal authorities either continued to direct them to local law enforcement officials for relief, or would decide not prosecute since FACE was enacted,

286. *See id.* at 379.

287. *Freedom of Access to Clinic Entrances Act: Hearing on S. 636 Before the Senate Labor and Human Resources Comm.*, May 12, 1993, reprinted in S. REP. No. 103-117, at 20 (1993)(statement of David Lasso, City Manager, Falls Church, Va.).

288. *Id.*

289. *See id.* at 21.

290. *See 1994 Clinic Violence Survey Report, supra* note 232, at 12; *1995 Clinic Violence Survey Report, supra* note 224.

291. The Feminist Majority Foundation's 1994 Clinic Violence Survey Report surveyed 314 clinics in 46 states, Puerto Rico and the District of Columbia. The 1995 Clinic Violence Survey Report surveyed 310 clinics in 44 states and American Samoa. In each survey the clinics surveyed included for-profit institutions, non-profit institutions and private practices.

292. The Feminist Majority Foundation, which has offices in Arlington, Virginia and Los Angeles, California, directs the largest clinic access project in the United States and, through the National Clinic Defense Project, leads efforts to keep clinics open in the face of violence and harassment by right-to-life activists. *National Clinic Defense Project* (The Feminist Majority Foundation, Arlington, Va.).

293. *See id.* at 16.

despite numerous incidents at the clinics which constituted violations of the provisions of FACE.²⁹⁴ Of the clinics which reported a high level of violence, 48% characterized federal law enforcement as "poor"²⁹⁵ and 40% of clinics which had reported a moderate level of violence agreed that federal law enforcement had been poor.²⁹⁶ In the 1995 follow-up survey conducted, clinics reported a higher level of satisfaction with law enforcement.²⁹⁷ Only 11% of clinics reporting excellent law enforcement response had suffered from a high level of violence, as opposed to 33% of those who had reported a poor law enforcement response.²⁹⁸ In 1994, one clinic administrator testified as to a direct correlation between active federal enforcement and the lack of violence at her clinic by stating that her clinic had not experienced any violent incidents in 1994, "however, the local FBI agency has contacted [her] numerous times and has emphatically stated that *her* office, the Federal Marshals, and the U.S. Attorney for the district are closely monitoring anti-choice activities."²⁹⁹

Statistical data reveals that there is a direct correlation between the presence of law enforcement and the commission of acts of violence at clinics.³⁰⁰ When the Feminist Majority Foundation did the follow-up survey in 1995, more clinics had reported a decrease in violence rather than an increase.³⁰¹ Decreases in violence directly corresponded with law enforcement response.³⁰² However, the greatest improvement in law enforcement response was seen at the local, rather than federal, level.³⁰³ The majority of FACE reports, that clinical officials had made to federal enforcement agencies were subsequently referred to local law enforcement officials.³⁰⁴ While law enforcement response seemed to have been improving, of the clinics surveyed, sixty-two stated that they had made FACE reports

294. *See id.*

295. *Id.*

296. *See id.*

297. *See 1995 Clinic Violence Survey Report, supra note 224, at 10.*

298. *See id.*

299. *1994 Clinic Violence Survey Report, supra note 232, at 16.*

300. *See id.*

301. *See 1995 Clinic Violence Survey Report, supra note 224, at 2.*

302. *See id.*

303. *See id.*

304. *See id.*

and 54% of those clinics were told by federal officials that their claim should be handled under state or local law.³⁰⁵ Close to 20% of the clinics that had reported violations were informed that federal authorities would not prosecute.³⁰⁶ Only 14.5% of clinics stated that their FACE reports were formally investigated, and a lower number stated that involved parties had been formally interviewed.³⁰⁷

Further, violence directed specifically at individual physicians and staff members has remained at a consistently high rate.³⁰⁸ Death threats, stalkings and home picketing are some of the various tactics utilized by radical pro-life activists in attempts to intimidate clinic staff.³⁰⁹ The Senate report unequivocally states that FACE was intended to cover conduct intended to interfere with the provision of reproductive health services whether or not it occurs in the vicinity of a clinic.³¹⁰ The Senate explained that the blockade of a provider's residence, if intended to keep that provider from getting to a clinic or continuing to provide reproductive health services, could constitute unlawful physical obstruction.³¹¹ Further, death threats to a doctor, even when away from the clinic, and whether made in person, by telephone or mail, could constitute unlawful threat of force.³¹²

H. *Criminal Cases Brought by the Department of Justice Since the Enactment of FACE*

Since FACE has been enacted, few criminal cases have been brought by the Department of Justice.³¹³ Yet, a collection of news-clippings compiled by the Feminist Majority Foundation reveals that, between July 1993 and July 1994 alone, there were "four murders, nine wounding or shootings, twenty-one arsons or attempted arsons, six bombing or attempted bombings,

305. *See id.*

306. *See id.*

307. *See 1995 Clinic Violence Survey Report, supra* note 224, at 8.

308. *See id.* at 2.

309. *See id.*

310. *See S. REP. NO. 103-117, at 24 (1993).*

311. *See id.*

312. *See id.*

313. *See Update on F.A.C.E. Cases Filed by the D.O.J. as of July 7, 1995 (The Feminist Majority Foundation, Arlington, Va.), 1995, at 1.*

and countless incidents of death threats, bomb threats and stalkings.”³¹⁴ In the first six months of 1995, at Planned Parenthood clinics alone, there were at least two cases of arson, four reported stalkings, seven clinic invasions, eighty instances of harassment, thirty-three incidents of vandalism and eight burglaries.³¹⁵

The most prominent case brought by the Department of Justice was *United States v. Hill*.³¹⁶ In that case, Paul Hill was convicted of violating FACE for intentionally injuring and interfering with three individuals who were providing reproductive services.³¹⁷ At the time of the murders, Paul Hill was the leader of Defensive Action, a group that circulated the “Justifiable Homicide” petition to show their support for those who take violent action against abortion providers.³¹⁸ Hill, along with fellow anti-abortion activist John Burt,³¹⁹ monitored The Ladies Center Clinic and surrounding roadways in Pensacola, Florida until they were able to obtain a photograph of Dr. John Baynard Britton and the license plate number of the car he drove.³²⁰ Hill and Burt were able to trace the license plate through the Department of Motor Vehicles and learn the doctor’s name and home address.³²¹ Shortly thereafter, Burt posted “WANTED” posters featuring Dr. Britton’s photograph outside The Ladies Center.³²² Approximately one year later, after “meticulously

314. *A Year in Review: The “Pro-Life” Movement Continues Its Deadly Agenda, July 29, 1994-July 29, 1995*, *supra* note 25, at 2.

315. *See 1995 Clinic Defense Affiliate Violence / Harassment Statistics*, *supra*, note 25.

316. 893 F. Supp. 1044 (N.D. Fla. 1994).

317. *See id.*

318. *See Anti-Abortion Shootings and Murders, 1991-Present*, *supra* note 36.

319. John Burt is the regional director of Rescue America, in Pensacola, Florida. *See Web of Anti-Abortion Extremists* (The Feminist Majority Foundation, Arlington, Va.), 1995 at 3. Burt was convicted for invading The Ladies Center in Pensacola, assault of the Clinic’s administrator, and destruction of medical equipment. *See id.* He was placed on probation and then later placed on two-year house-arrest for violating a condition of the probation agreement which restricted him from going within 100 yards of the clinic. *See id.* After the bombing of the Pensacola Clinic in 1984, Mr. Burt stated he was “in a battle of good and evil. Just like the commander-in-chief of the armed forces can’t be held accountable for every person killed in battle, so I can’t be held accountable.” Hirth, *supra* note 33, at 1A.

320. *See Web of Anti-Abortion Extremists* (The Feminist Majority Foundation, Arlington, Va.), 1995, at 3.

