

NO PLACE TO HIDE: WHY STATE AND FEDERAL ENFORCEMENT OF STALKING LAWS MAY BE THE BEST WAY TO PROTECT ABORTION PROVIDERS

I. INTRODUCTION

“I think that if you live by the sword, you’re going to die by the sword.”¹ This announcement, made by an anti-abortion protestor interviewed on television, serves as a chilling example of a new attitude surfacing in the divisive debates surrounding the bitter issue of abortion. Once upon a time, the discussion was one of semantics and differing ideologies. Once upon a time, the issue was whether or not a woman had a right to obtain an abortion.² Once upon a time, the game was played out in courtrooms and was based on legal niceties. Times have changed though, and abortion foes have rewritten the rules of the game. Now, discussion has turned into threats and real episodes of physical violence.³ Now, the issue is not whether a woman has a right to control her body; the issue is how many abortion protestors a woman will have to fend off in order to get into a clinic to exercise that right.⁴ And now, the game is played out where abortion providers and their families live,⁵ and wherever their employees

1. *Nightline: Doctors Targets of Anti-Abortion Threats* (ABC television broadcast, Mar. 12, 1993) [hereinafter *Nightline*].

2. See *Roe v. Wade*, 410 U.S. 113 (1973).

3. In 1991, abortion providers reported experiencing 95 incidents of violence, including bombings, arson, assault, and vandalism. In 1992, 194 such incidences were reported. By 1993, the number had risen to 434, including one murder and one attempted murder. NATIONAL ABORTION FEDERATION, INCIDENTS OF VIOLENCE AND DISRUPTION AGAINST ABORTION PROVIDERS (1994) (on file with author).

4. In 1990, 45 incidences of picketing occurred at abortion clinics and 1363 arrests took place. In 1991, 292 incidences of picketing occurred at clinics and 3885 arrests took place. In 1992, 2898 incidences of picketing occurred and 2580 arrests took place. Finally, in 1993, 2279 incidences of picketing at clinics occurred and 1236 arrests took place. *Id.*

5. Jeri Rasmussen, a women’s health clinic owner, checks her car every day for vandalism and her driveway for nails planted to destroy her tires. Chunks of concrete have been thrown through the windows of her home with anti-abortion messages attached. Laura L. Sydell, *The Right-to-Life Rampage: Anti-Abortion Groups Step Up the Terror*, THE PROGRESSIVE, Aug. 1993, at 24. See *infra* notes 26-62 and accompanying text for examples of harassment of clinic doctors and employees.

go.⁶ Today, abortion providers are considered "fair game."⁷ Anti-abortion groups such as Operation Rescue have declared war on providers, promising them "No Place to Hide."⁸ Militant abortion protestors raised the stakes of the game, and now they are playing for keeps: the life of the abortion provider.

Attempts to shield providers from intrusive and illegal action by protestors have been made. In 1994, Congress enacted the Freedom of Access to Clinic Entrances Act (FACE),⁹ which established criminal and civil penalties for use against anti-abortion protestors who block access to abortion clinics. However, abortion providers generally agree that the Act has failed to reduce incidences of violence at their clinics.¹⁰

Recent judicial decisions also reflect concern for the safety of abortion providers and patients. In 1993, in *National Organization of Women, Inc. v. Scheidler*,¹¹ the Supreme Court found in favor of the National Organization for Women (NOW) in a civil suit against a coalition of anti-abortion groups and refused to exempt abortion opponents from potential liability under the Racketeering Influenced and Corrupt Organizations Act (RICO).¹² This decision allows pro-choice groups to challenge anti-abortion activities as patterns of racketeering activity and to seek substantial monetary penalties. *Scheidler*'s practical value will be limited, however, to organizations such as NOW that can afford massive litigation costs; it will not aid the individual abortion practitioner.