321. *See id.*

322. *See id.*

plann[ing] [his] every move,"³²³ Paul Hill shot and killed Dr. John Baynard Britton and his volunteer escort, retired Lieutenant Colonel James Barrett, while the two sat in their van in the parking lot of The Ladies Center.³²⁴ June Barrett, wife of James Barrett, was also wounded in the shooting.³²⁵ Under FACE, Paul Hill was sentenced to two life sentences for the murders of James Barrett and John Britton and the attempted murder of June Barrett. Hill was later sentenced to death on state charges including murder and attempted murder.³²⁶

Hill asserts that his actions were justifiable and plans to raise this issue on his appeal.³²⁷ Hill attempted to raise a necessity defense at his trial.³²⁸ The court granted the government's motion in limine to suppress evidence of the necessity defense.³²⁹ Despite Hill's assertions that he acted with the intent to prevent imminent harm because twenty-five abortions were scheduled to be performed at the clinic on the day of the shooting, the court held that Hill failed to show that any abortion to be performed that day was outside the protection of the Constitution and the laws of the state of Florida.³³⁰ The court further held that the "[necessity] defense simply cannot be applied to justify averting acts that have expressly been declared by the highest court in the land to be constitutional and legally protected."³³¹

323. Tom Kuntz, *Hill Feels Relief—Not Remorse—For Killing Doctor*, COMMERCIAL APPEAL (Memphis, TN.), Sept. 24, 1995, at A15.

324. See Ronald J. Ostrow, *Clinic Slaying Suspect Charged Under Federal Law*, LOS ANGELES TIMES, Aug. 13, 1994, at 22.

325. See *id.*

326. See *id.*

327. See *United States v. Hill*, 893 F. Supp. 1048 (N.D. Fla. 1994).

328. See *id.* Defendant's oral motion to reconsider the granting of the government's motion in limine to exclude evidence of a necessity defense was denied. See *id.* To be entitled to a proffer of the necessity defense, a defendant must be able to show that (1) he or she was faced with a number of evils and he or she chose the lesser evil; (2) he or she acted to prevent imminent harm; (3) he or she reasonably anticipated a causal relation between his or her conduct and the harm to be avoided; (4) there were no other alternatives under state law. *United States v. Milligan*, 17 F.3d 177, 181 (6th Cir. 1994); *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989).

329. See *United States v. Hill*, 893 F. Supp. 1048, 1049 (N.D. Fla. 1994).

330. See *id.* at 1050.

331. *Id.* at 1051.

Hill has said, "I'm not saying that what I did was legal, but I'm saying what I did was moral and according to the highest legality."³³² It is Hill's belief that if you believe abortion is murder, you are morally obligated, by God, not only to take political action and teach of its social evils, but also to act forcefully to protect the unborn, even if that means killing.³³³ Hill believes that he will be seen as a martyr,³³⁴ and many other violent activists, such as Rachelle Shannon³³⁵ and Regina Dinwiddie,³³⁶ have praised his actions and commended his tenet.

In another action brought by The Department of Justice, *United States v. Brock*,³³⁷ six defendants³³⁸ were convicted of criminally violating FACE after creating a blockade around a clinic in Milwaukee, Wisconsin.³³⁹ The defendants locked themselves in their cars which were parked directly in front of the clinic's door, thus blocking access.³⁴⁰ Defendants had cut holes in the hood or floor of their respective vehicles, reached their arms out and handcuffed themselves to pipes attached to the frame of the vehicle and filled with concrete.³⁴¹ The doors of other vehicles had been welded shut and the interior of the car

332. Tom Kuntz, *Hill Feels Relief—Not Remorse—For Killing Doctor*, COMMERCIAL APPEAL (Memphis, TN.), Sept. 24, 1995, at A15.

333. *See id.*

334. *See id.*

335. Commonly known as "Shelley" Shannon. Ms. Shannon has been convicted of attempting to murder George Tiller, an abortion doctor in Wichita, Kansas and pled guilty to a string of arsons and acid attacks aimed at abortion clinics. *See* Judy Thomas, *Inmate Allegedly Urged Anti-Abortion Violence 'Campaign of Terror' Conducted by Activist, Authorities Say*, KANSAS CITY STAR, Sept. 3, 1995, at A23.

336. Regina Dinwiddie was found in civil contempt of a permanent injunction issued under FACE for harassing three employees of Greater Kansas Planned Parenthood. Her case is currently on appeal; *see* *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (upholding an injunction issued after request of Attorney General Janet Reno); *Update on F.A.C.E. Cases Filed by D.O.J. as of July 7, 1995*, *supra* note 313 at 1; Thomas, *supra* note 335 (noting that Paul Hill had stayed at Dinwiddie's house two weeks before the shootings in Pensacola).

337. *See* 863 F. Supp. 851 (E.D. Wis. 1994), *aff'd sub. nom.*, *United States v. Soderna*, 2 F.3d 1370 (7th Cir. 1996).

338. Ronald Dean Brock, James Daniel Soderna, Dale Robin Pultz, Michael Charles Suhy, Colin Lester Hudson and Marilyn Ruth Hatch. *See* *United States v. Brock*, 863 F. Supp. 851, 854 (E.D. Wis. 1994).

339. *See id.* at 855.

340. *See id.*

341. *See id.*

was reinforced with concrete and metal rods to ensure they could not be entered and subsequently moved.³⁴²

Due to the number of vehicles and individuals blocking both principal entrances to the clinic, none of the employees or medical personnel were initially able to gain access to the clinic in order to provide medical services until after police had physically removed two of the individuals.³⁴³ After the clinic's staff gained access, they were able to open a fire escape entrance which had not been blocked by the protestors, in order to provide a form of entrance to the clinic.³⁴⁴ The clinic was unable to serve seventeen patients who had appointments for reproductive services at the clinic that morning.³⁴⁵

The defendants were sentenced to terms of imprisonment ranging from a 30 day sentence to 180 days, and restitutionary fines payable to the City of Milwaukee and Affiliated Medical Services.³⁴⁶ The defendants challenged the constitutional authority of Congress to enact FACE,³⁴⁷ but their motion to dismiss the charges was denied.³⁴⁸

In *United States v. Unterburger*³⁴⁹ the defendants³⁵⁰ were charged with non-violent obstruction of a reproductive services clinic when they chained themselves to a concrete slab at the front door of the Aware Women Medical Center in Lake Clarke Shores, Florida with the intent of intimidating and interfering with women entering the clinic.³⁵¹ After arrest, the two defendants were released on bail under the condition that they stay more than 100 feet from an abortion clinic in Melbourne, Florida.³⁵² The defendants, rather than obey the judge's order to

342. See *Brock*, 863 F. Supp. at 855.

343. See *id.*

344. See *id.*

345. See *id.*

346. See *id.* at 851.

347. See generally Part II.D.(1)(a).

348. See *Brock*, 863 F. Supp. at 870.

349. 97 F.3d 1413 (11th Cir. 1995).

350. The defendants were two Christian missionaries, Eric Olson and Raymond Unterburger. *Missionaries Convicted*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Sept. 19, 1995, at 3B.

351. See *United States v. Unterburger*, 97 F.3d 1413, 1415 (11th Cir. 1996); *Missionaries Convicted*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Sept. 19, 1995, at 3B; *Update on F.A.C.E. cases filed by D.O.J. as of July 7, 1995 supra* note 313, at 3.

352. See *Missionaries Convicted*, SUN SENTINEL (Ft. Lauderdale, Fla.), Sept. 1995, at 3B.

stay away from the clinic, chose to surrender themselves to the United States Marshal Service.³⁵³ Both men were then held in custody while awaiting trial.³⁵⁴ The two men were sentenced to time served and one year of probation.³⁵⁵

Similarly, in *United States v. Lucero*,³⁵⁶ the defendants welded themselves into a disabled vehicle, thereby blocking access to a clinic in Wichita, Kansas.³⁵⁷ The defendants filed a motion to dismiss on the grounds that FACE was unconstitutional.³⁵⁸ The court denied this motion.³⁵⁹ The government stipulated that the defendants' conduct was limited to nonviolent physical obstruction and therefore each defendant faced a maximum penalty of imprisonment for six months and a fine of no more than \$10,000.00.³⁶⁰ Both defendants, Charles L. LaCroix and James H. Lucero, were found guilty after a jury trial.³⁶¹

More recently, in *United States v. Bird*,³⁶² the defendant was found guilty of physically attacking Dr. Herring, a physician who performed abortions at America's Women Clinic.³⁶³ Mr. Bird threw a glass bottle, smashing the windshield of a vehicle being driven by Dr. Herring.³⁶⁴ Mr. Bird was not released on bail following his arrest because he would not agree to stay 1,000 feet away from an abortion clinic, the condition for his pre-trial release suggested by a United States Magistrate Judge.³⁶⁵ Mr. Bird proclaimed that he had been "called by God" to go to the clinic.³⁶⁶

353. *See id.*

354. *See id.*

355. Ronnie Greene, *Abortion Protestors Found Guilty Under Federal Law*, MIAMI HERALD, September 19, 1995, at B1.

356. 895 F. Supp. 1421 (D. Kan. 1995).

357. *See id.* at 1422.

358. *See id.*; *see generally supra* Part II.D.(1)(a).

359. *Lucero*, 895 F. Supp. at 1427.

360. *See id.*

361. *See id.*

362. No. 4:95CR00071-001, (S.D. Tx. Sept. 14, 1995).

363. *See* Deborah Tedford, *Man Gets 12-year Sentence in Abortion Doctor Attack*, HOUSTON CHRONICLE, Sept. 16, 1995, at 30; *but see Correction*, HOUSTON CHRONICLE, Sept. 18, 1995, at 2 (Frank Bird's sentence was 12 months not 12 years as previously reported).

364. *See* Tedford, *supra* note 363, at 30; *but see Correction*, *supra* note 363, at 2.

365. *See id.*

366. *Id.*

In September 1995, Mr. Bird was sentenced to one year in federal prison and one year supervised release when his prison term ends.³⁶⁷ Mr. Bird was also ordered to pay \$850 restitution to Dr. Herring for damage to his car, but Bird has refused to pay, calling the doctor a "baby killer"³⁶⁸ and proclaiming that the judge could keep him in jail "until Jesus comes."³⁶⁹

Although, under FACE, the majority of arrests have been of violent anti-abortion protestors, FACE has also been applied to pro-choice activists who resort to violent or threatening acts. The term "reproductive health services,"³⁷⁰ as used in the statute, has been interpreted to include facilities that do not offer abortions or other forms of reproductive health care, but rather offer counselling about possible alternatives to abortion.³⁷¹ Therefore, any pro-choice activists who took violent actions against a clinic that, for example, counsels patients in alternative reproductive services, could be prosecuted under FACE.

In *United States v. Mathison*,³⁷² the defendant, a supporter of the pro-choice movement, was charged with violating FACE for making phone calls to an anti-abortion counseling service, during which he threatened to kill the employees.³⁷³ Mr. Mathison told a Federal Bureau of Investigations agent that he had made the phone calls because he wanted to "instill fear in the pro-life movement similar to what the pro-choice people have to deal with."³⁷⁴ Mr. Mathison pled guilty to the second count of

367. *See id.*

368. *Id.*

369. *Id.* In January, 1997, in a civil case brought under FACE, United States District Judge John E. Sprizzo declined to find two clergymen guilty of criminal contempt after the defendants stationed themselves in the driveway of a clinic in Dobbs Ferry, New York in direct violation of a permanent injunction. *See* David E. Rovella, *Abortion Clinic Act Guttled by Unexpected Ruling: Federal Judge Says Sincere Religious Belief May Permit Enjoined Blocking of Access*, 19 NAT'L L. J. No. 23, Feb. 3, 1997, at A6. The Judge held that the protestors' sincere religious belief regarding abortion was a viable defense to the criminal contempt charge. *See id.*

370. 18 U.S.C. § 248(a)(1) (1994).

371. Joint Explanatory Statement of the Comm. of Conference (Conference Comm. Report), § 10(a), 140 CONG. REC. H. 2920 (May 2, 1994).

372. No. CR-95-085-FVS, (E.D. Wash. Sept. 1, 1995).

373. *See Abortion Backer Charged in Threat*, BOSTON GLOBE, June 7, 1995, at 7.

374. *Id.*

violating FACE, and the first count was thereafter dropped.³⁷⁵ Although the fine options ranged from \$500 to \$5,000, the defendant was ordered to pay a special assessment fee of \$25.00 based on his inability to pay a greater sum.³⁷⁶ Mr. Mathison was also placed on probation for five years, including a thirty day home detention of intermittent confinement.³⁷⁷

Usually, the defendants charged under FACE are found to have mental deficiencies. In *United States v. Lang*,³⁷⁸ the defendant was charged with calling three television stations in Huntsville, Alabama, claiming that she had a .22 caliber gun and was going to kill Dr. Ralph Robinson, an abortion provider in Birmingham.³⁷⁹ Ms. Lang allegedly saw the doctor's name in the newspaper.³⁸⁰ Ms. Lang was diagnosed as a paranoid schizophrenic and, subsequently, the parties agreed on a pre-trial diversion which required Ms. Lang to report to a probation counselor regularly and undergo psychiatric treatment.³⁸¹ After the eighteen month diversion period, if all requirements are satisfied and Lang stays away from the doctor, the charges will be dropped.³⁸² According to her probation officer and her attorney, Mr. Harwell Davis, "she is doing well."³⁸³

In *United States v. Blackburn*,³⁸⁴ the defendant's attorney questioned her client's competency.³⁸⁵ Ms. Blackburn was charged with making phone calls to five clinics in Montana threatening to bomb them.³⁸⁶ Her attorney asserted that Ms.

375. See *United States v. Mathison*, No. CR-95-085-FVS (E. Wash. Sept. 1, 1995).

376. See *United States v. Mathison*, No. CR-95-085-FVS at 3.

377. See *id.* at 2.

378. No. 95-00016 (D. Ala. Jan. 14, 1995), cited in *Update on F.A.C.E. Cases Filed by D.O.J. as of July 7, 1995*, *supra* note 313, at 3.

379. See *Woman Jailed After Threats Against Doctor*, SUN-SENTINEL, (Ft. Lauderdale, Fla.), January 15, 1995, at 6A.

380. See *id.*

381. Telephone conversation with Harwell Davis, United States Attorney for the Department of Justice, Huntsville, Ala. (July, 1995). See also, *Update on F.A.C.E. Cases Filed by D.O.J. as of July 7, 1995*, *supra* note 313, at 4.

382. See *Update on F.A.C.E. Cases Filed by D.O.J. as of July 7, 1995*, *supra* note 313, at 3.

383. *Id.*

384. No. CR-95-16-H-CCL (D. Mont.).

385. See *Update on F.A.C.E. Cases Filed by D.O.J. as of July 7, 1995*, *supra* note 313, at 4.

386. See *id.*

Blackburn was suffering from severe mental disease or defect and was therefore unable to appreciate the nature and quality of her acts.³⁸⁷ Ms. Blackburn was ordered to undergo a psychiatric or psychological evaluation to determine if she was legally insane at the time she performed the acts which allegedly constituted a violation of FACE.³⁸⁸

Additionally, in *United States v. MacDonald*,³⁸⁹ the defendant's competence to stand trial was once again put at issue.³⁹⁰ The defendant was indicted for attempted arson and twice using locks and chains to block a clinic's entrance.³⁹¹ Mr. MacDonald's attorney questioned his competence to stand trial and he was scheduled for psychiatric evaluation.³⁹²

Most recently, on March 24, 1997, Terrence J. McManus of Worcester, Massachusetts, described as an alcoholic schizophrenic, was sentenced to twenty-seven months in a federal prison hospital for making bomb threats to reproductive health clinics in Worcester and Brookline, Massachusetts.³⁹³ Mr. McManus pled guilty to violating FACE by willfully threatening to damage or destroy a clinic and maliciously conveying false information about the attempt.³⁹⁴ Mr. McManus telephoned the clinics and stated a bomb was ready to go off and the clinics were "doing the devil's work."³⁹⁵ As a result, the Worcester clinic had to be evacuated, but no explosive devices were found.³⁹⁶ Mr. McManus has an extensive criminal record and was also ordered to attend a substance abuse program, a mental health program, and was fined \$250.00.³⁹⁷

387. See Motion for Evaluation Under 18 U.S.C. 4241 and 4242 at 2, *United States v. Blackburn*, No. 95-16-H-CCL (D. Mont. June 7, 1995).