Each state also has a myriad of criminal statutes that prosecutors may invoke to prosecute dangerous protestors.¹³ Almost all of these statutes,

6. Patricia Windle is the owner of the Aware Women Center for Choice in Melbourne, Florida. Sydell, *supra* note 5, at 25. Recalling the harassment of her friends, family, and employees that has gone on for much of her twenty years as an abortion provider, Windle recounted one instance as an example. One day, Windle was called to an employee's house to comfort the employee's screaming child; the child had been scared by an anti-abortion protestor who waited until the child's mother had gone to work before coming to the door to harass the child. *Id.*

7. *Minnesota: Free Speech Question Raised by Clinic Laws*, American Political Network, June 10, 1993, available in LEXIS, Nexis Library, Current News File.

8. See H.R. REP. NO. 306, 103d Cong., 1st Sess. 5 (1993). Jeff White, the Director of Operation Rescue for California, originated the "No Place to Hide" campaign of harassment toward doctors providing abortions. *Id.*

9. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (to be codified at 18 U.S.C. § 248); see also S. REP. NO. 117, 103d Cong., 1st Sess. 1 (1993).

10. Peter Eisler, *Abortion Providers Say New Law Does Not Protect Them*, Gannett News Service, Sept. 22, 1994, available in LEXIS, Nexis Library, Current News File.

11. *National Organization for Women, Inc. (NOW) v. Scheidler*, 114 S. Ct. 798 (1994).

12. 18 U.S.C. §§ 1961-1968 (1988).

13. See *infra* Part III.C. for a discussion of these state statutes.

however, require that the victim suffer some level of physical attack, thereby leaving a victim unprotected from harassment short of physical violence that a victim finds threatening. However, the use of statutes that do not require a physical attack, such as harassment statutes, raises serious constitutional difficulties. Despite this veritable cornucopia of existing remedies to protect providers against abuse, attacks will continue. None of the described remedies effectively protects abortion providers.

This Note advocates the use of state stalking statutes to prosecute overzealous anti-abortion protestors and protect abortion providers. The existence of stalking laws in almost every state¹⁴ presents a unique opportunity to guard the safety of abortion providers, both at work and in their private lives. State stalking statutes offer the most effective response to the problems each individual provider faces. The statutes are tailored to restrain both verbal and physical actions, and, thus, would prohibit the harassment and residential picketing that many providers experience.¹⁵ Further, most state stalking laws exempt legitimate protest¹⁶ and are narrowly drafted so as to resist constitutional challenge,¹⁷ unlike other available criminal statutes that target the same behavior.¹⁸ Thus, stalking laws already in place, rather than new and costly legislation, can be used to stop violence by anti-abortion protestors.

More importantly, stalking laws provide immediate physical security to the vulnerable doctor or clinician by authorizing courts to impose restraining orders and harsh criminal sanctions on stalker-protestors. The independent shelter of stalking laws legitimizes the victim's belief that she is the target of a novel and virulent crime intended to wear down her defenses.¹⁹ In the abortion context, the protestor's intent is to get at the "weak link"²⁰ in the armor of abortion rights and force all abortion providers to quit the system. This campaign of terrorism is working: anti-

14. See *infra* note 124 for a survey of state stalking laws.

15. See *infra* Part IV.B. for a discussion of the range of behaviors proscribed by stalking statutes.

16. See, e.g., IND. CODE § 35-45-10-1 (1993) (providing that the definition of stalking "does not include statutorily or constitutionally protected activity").

17. See *infra* notes 167-91 and accompanying text for a discussion of the constitutional challenges to stalking laws.

18. See *infra* notes 114-17 and accompanying text.

19. See Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 890 (1993) ("The victim's state of mind is an important component of many anti-stalking laws.").

20. Randall Terry, President of Operation Rescue, see *infra* notes 26-48 and accompanying text, has been quoted as stating that doctors are the "weak link" in the provision of abortion services, and he has vowed to make doctors' lives "a living hell." H.R. REP. NO. 306, *supra* note 8, at 9.

abortion protestors continue to endanger women's access to a constitutionally protected abortion as well as doctors' and clinicians' lives.

While state stalking statutes promise to be the most effective tool yet in restraining the illegal activity of abortion protestors, some criticisms remain concerning their use. First, while the restraining order²¹ is the most common remedy used in conjunction with state stalking laws,²² the restraining order, often proves ineffective because it is simply ignored.²³ Thus, the value of using stalking laws against abortion protestors is limited by the order's enforceability. Second, even if state legislatures endorse the use of stalking laws to prosecute anti-abortion protestors, local or state police and courts may simply refuse to enforce those laws.²⁴ Third, stalking laws may face constitutional challenge.²⁵ While these problems may appear fatal, they can be overcome by careful drafting.

These criticisms, though valid in certain situations, do not substantially reduce the overall effectiveness of using state stalking laws to protect abortion providers, their families, and their patients. State stalking laws remain the best, and the most narrowly tailored, means to prosecute anti-abortion protestors who exceed the legal limits of protest.

II. THE CAMPAIGN TO END ACCESS TO ABORTION

While generalization is inherently dangerous, Operation Rescue stands as a moderately mainstream example of the philosophies and organizational

21. A restraining order is a court-ordered injunction issued against a person who has harmed, attempted to harm, or threatened to harm another, and is usually issued in an emergency situation. *McAnaney et al.*, *supra* note 19, at 876 n.281.

22. See Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Perceived Problems with Today's Injunction System*, 19 OHIO N.U. L. REV. 271, 271, 273 (1992).

23. In Illinois, 35,346 order-of-protection violations were reported in a five-month period in 1992. *Id.* at 876 n.280 (citing Linda Mae Caristone, *Every Day May Be My Last*, CHI. TRIB., Sept. 13, 1992, at 3).

24. During large-scale anti-abortion protests in Wichita, Kansas, in 1991, the United States District Court for the District of Kansas made specific findings that the city of Wichita displayed a "lack of zeal . . . in defending the legal rights of the [abortion clinic] plaintiffs and their patients." *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. 258, 266 (D. Kan. 1991). When protestors gathered in Missoula, Montana, local police refused to respond to a clinic invasion. S. REP. NO. 117, *supra* note 9, at 19 (testimony of Willa Craig, Executive Director of the Blue Mountain Clinic in Missoula, Montana, before the Senate Subcommittee on Labor and Human Resources, May 12, 1993).

25. Most often, these challenges are based on the theory that a stalking law is too broad or too vague, and thereby proscribes activities that the Constitution protects along with those which it does not. The most frequent grounds for challenge include alleged violations of the rights of association and of free speech. See *infra* notes 167-91 and accompanying text.

structure of today's anti-abortion alliance.²⁶ Using Operation Rescue as a model, this Part traces the current activities of America's anti-abortion groups and the effects of those activities upon the availability of abortion and upon those who provide abortion services.

Randall Terry founded Operation Rescue in 1988²⁷ and quickly moved to originate a week of blockades at a New York City abortion clinic.²⁸ Terry and his followers adopted aggressive philosophies, instructing activists to harass all comers to abortion clinics.²⁹ Soon, mainstream Christian leaders endorsed Operation Rescue's tactics,³⁰ giving the group both publicity and respectability.

As Operation Rescue's network spread, so did its notoriety. In 1989, the National Organization for Women (NOW) successfully sued Operation Rescue to enjoin the organization from obstructing abortion clinic facilities.³¹ When members of Operation Rescue violated the injunction's

26. Well-known mainstream anti-abortion groups include Rescue America, Project Rescue, and the Christian Defense Coalition. Other anti-abortion groups include the Pearson Foundation, Lambs of Christ, and Missionaries to the Preborn. See *Nightline*, *supra* note 1; Laura Griffin, *Violence in the Name of God*, ST. PETERSBURG TIMES, Oct. 23, 1994, at 1A; H.R. REP. NO. 106, *supra* note 8, at 4-5.