388. See Order at 2-3, *United States v. Blackburn*, No. 95-16-H-CCL (D. Mont. June 13, 1995).

389. No 95-145, (D. N.M. 1995), cited in *Update on F.A.C.E. Cases Filed by D.O.J. as of July 7, 1995*, supra note 313, at 3.

390. See *Update on F.A.C.E. Cases Filed by D.O.J. as of July 7, 1995*, supra note 313, at 3.

391. See *id.*

392. *Id.*

393. See Emille Astell, *Worcester Man Gets 27 Months in Clinic Threats*, TELEGRAM & GAZETTE (Worcester, Ma.), Mar. 25, 1997, at B1.

394. See *id.*

395. See *id.*

396. See *id.*

397. See *id.*

I. *The Violence Continues*

Violent acts continue to plague clinics on a regular basis. One of the more frightening occurrences is the formation of a group called the American Coalition of Life Activists (ACLA). The group consists mainly of pro-violence radicals.³⁹⁸ When asked if the ACLA encourages violence and killing, one of the group's founders professed that no one who condemns violence would want to work with ACLA.³⁹⁹ ACLA is defined by pro-life activists as a group

[b]orn of a desire of a number of nationally-known leaders to continue having national pro-life events which were characteristically non-violent but did not require lockstep ideological and doctrinal conformity on the debate over the morality of the use-of-force. . . .⁴⁰⁰

Many of ACLA's founders are allegedly advocates of justifiable homicide.⁴⁰¹ This group also published a list of abortion doctors entitled "The Deadly Dozen."⁴⁰² A number of the doctors who appear on the list have been targeted by activists, subjected to residential picketing, and have been the target of "WANTED" posters showcasing their names, addresses, phone numbers and photographs, behavior similar to that which Dr. Gunn and Dr. Britton were subjected shortly before their murders.⁴⁰³ In 1995, ACLA launched a national campaign which it calls the "Contract with the American Abortion Indus-

398. See Cooper, *supra* note 32, at 251. The directors of ACLA are Andrew Burnett, publisher of *Life Advocate* Magazine and supporter of "justifiable homicide," Donald Treschman, Head of *Rescue America*, David Crane, Michael Dodds, Monica Miller and Bruce Murch. See *Expose America's Abortion Industry in America's Gateway City*, GATEWAY TO THE TRUTH (American Coalition of Life Activists, Norfolk, Va) 1995 (flier announcing rallies and training organized by ACLA); Hirth, *supra* note 33, at 1A.

399. See Cooper, *supra* note 32, at 251.

400. Paul deParrie, *Wichita Wakes to ACLA*, LIFE ADVOCATE, July 1995, at 13 [hereinafter deParrie, *Wichita*].

401. See *A Year in Review: The "Pro-Life" Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995*, *supra* note 25, at introduction.

402. See Cooper, *supra* note 32, at 251.

403. See *A Year in Review: The "Pro-Life Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995*, *supra* note 25, at 9, 16; see *supra* notes 316-26 and accompanying text.

try,"⁴⁰⁴ aimed at vendors, suppliers, and any other person associated with women's health care.⁴⁰⁵ For example, anti-abortion groups have admittedly targeted cab companies that regularly carry patients to and from the doctors offices⁴⁰⁶ and hotels where patients stay during their recuperation to be monitored by clinic staff.⁴⁰⁷

Further, in January of 1997, two reproductive health clinics were bombed.⁴⁰⁸ On January 16, two bombs exploded at a clinic in Atlanta, Georgia.⁴⁰⁹ The bombs were apparently timed to go off about an hour apart.⁴¹⁰ Seven people, including investigators and several news reporters who had been drawn to the scene after the first blast, were injured in the explosions and the clinic structure suffered severe damage.⁴¹¹ Federal investigators have received a letter from a group called "The Army of God" claiming responsibility for the bombing.⁴¹² The Army of God has been known to law enforcement officials since 1982 when three members kidnapped an Illinois abortion doctor and his wife.⁴¹³ The group is also known for their anti-abortion manual which includes instructions on making bombs and states "we, the remnant of God-fearing men and women of the United States of Amerika [sic], do officially declare war on the entire child-killing industry."⁴¹⁴

404. *Expose America's Abortion Industry in America's Gateway City*, GATEWAY TO THE TRUTH (American Coalition of Life Activists, Norfolk, Va.) 1995 (flier announcing rallies and training organized by ACLA, August 2-5, 1995).

405. *See A Year in Review: The "Pro-Life" Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995*, *supra* note 25, at introduction, 16.

406. *See deParrie, Wichita*, *supra* note 395, at 16.

407. *See Paul deParrie, Constant Attention Dogs Tiller, Motel Refuses His Business*, LIFE ADVOCATE, July 1995, at 16.

408. *See Boy, 15, Held in Clinic Bombing*, NEWSDAY (New York, N.Y.), Feb. 7, 1997, at A17; Kevin Johnson & Richard Willing, *Bombs Unsettle Clinics After Time of Relative Calm. Second Explosion Could Indicate New Disturbing Tactic*, USA TODAY, Jan. 17, 1997, at 4A.

409. *See Johnson & Willing*, *supra* note 408, at 4A.

410. *See id.*

411. *See id.*

412. *See Ron Martz & Kathy Scruggs, Credit for 2 Bombings Claimed Anti-Abortion 'Army' Set Blasts, Long Letter Says*, ATLANTA JOURNAL, Feb. 25, 1997, at A01. In the letter, The Army of God also claims responsibility for the bombing of a gay and lesbian nightclub in Atlanta. *See id.*

413. *See id.*

414. *See id.*

The Federal Bureau of Investigations is evaluating the letter and its accuracy to determine if it was actually written by a member of the Army of God.⁴¹⁵ The letter states that the clinic was bombed because “[t]hose who participate in anyway [sic] in the murder of children may be targeted for attack.” It goes on to state that the second bomb, which exploded sixty-seven minutes after the first, “was aimed at agents of the so-called federal government, i.e. ATF, FBI, Marshall’s [sic], etc.”⁴¹⁶

A reproductive health clinic in Tulsa, Oklahoma was also bombed in January of 1997.⁴¹⁷ On January 1, the clinic was hit by two firebombs and was slightly damaged when, again, on January 19, two bombs exploded at the rear of the building.⁴¹⁸ There were no injuries as a result of these bombings.⁴¹⁹ Federal agents have arrested a fifteen year old boy in connection with these crimes.⁴²⁰

Further, in April of 1997, John Yankowski was arrested and charged with arson after allegedly setting fire to a reproductive health clinic in Montana causing \$2,000 in damage.⁴²¹ Mr. Yankowski, who claimed “[t]hose flames there were more of a symbolic thing rather than serious arson,”⁴²² is being held on a \$100,000 bond and could receive up to twenty years in prison on the state arson charge, but has not been charged under FACE.⁴²³ Similarly, on March 18, 1997 a man driving a truck filled with thirteen gas cans and three tanks of propane drove into a clinic in Bakersfield, California.⁴²⁴ Peter Howard, a frequent protestor at the clinic, has been charged with “detonating a destructive device” and “terrorism with a destructive device,”

415. *See id.*

416. *See id.*

417. *See Bombs Damage Abortion Clinic In Oklahoma*, NEW YORK TIMES, Jan. 20, 1997 at A3.

418. *See id.*

419. *See id.*

420. *See Boy, 15, Held in Clinic Bombing*, NEWSDAY (New York, N.Y.), Feb. 7, 1997 at A17.

421. *See State Reports Montana: Abortion Clinic Set on Fire*, 7 AM. POLITICAL NETWORK ABORTION REPORT, No. 170, Apr. 3, 1997, available in WL 4/3/97 APN-AB 3.

422. *See id.*

423. *See id.*

424. *See State Reports California: Propane-Loaded Truck Driven Into Clinic*, 7 AM. POLITICAL NETWORK ABORTION REPORT, No. 159, Mar. 18, 1997, available in WL 3/18/97 APN-AB 3.

but apparently has not been charged under FACE although Federal agents have been helping in the investigation.⁴²⁵ Although it appears Mr. Howard intended to cause severe damage, the interior of the truck did not fully ignite and firefighters were able to put out the fire before an explosion occurred.⁴²⁶ These incidents make it readily apparent that the violence surrounding the abortion debate continues.

Activists still chant violent battle cries: "We are the church militant. There is a battle going on. We are armed with bows, and we need to fire those weapons;"⁴²⁷ "[a]ll abortion providers should be murdered and Supreme Court Justices should be murdered because of *Roe v. Wade*."⁴²⁸ With these war cries, the deadly violence continues. Anne Lewis of Planned Parenthood has said "[y]ou cannot keep screaming 'Baby killer, baby killer' every day, then walk away and pretend you are shocked that someone has done something [violent.]"⁴²⁹ Although Americans have the right to voice their discontentment and to publicly criticize constitutional decisions with which they disagree, at least twenty-one arsons or attempted arsons occurred at women's health centers in 1995.⁴³⁰ Assaults and death threats continue to plague doctors and clinic staff.⁴³¹

On December 30, 1994, an armed gunman, John Salvi III, murdered two women and injured five others when he went on a

425. *Id.*

426. *See id.*

427. *See* Susan Roth, *Protests Leave Abortion Foes Rejuvenated, Supporters Wary*, ARKANSAS DEMOCRAT-GAZETTE, July 17, 1995 (quoting Reverend Flip Benham, leaving a protest in Little Rock, Arkansas), *cited in A Year in Review: The "Pro Life" Movement Continues Its Deadly Agenda July 24, 1994 - July 29, 1995*, *supra* note 25, at 16.

428. Statements made by Stanley Scott, a frequent protestor at a clinic in Connecticut which has been subject to constant protests and blockades. *1994 Death Threat Report* (The Feminist Majority Foundation, Arlington, Va.), 1994-95, *cited in A Year in Review: The "Pro-Life" Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995*, *supra* note 25, at 13.

429. Rene Sanchez, *From Year of Promise to Year of Violence; Abortion Rights Advocates Decry Trend Toward Militant Opposition*, WASH. POST, Dec. 31, 1994, at A14.

430. *See A Year in Review: The "Pro-Life" Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995* *supra* note 25, at introduction, 16.

431. *See id.* at 6.

shooting rampage inside a clinic in Brookline, Massachusetts.⁴³² Again, on December 31, 1994, the gunman attempted to gain entrance into a clinic in Norfolk, Virginia, and when he was unable to do so, shot 23 bullets at the structure.⁴³³ Mr. Salvi was arrested and, soon thereafter, his competency to stand trial was questioned by his attorneys.⁴³⁴ Mr. Salvi was charged with two counts of first degree murder and five counts of armed assault with intent to murder in regards to the incident in Brookline, but was not charged under FACE.⁴³⁵ Seemingly, the jury did not credit Mr. Salvi's insanity defense at trial.⁴³⁶ The jury convicted Mr. Salvi on all counts and he was sentenced to two life sentences for the murder charges and five additional terms for the attempted murder charges.⁴³⁷

Mr. Salvi was granted an automatic appeal to the Massachusetts Supreme Judicial Court.⁴³⁸ Legal commentators had asserted that the likely grounds of Mr. Salvi's appeal would be the limitations that were imposed on Mr. Salvi's ability to testify on his mental competence and the admission of testimony regarding the earlier murders in Florida.⁴³⁹ Additionally, the District Attorney's Office in Norfolk, Virginia indicated that Mr. Salvi would have been tried in Virginia for maliciously shooting bullets into the Hillcrest Clinic located in Norfolk.⁴⁴⁰ Mr. Salvi was originally arrested in Norfolk, but charges were deferred so

432. See *Insanity Defense Planned In Abortion Clinic Attack*, CHICAGO SUN-TIMES, Sept. 16, 1995, at 13; see also *A Year in Review: The "Pro-Life" Movement Continues Its Deadly Agenda: July 29, 1994 - July 29, 1995*, supra note 25, at 6.

433. See *A Year in Review: The "Pro-Life Movement Continues its Deadly Agenda: July 29, 1994 - July 29, 1995*, supra note 25, at 6.

434. See *Lawyer Plans Insanity Defense In Slayings at Abortion Clinics*, WASH. POST, September 16, 1995, at A14.

435. See John Ellement, *Salvi Waives Right to Join Jurors on Tour of Brookline Shooting Sites*, BOSTON GLOBE, Feb. 10, 1996, at 13.

436. See *Brookline Shootings John Salvi: Insanity Defense Denied; Gets 2+ Life Sentences*, 7 AM. POLITICAL NETWORK ABORTION REPORT No. 160, Mar. 19, 1996, available in WL 3/19/96 APN-AB 4.

437. See *id.*

438. *State Reports Massachusetts: What Will Happen With Salvi's Appeal*, 7 AM. POLITICAL NETWORK ABORTION REPORT No. 162, Mar. 21, 1996, available in WL 3/21/96 APN-AB 3.

439. See *id.*; supra notes 316-26 and accompanying text.

440. See *Brookline Shootings John Salvi: Insanity Defense Denied; Gets 2+ Life Sentences*, 7 AM. POLITICAL NETWORK ABORTION REPORT No. 160, Mar. 19, 1996, available in WL 3/19/96 APN-AB 4.

that he could be tried in Massachusetts.⁴⁴¹ However, on November 30, 1996, Mr. Salvi was found dead of apparent suicide in his cell in a Massachusetts maximum-security prison⁴⁴²

Mr. Salvi's attorney and his parents question whether Mr. Salvi's death was suicide.⁴⁴³ Mr. Salvi was found in his cell with his feet tied, his hands tied, cotton stuffed in his mouth and a plastic bag over his head.⁴⁴⁴ William Weld, governor of Massachusetts, has ordered an extended investigation into Mr. Salvi's death and mental health care.⁴⁴⁵

On January 21, 1997, Judge Dortch-Okara voided Mr. Salvi's convictions based on precedent which allows for the charges against an inmate to be dismissed if he dies before his case is reviewed by an appellate court.⁴⁴⁶ Shortly after the nullification of Mr. Salvi's convictions, the Massachusetts Senate unanimously approved a bill that would prohibit such posthumous action, referred to as legal abatement.⁴⁴⁷ The bill is also expected to gain approval from the Massachusetts House of Representatives.⁴⁴⁸

III. Analysis

The federal government has the power to bring an action under FACE if it has cause to believe that a person's conduct will wrongfully interfere with the exercise of a woman's constitutional right to terminate a pregnancy.⁴⁴⁹ The congressional intent in enacting FACE was to ensure that there was a federal remedy for violence at reproductive health care clinics because state and local law had proven inadequate to deter and punish

441. *See id.*

442. *See State Reports Massachusetts: Salvi Family and Gov. Call For Investigation*, 7 AM. POLITICAL NETWORK ABORTION REPORT No. 94, Dec. 3, 1996, available in WL 12/3/96 APN-AB 3.