An example of a less mainstream anti-abortion organization is the Pearson Foundation, which provides information and advice to Midwestern anti-abortion groups in order to assist them in setting up anti-abortion counseling centers. The Foundation distributes video equipment, pamphlets, kits for urine tests, and slide shows. The Foundation's modus operandi is to advertise its services in a neutral manner, such as listing "Abortion Services" in the local Yellow Pages. Once women come to the clinic, most are surprised to receive a lecture on the immorality of abortion and information only on alternatives to it. Victims of such duplicity have sued these mock abortion clinics on a variety of claims: for deceptive advertising, see *Mother & Unborn Baby Care of North Texas, Inc. v. State*, 749 S.W.2d 533 (Tex. Ct. App. 1988) (enjoining the Pearson Foundation for violating Deceptive Trade Practices Act), *cert. denied*, 109 S. Ct. 2431 (1989); for intentional infliction of emotional distress, see *Boes v. Deschu*, 768 S.W.2d 205 (Mo. Ct. App. 1989); and for a civil rights conspiracy against a class of women who decided to have an abortion, see *Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318, *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990).

27. See John H. Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251, 253-56 (1990) (discussing Operation Rescue's organization, strategies and intent to stop abortions).

28. See Sara Diamond, *Watch on the Right*, THE HUMANIST, Sept. 1993, at 41; see also Nadine Brozan, *Effectiveness of Abortion Protests Is Debated*, N.Y. TIMES, May 8, 1988, at 28 (describing the first organized effort by Operation Rescue to close down New York City's abortion clinics).

29. Diamond, *supra* note 28, at 41. Diamond cites Joseph Scheidler's pamphlet, *Closed: 99 Ways to Stop Abortion*, as a seminal tract for the anti-abortion movement. *Id.*

30. *Id.* Diamond reported that some of the "Christian right" figures endorsing Operation Rescue include Pat Robertson, Jerry Falwell, James Dobson, Beverly Lattaye, and Cardinal John J. O'Connor. *Id.*

31. *New York State Nat'l Org. for Women v. Operation Rescue*, 886 F.2d 1339, 1362 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); see also *National Org. for Women (NOW) v. Operation Rescue*, 726 F. Supp. 1483, 1496-97 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part*

prohibitions,³² Terry chose to close his main office in upstate New York rather than pay the civil contempt penalty. While the resulting lack of a geographical focus temporarily splintered Operation Rescue's support, a grass-roots campaign emerged around the country.³³ Between 1977 and April 1993, over 8,000 clinic blockades and related disruptions were reported.³⁴ A national survey in November 1993 showed that at least one-fifth of the nation's abortion clinics had been the targets of violence that year alone.³⁵

Operation Rescue's members vary widely in the level of their devotion to the cause of stopping abortions.³⁶ Their tactics vary just as widely, ranging from passive picketing to physical invasions of clinics. One common strategy used by the group is the human barricade.³⁷ Typically, dozens of persons—and in some cases hundreds or even thousands—trespass onto clinic property and physically barricade entrances and exits by sitting, lying down, or standing and interlocking their arms.³⁸ This ingenious approach, invented by Randall Terry, is called the "rescue" and is defined in Operation Rescue's literature as the act of "*physically* blockading abortion mills with [human] bodies, to intervene between

and vacated in part sub nom. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993).

32. Diamond, *supra* note 28, at 41; see *New York State Nat'l Org. for Women v. Terry*, 732 F. Supp. 388, 393-96 (S.D.N.Y. 1990) (describing the civil contempt penalties imposed on Operation Rescue).

33. See *NOW v. Operation Rescue*, 726 F. Supp. 300, 301 (D.D.C. 1989). In a letter on Operation Rescue letterhead, Randall Terry described "the growth of this movement": "On April 29th, the National Day of Rescue II, rescue groups in 46 cities participated in rescue missions." For a description of "rescues," see *infra* notes 37-39 and accompanying text.

34. NATIONAL ABORTION FEDERATION, *supra* note 3.

35. See *Brookline Attacks Continue Rising Tide of Violence*, REUTERS, Dec. 30, 1994 [hereinafter *Brookline Attacks*], available in LEXIS, Nexis Library, Current News File. *USA Today*, a popular daily newspaper, reported the following results:

Percentage of abortion clinics experiencing violence from January to July 1993:

Death Threats	21.0%
Bomb Threats	18.1%
Blockades	16.0%
Stalkings	14.9%
Invasions	14.6%
Chemical attacks	10.3%
Arson	1.8%

Paul Leavitt & Mimi Hall, *Abortion Defenders: Stop Clinic Terror*, USA TODAY, Nov. 5, 1993, at 3A (citing as its source the Feminist Majority Foundation).