443. *See id.*

444. *See id.*

445. *See id.*

446. *See John Ellement, Salvi's Record Wiped Clean, Posthumously Charges Voided on Technicality*, BOSTON GLOBE, Feb. 1, 1997 at A1.

447. *See Doris Sue Wong, Massachusetts Bill Aims to Keep Dead Killers Convicted*, BOSTON GLOBE, Mar. 1, 1997, at A17.

448. *See id.*

449. *See* 18 U.S.C. § 248(a)(1), (c)(2)(A) (1994).

the violent activity being organized across state lines.⁴⁵⁰ Yet, the majority of complaints filed by clinics are still referred to state and local law enforcement authorities.⁴⁵¹ Of the clinics that indicated that they had informed federal authorities of FACE violations, very few have stated that their complaints resulted in criminal action under federal law.⁴⁵² Therefore, even though violence seems to have decreased and law enforcement seems to have improved, the impetus for the enactment of FACE seems to have fallen by the wayside.

The wording of the statute, which prohibits intentional intimidation, interference and physical obstruction,⁴⁵³ clearly authorizes federal law enforcement officials to arrest those who employ tactics to block access to the clinics and harass staff and patients.⁴⁵⁴ It is unnecessary to wait until violence erupts or until services have been halted. If those who participate in demonstrations which obstruct access recognize the presence of federal agents, it is likely that this will curb their violently aggressive routine.⁴⁵⁵ Yet, the irresolute conduct of federal agencies has left the problem in the hands of state authorities.⁴⁵⁶

Perhaps the hesitancy of federal agencies to enforce FACE themselves comes from the fact that the constitutionality of the statute has been questioned on several occasions.⁴⁵⁷ However, the senate report on the proposed bill is clear in expressing that Congress had the authority to enact the statute and the provisions are consistent with the United States Constitution.⁴⁵⁸ The district court in *Hoffman* believed that the United States Supreme Court decision in *Lopez* had limited congressional

450. See S. REP. No. 103-117, at 2-3 (1993); *supra* notes 70-72, 259, 261-310 and accompanying text.

451. See *supra* notes 264, 303-07 and accompanying text.

452. See *1995 Clinic Violence Survey Report*, *supra* note 224, at 8.

453. See *supra* notes 47-49 and accompanying text.

454. See *supra* notes 47-50 and accompanying text.

455. See *1995 Clinic Violence Survey Report*, *supra* note 224, at 2 (finding that there is a direct correlation between law enforcement response and the level of violence occurring at reproductive health clinics); *supra* notes 289-302 and accompanying text.

456. See *supra* notes 262-70 and accompanying text.

457. See *supra* Part II.D.

458. See S. REP. No. 103-117 at 28-33 (1993); *supra* notes 70-74 and accompanying text.

power under the Commerce Clause.⁴⁵⁹ The court in *Hoffman* held that Congress had exceeded its power under the Commerce Clause because reproductive health clinics were not the target of the statute and, even if they were, the clinics are not involved in interstate commerce to an extent that would allow federal regulation.⁴⁶⁰ Of course, the *Hoffman* court did not feel that the violence at reproductive health clinics should be ignored, but rather that such violence was an area of traditional state concern and should remain such.⁴⁶¹

The United States Court of Appeals for the Seventh Circuit addressed the same issues in *Wilson* and upheld the constitutionality of FACE.⁴⁶² Although the *Wilson* court agreed that the fact that the problem was national in scope, standing alone, could not justify Congress' power to enact FACE, it held that the numerous findings that clinics participate in interstate commerce and that the activities of violent protestors were organized across state lines could sustain the congressional action.⁴⁶³ The court in *Hoffman* explicitly stated that its holding contradicted that of two earlier courts that held FACE was constitutional,⁴⁶⁴ and it is likely that the *Hoffman* decision will be reversed on appeal given its retreat from precedent.

The federal enactment of the Gun-Free School Zone Act which the *Lopez* Court held was beyond the power granted to Congress under the Commerce Clause⁴⁶⁵ is easily differentiated from the enactment of FACE. Upon enacting the Gun-Free School Zone Act, Congress provided no findings relevant to its Commerce Clause power and, in *Lopez*, it was emphasized that neither the statute, nor its legislative history contained any findings relevant to the effects that gun possession near a school may have on interstate commerce.⁴⁶⁶ When enacting FACE, however, Congress made specific findings based on expert testi-

459. See *supra* notes 128-49, 158-60 and accompanying text.

460. See *supra* notes 128-49 and accompanying text.

461. See *Hoffman*, 923 F. Supp. at 813-14.

462. See *Wilson*, 73 F.3d at 688-89 (7th Cir. 1995); *supra* notes 117-25, 150-54 and accompanying text.

463. See *supra* notes 117-25, 150-54 and accompanying text.

464. See *Hoffman*, 923 F. Supp. at 814 (citing *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) and *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995)).

465. See *supra* notes 132-36 and accompanying text.

466. See *Lopez*, 115 S. Ct. at 1631-32.

mony which revealed that reproductive health clinics are involved in a commercial activity, and that the Act was intended to prohibit obstruction of such activity.⁴⁶⁷ Although Congress is not required to make such findings,⁴⁶⁸ if findings are made they will be considered when the judiciary is forced to determine whether the activity at issue has a substantial effect on interstate commerce.⁴⁶⁹ If such findings are deemed reasonable by the judiciary, the legislation will be upheld.⁴⁷⁰ Perhaps the court stated it best in *Cheffer v. Reno*⁴⁷¹ when it stated that "Congress' findings are plausible and provide a rational basis for concluding that [FACE] regulates activity which 'substantially affects' interstate commerce. Thus, [FACE] is a constitutional exercise of Congress' power under the Commerce Clause."⁴⁷²

The *Hoffman* court's assertion that FACE is view-point based and is intended only to restrict the actions of pro-life activists,⁴⁷³ is easily refuted by the fact that Daniel Mathison, a pro-choice activist, was charged and convicted for violating FACE.⁴⁷⁴ Although Mathison is the only pro-choice activist charged under FACE thus far, it is clear evidence that the statute can, and should, be applied even-handedly. The language of the statute was altered specifically to address concerns that it would be applied only to pro-life activists.⁴⁷⁵ Therefore, the legislative history also makes clear that the statute was to be applied to everyone in the same manner.⁴⁷⁶ Neither pro-life nor pro-choice activists have a right to impose their political beliefs onto someone else by means of force, harassment, or intimidation.⁴⁷⁷

467. See S. REP. NO. 103-117, at 30-32 (1993).

468. See *Lopez*, 115 S. Ct. at 1631.

469. See *id.* at 1631-32.

470. See *Wilson*, 73 F.3d at 679-80.

471. 55 F.3d 1517 (11th Cir. 1995); see generally *supra* notes 126-27 and accompanying text.

472. *Cheffer*, 55 F.3d at 1520-21.

473. See *Hoffman*, 923 F. Supp. at 821-22; *supra* notes 211-13 and accompanying text.

474. See *supra* notes 372-77 and accompanying text.

475. See *supra* notes 88-90 and accompanying text.

476. See *supra* notes 88-90 and accompanying text.

477. See 18 U.S.C. § 248(a) (1994).

The hesitancy of federal agencies to participate in the enforcement of FACE causes women seeking to exercise their freedom of choice to continue to face vicious acts of domestic terrorism. Physicians and clinic staff have been shot and killed.⁴⁷⁸ Medical students must reconsider learning how to perform abortions, for fear that their lives and the lives of their families will be put in jeopardy.⁴⁷⁹ Although the level of violence at abortion clinics has decreased,⁴⁸⁰ the purpose of FACE, to ensure that federal law enforcement agencies could effectively and efficiently respond to clinic violence,⁴⁸¹ has not been fully accomplished and will not be fully accomplished unless federal law enforcement agencies are made aware of their duties under FACE. After the murders of Doctor Britton and Lieutenant Colonel Barrett,⁴⁸² it was hoped that federal law enforcement agencies would react to complaints of violence more effectively.⁴⁸³ However, almost one-fifth of clinics that reported FACE violations to federal law enforcement agencies were informed that the federal government would not prosecute.⁴⁸⁴

Perhaps the most enlightening example of the federal government's reluctance to pursue FACE convictions is the fact that John Salvi III, who shot and killed two people and wounded five others at one clinic, and shot at the structure of a second clinic in another jurisdiction, was arrested for violating both state's laws but was never charged under FACE.⁴⁸⁵ Although Mr. Salvi received two life sentences on the state charges, and a charge under FACE could not have imposed a greater sentence,⁴⁸⁶ Mr. Salvi should have been indicted under federal law. Had Mr. Salvi been convicted of violating FACE, rather than being charged only with state crimes, his convictions would most likely have remained in tact even after his death. Although the nullification has no practical effect due to

478. See *supra* notes 39-42, 316-26, 408-11 and accompanying text.

479. See *supra* notes 221-25, 240-42 and accompanying text.

480. See 1995 Clinic Violence Survey Report, *supra* note 224, at 2-3.

481. See *supra* notes 1-6, 39, 70-72 and accompanying text.

482. See *supra* notes 316-26 and accompanying text.

483. See Rene Sanchez, *From Year of Promise to Year of Violence; Abortion Rights Advocates Decry Trend Toward Militant Opposition*, WASH. POST, Dec. 31, 1994.

484. See 1995 Clinic Violence Survey Report, *supra* note 224, at 8.

485. See *supra* notes 408-19 and accompanying text.

486. See 18 U.S.C. § 248(b)(2) (1994).

Mr. Salvi's death, the victims of Mr. Salvi's murderous rampage feel it is important that Mr. Salvi not be relieved of responsibility.⁴⁸⁷ Representative John Rogers, co-chairman of the Joint Committee on the Judiciary in Massachusetts and co-sponsor of the bill seeking to ban similar acts of nullification, has stated that "[t]he current policy adds insult to injury to victim's families by erasing an arduously and emotionally won conviction."⁴⁸⁸ Had Mr. Salvi been charged under FACE, the families of these victims would, at least, have the satisfaction of having Mr. Salvi remain accountable for his actions.

Mr. Salvi's murderous actions were a clear violation of FACE.⁴⁸⁹ A federal indictment would have sent a clear message that violence will not be tolerated as a means of social and political expression. Instead, the absence of a federal charge sent the opposite message: protection from anti-abortion violence will remain a state concern, that federal law enforcement agencies will not get involved, and that FACE is simply an illusory means of protection.

The legislative history illustrates that Congress felt that state and local law enforcement had been ineffective in addressing the violence at reproductive health clinics.⁴⁹⁰ Often, when activists gather in a small town or city, they outnumber the police force.⁴⁹¹ Additionally, activists have been known to travel across state lines to reproductive health clinics and often the strategy for obstruction is orchestrated across state lines.⁴⁹² This causes jurisdictional difficulties for local law enforcement.⁴⁹³ Were the federal government responsive to the pleas of the clinics under siege, access to criminal records and relevant data would be less complicated. Although state and local authorities may be in a better position to monitor the clinics and the violent activity, the resources of the federal government should be available and the powerful deterrent effect of the fed-

487. See Doris Sue Wong, *Massachusetts Bill Aims to Keep Dead Killers Convicted*, BOSTON GLOBE, March 1, 1997, at A17.

488. See *id.*

489. See *supra* notes 408-19 and accompanying text; 18 U.S.C. § 248(a)(1) (1994).

490. See *supra* notes 70-72 and accompanying text.

491. See *supra* notes 280-88 and accompanying text.

492. See *supra* notes 275-76 and accompanying text.

493. See *supra* notes 275-80 and accompanying text.

eral indictment and stringent penalty scheme should be utilized.

The federal government must insist that its agents take every available step to stop the violence. Federal Marshals must work *with* local law enforcement. The federal government should supervise local officials to ensure that each officer's personal political beliefs do not impede his or her ability to enforce the law. At the very least, the federal agencies must act as a check on local government to ensure that every individual is free to exercise his or her constitutional rights. For FACE to reach its potential as a deterrent and as the authoritative basis to press charges against those who undertake violent means of protest, the federal government must see beyond the political sensitivity surrounding the issue of abortion⁴⁹⁴ and concentrate on ending the violent rampage at clinics across the country.

The best way to ensure that federal agents understand the gravity of the violence clinics face and the immediate need for federal intervention is through an educational program which details the authority granted by FACE and the need for prompt enforcement. Every federal agent must learn that abortion protests have gone beyond the scope of First Amendment protection into the realm of unlawful violence.⁴⁹⁵ Although protecting the integrity of the First Amendment is of utmost importance, violence, and encouragement thereof, is not protected by the United States Constitution.⁴⁹⁶

A federal program which teaches law enforcement officials to monitor clinics at risk and those activists who have stated that they believe murder of persons who attempt to perform abortions is justifiable, should be implemented to ensure that FACE is effectively enforced. This matter is no longer solely within the realm of state and local authorities.⁴⁹⁷ FACE was enacted because state and local authorities had proven inadequate.⁴⁹⁸ Federal agents must be informed of the authority they have been granted by Congress under FACE, the need for enforcement, and the difference between a peaceful protest pro-

494. See generally *supra* Part II.A.

495. See *supra* notes 23-25, 173-78, 188-90 and accompanying text.

496. See U.S. CONST. amend. I; see also *supra* 189-90 and accompanying text.

497. See *supra* notes 70-74 and accompanying text.

498. See *supra* note 72 and accompanying text.

tected by the Constitution and a violent obstruction in violation of federal law.

One of the most prominent tactics used against abortion providers is death threats.⁴⁹⁹ These threats tend to be graphic, violent and aggressive.⁵⁰⁰ FACE specifically prohibits the threat of force in connection with the provision of abortion services⁵⁰¹ and can, therefore, be used to address death threats. A death threat is only a violation of FACE, however, if threats of force contained within the letter, telephone call or person-to-person encounter intended to intimidate the receiver from providing or obtaining reproductive health services.⁵⁰² In 1994, following the murders of Doctor Britton and Retired Lieutenant Colonel Barrett in Pensacola,⁵⁰³ death threats against health care workers reached an all-time high.⁵⁰⁴ With relatively low expenditures on investigation, FACE provides federal authorities with a means to address this problem,⁵⁰⁵ yet there has been inadequate enforcement of these provisions and doctors continue to be intimidated by threats of violence, which creates a shortage of physicians who are willing to provide reproductive health services out of fear for their own health and safety.⁵⁰⁶ Death threats, whether received at the clinic or at the home, are actionable under FACE⁵⁰⁷ and enforcement of the federal statute is likely, at the very least, to serve as a deterrent and a reminder that any means of intimidation or harassment which interferes with the exercise of a constitutional right will not be tolerated.