36. More militant groups, such as Pro-Life Virginia, have denounced Operation Rescue, calling its members "wimps." Griffin, *supra* note 26, at 1A.

37. For a further description of the human barricade technique, see S. REP. NO. 117, *supra* note 9, at 7.

38. *Id.*

abortionists and the innocent victims."³⁹ Often, however, these rescues turn ugly as protestors invade the clinics themselves and physically attack both the clinic's facilities⁴⁰ and those who provide abortions.⁴¹

The tide began to turn away from peaceful protest after the 1991 "Summer of Refuge"⁴² and 1992 "Spring of Life"⁴³ campaigns run by

39. Kelly Faglioni, Note, *Balancing First Amendment Rights of Abortion Protestors with the Rights of Their "Victims,"* 48 WASH. & LEE L. REV. 347, 362 n.9 (1991) (emphasis in original) (citing National Org. for Women (NOW) v. Operation Rescue, 726 F. Supp. 1483, 1488-90 (E.D. Va. 1989), which in turn quoted Operation Rescue literature that defined "rescue" activities).

40. Abortion clinics have endured arson fires, bombings, and chemical attacks. These attacks have not only endangered the lives of the women and providers present but also have had the unfortunate result of severely limiting access to health care for women, especially those in rural areas. See *infra* notes 72-80 and accompanying text for a discussion of the effects of such terrorism upon the availability of abortion. One Senate report noted that "from January through May 1993, alone, three reported acts of arson in Florida, Texas, and Montana caused over \$1.5 million in damages." S. REP. NO. 117, *supra* note 9, at 5.

Anti-abortion protestors recently added a new tactic with which to vandalize abortion clinics: chemical attacks. Since January 1992, 71 chemical attacks have occurred in at least 15 states, at a cost of at least \$500,000. *Id.* at 6. The chemical of choice is now butyric acid. The acid is poured through holes in clinic walls, injected through locks and mail slots, slipped under doors, and left in bathrooms by people entering the facilities posing as patients. *Id.* The acid "creates an intolerable stench and causes nausea, vomiting, headaches, dizziness, inflamed eyes and skin, and difficulty in breathing." *Id.* After butyric acid was sprayed through the mail slot of a Memphis clinic in May 1992, the clinic was forced to close for two weeks and to discard all of its furnishings. *Id.* (citing Frank Fisher, *Acid Attacks*, Associated Press, Mar. 3, 1993).

41. The National Abortion Federation reported that from 1977 to April 1993, more than 1,500 acts of violence against providers of reproductive health services were reported in the United States. These acts included at least 37 bombings, 87 arsons, 166 death threats, 88 assaults, two kidnappings, 345 clinic "invasions," and one murder. NATIONAL ABORTION FEDERATION, *supra* note 3. Since that report, four other murders have taken place. See *infra* notes 49-62 and accompanying text.

"Invasions" refer to another Operation Rescue technique that involves a number of anti-abortion protestors storming and forcefully entering clinics that offer services to patients. See H.R. REP. NO. 306, *supra* note 8, at 7.

42. During the 1991 "Summer of Refuge" campaign, Operation Rescue repeatedly protested at abortion clinics in Wichita, Kansas, among other cities designated as "Cities of Refuge." For two months, hundreds, perhaps thousands, of people came to Wichita from across the nation to engage in activity including "acts of trespass and obstruction" aimed at blocking access to the clinics." S. REP. NO. 117, *supra* note 9, at 9 (citing United States v. Cooley, 787 F. Supp. 977, 980 (D. Kan. 1992)). Operation Rescue succeeded in "virtually overwhelming the resources of the city's relatively small police forces." *Id.* (quoting Women's Health Care Services v. Operation Rescue, 773 F. Supp. 258, 265-66 (D. Kan. 1991)). The six-week protest is estimated to have cost Wichita one million dollars and to have led to over 2,741 arrests. *Id.* (citing NATIONAL ABORTION FEDERATION, THE COST OF CLINIC BLOCKADES (1993)).