Further, one type of violence that remains at a high level is that which is aimed at clinic staff and physicians at their

499. See *1994 Clinic Violence Survey Report*, supra note 232, at 15; supra notes 308-12 and accompanying text.

500. See, e.g., supra notes 60-63 and accompanying text.

501. See supra notes 47-50 and accompanying text.

502. See supra notes 47-50 and accompanying text; see also S. REP. NO. 103-117, at 22-24 (1993).

503. See supra notes 316-26 and accompanying text.

504. See *1994 Clinic Violence Survey Report*, supra note 232, at 15.

505. See generally 18 U.S.C. § 248 (1994); supra notes 47-57 and accompanying text.

506. See supra notes 221-29, 240-42 and accompanying text.

507. See supra notes 308-12 and accompanying text.

homes.⁵⁰⁸ FACE allows federal authorities to protect clinic staff, even when they are not on the clinic premises.⁵⁰⁹ The Senate Report explicitly states that “[t]he conduct prohibited by [FACE] constitutes a violation whether or not it occurs in the vicinity of a facility that provides abortion related services.”⁵¹⁰ If protestors blockade a doctor’s home with the intent to impede passage from the home to the clinic, FACE allows for prosecution as physical obstruction of access to a reproductive clinic.⁵¹¹ It is the intent to intimidate or interfere with reproductive health services of any kind that allows application of FACE.⁵¹² This requirement, at the same time, ensures that federal enforcement of FACE will not infringe on the constitutional rights of those who choose to voice their objection to abortion.

For a first offense, those who violate FACE are subject to fines and imprisonment of not more than a year.⁵¹³ When the conduct consists wholly of nonviolent physical obstruction, FACE provides for penalties not in excess of \$10,000 and imprisonment of no more than sixth months.⁵¹⁴ Peaceful, non-obstructive protest is not punishable by law.⁵¹⁵ Persons arrested under FACE typically receive reduced sentences, time served, or nominal fines.⁵¹⁶ Even when courts impose orders of protection to keep violators within a specified distance from clinics, many refuse to comply.⁵¹⁷ Federal law enforcement authority and judicial orders are regularly ignored.⁵¹⁸ Protestors often leave jail and return immediately to the clinics.⁵¹⁹ If the penalties provided for in FACE were vigorously imposed, it might be a more powerful deterrent. Although someone who obstructs a

508. See *supra* notes 308-12 and accompanying text; see also 1995 *Clinic Violence Survey*, *supra* note 224, at 5.

509. See *supra* notes 310-12 and accompanying text; S. REP. NO. 103-117, at 24-25 (1993).

510. See S. REP. NO. 103-117, at 24 (1993).

511. See *id.* at 23-24.

512. See *supra* notes 47-50 and accompanying text.

513. See 18 U.S.C. § 248(b)(1) (1994).

514. See *id.* § 248 (b)(2) (1994).

515. See *supra* notes 174-78 and accompanying text.

516. See, e.g., *supra* notes 346-61 and accompanying text.

517. See *supra* notes 352-53, 362-69 and accompanying text.

518. See *supra* notes 349-53, 362-69 and accompanying text.

519. See, e.g., Ramey, *supra* note 282, at 13. “Despite his recent release from a two and a half year sentence, Boston rescuer Bill Cotter . . . joined in the Dobbs Ferry blockade that closed the mill for a day.” *Id.*

clinic should clearly not face the same penalty as someone who assaults a clinic patient, the punishment imposed must be stringent enough, in either case, to be an effective, specific and general deterrent. Yet, the federal courts have been hesitant to impose severe penalties, presumably due in part to the First Amendment issues involved. However, once a person has violated FACE, he or she has stepped beyond the realm of First Amendment protection.⁵²⁰

One crucial element to ensuring that FACE is enforced properly is to assure that those charged with its enforcement understand its provisions. FACE criminalizes force, threat of force, physical obstruction, intentional or attempted injury, intimidation, or interference with any person with the intent to prevent such person from obtaining or providing reproductive health services.⁵²¹ Each one of those terms is defined and explained in the statutory definitions or case law.⁵²² Federal law enforcement agencies must be educated to the differences between interference with clinic services and peaceful protest, since the latter remains constitutionally protected.

Once protestors are no longer demonstrating their adversity by "pure speech" and rather choose to implement tactics which cause an obstruction to service providers and patients, FACE must be enforced, arrests must be made, and the perpetrators must be subject to the penalties authorized by FACE. Such activity includes blocking clinic doors, driveways, and threatening patients and staff.⁵²³ To achieve the goals of FACE, the federal government must investigate and scrutinize areas where demonstrators advocate violence. Although a nationwide investigation and an educational program may be costly, unless federal agencies take every possible step to see that FACE is enforced, those who seek to exercise the constitutional right to have an abortion will continue to be at risk. In the beginning

520. See 18 U.S.C. § 248(d)(1) (1994); *supra* notes 173-78, 188-90 and accompanying text.

521. See 18 U.S.C. § 248(a)(1) (1994); *supra* notes 47-52 and accompanying text.

522. See 18 U.S.C. § 248(e) (1994); *supra* notes 47-49, 186-88, 199-210 and accompanying text.

523. See S. REP. NO. 103-117, at 23-24 (1993).

months of 1997, clinics continue to be bombed and yet the suspects do not face federal charges.⁵²⁴

Further, stringent federal enforcement may encourage medical professions to continue to provide abortions, which is now a risky business.⁵²⁵ The legislative history makes clear that Congress intended FACE to be a tool to end the ongoing violence surrounding the practice of abortion.⁵²⁶ Only through a federal system which encompasses broad investigations, education, supervision of and cooperation with local authorities, frequent arrests, and fair and just prosecutions, can FACE live up to its potential as an effective deterrent and authoritative statute.

IV. Conclusion

These acts of violence cannot continue. Each protestor, on either side of the debate, is constitutionally entitled to voice his or her political opinions about legalized abortion, but regardless of political beliefs, both sides must unify to ensure that violence is not part of the solution. Whether your personal political views are pro-life or pro-choice, the use of deadly violence should not be condoned.

The debate surrounding legalized abortion will continue, but the deadly violence can and must be stopped. FACE can be an effective tool to bring a change in the atmosphere at abortion clinics throughout the United States. Doctors should not have to wear bullet proof vests and hire body guards in order to provide a constitutionally protected service,⁵²⁷ and women should not have to fear for their lives when they make the already difficult decision to enter an abortion clinic for services. Only if the federal law enforcement agencies let their presence and authority be known will FACE protect those seeking and performing abortions. Contacting the clinics is a starting point,⁵²⁸ but response is critical.

524. See *supra* notes 408-26 and accompanying text.

525. See *supra* notes 221-25, 240-42 and accompanying text.

526. See *supra* note 5 and accompanying text.

527. See *supra* notes 221-22 and accompanying text.

528. See, e.g., *1995 Clinic Violence Survey Report*, *supra* note 224, at 10 (over two-thirds of clinics reported that they had been contacted by United States Marshals about clinic violence).

The congressional intent in enacting FACE was to end the senseless violence,⁵²⁹ but without stringent enforcement the violence will undoubtedly continue. Those clinics which have received law enforcement assistance have seen a marked decrease in the daily violence at the clinics.⁵³⁰ Sitting idle in a statute book, FACE is ineffective. Federal agents must inform themselves of the authority FACE bestows upon them, become a powerful and deterring presence at clinics, monitor clinics which have experienced high levels of violence, supervise local authorities and urge that state law be enforced in conjunction with FACE, and investigate and pursue FACE violations for death threats or "threats of force."⁵³¹ Only by these means will we see an end to the rampant violence surrounding abortion clinics. This violence is not "*justifiable*,"⁵³² rather it is a federal crime which must be sternly punished.

Robust debate on the issue of abortion will, and should continue. However, the instrument of debate should be speech and not violence. If we allow this form of domestic terrorism to continue, the federal government is, in effect, saying to all those who oppose a constitutional issue or a government policy that the best way to express your discontent is to pick up a gun or a bomb and seek your own justice. If FACE is effectively enforced the message will be that the use of such violence will be punished to the fullest extent of the law.

*Arianne K. Tepper**

529. See *supra* notes 1-6 and accompanying text.

530. See *1995 Clinic Violence Survey Report*, *supra* note 224, at 10; *supra* notes 298-305 and accompanying text.

531. 18 U.S.C § 248(a)(1) (1994).

532. See *supra* notes 31-35 and accompanying text.

* This article is dedicated in loving memory to my grandparents, Joseph and Gladys Levy.