43. Buffalo, New York, was chosen as the target for Operation Rescue's "Spring of Life" protests in April 1992. Buffalo police arrested 605 blockaders protesting at city abortion clinics. The protests cost the city over \$380,000 during a two-week span of time. S. REP. NO. 117, *supra* note 9, at 9. A strong contingent of pro-choice "escorts" and pro-choice protestors kept the clinics open. Diamond, *supra* note 28, at 41.

Operation Rescue. During the summer of 1993, Operation Rescue targeted health care facilities in seven cities.⁴⁴ However, in most cities, the anti-abortion protestors met strong resistance from pro-choice supporters,⁴⁵ local police departments,⁴⁶ and courts.⁴⁷ As a result, the tactics of the pro-life movement shifted away from large clinic blockades and towards dissuading doctors from performing abortions.⁴⁸

This shift in the pro-life movement's tactics has resulted in violence. On March 10, 1993, Dr. David Gunn, a physician who performed abortions at several clinics in northern Florida, was shot and killed during an anti-abortion demonstration outside a health clinic in Pensacola, Florida.⁴⁹ Prior to his death, Dr. Gunn had been followed, threatened, and harassed for years.⁵⁰ Abortion foes distributed "wanted" posters bearing his photograph, home address, home telephone number, and daily work schedule.⁵¹ An anti-abortion activist was convicted of first-degree murder in the case.⁵²

In August 1993, just months after Dr. Gunn's death, an anti-abortion protestor shot Dr. George Tiller outside a Wichita, Kansas, women's health

44. *Operation Rescue, Abortion Rights Activists Clash at Clinics*, UPI, July 10, 1993 [hereinafter *Clash at Clinics*], available in LEXIS, Nexis Library, UPI File.

45. In Northern California, the Bay Area Coalition for Our Reproductive Rights (known as BACORR) has sent teams of clinic defenders to meet Operation Rescue blockaders. Diamond, *supra* note 28, at 42. Similar resistance met Operation Rescue's protests in Buffalo, New York, in the spring of 1992. *Id.*

46. See James Risen, *Giving Peace a Chance*, L.A. TIMES, July 19, 1993, at A1 (detailing how police readiness affects anti-abortion groups); see also *Clash at Clinics*, *supra* note 44 (describing many arrests of anti-abortion protestors during Operation Rescue's campaign in the Summer of 1993); Mimi Hall, *Turnout Low for Abortion Protestors*, USA TODAY, July 19, 1993, at 3A (comparing number of arrests in Summer 1993 to those in 1991 Operation Rescue campaign).

47. In several cities subject to Operation Rescue's overwhelming protests, local courts and city councils reacted in a manner similar to Judge Robert McGregor in Melbourne, Florida. Judge McGregor ordered anti-abortion protestors to establish a 36-foot "buffer zone" around a local abortion clinic, citing a local anti-stalking law as the basis for his decision. Amy Stevens, *Stalking Law Cited*, WALL ST. J., Apr. 9, 1993, at B8.

48. "We may not get laws changed or be able to change people's minds, . . . [b]ut if there is no one willing to conduct abortions, there are no abortions," said the field director of Operation Rescue's national organization. Sandra G. Boodman, *The Death of Abortion Doctors*, WASH. POST, Apr. 20, 1993, at 27.

49. S. REP. NO. 117, *supra* note 9, at 3.

50. *Id.* Gunn's son, David Jr., said that his father told him about being followed just days before his death. *Nightline*, *supra* note 1.

51. S. REP. NO. 117, *supra* note 9, at 4.

52. Charles Laurence, *Murderer of Abortion Doctor Gets Life in Jail*, DAILY TELEGRAPH, Mar. 7, 1994, at 10.

care clinic.⁵³ The woman who shot Dr. Tiller testified at trial that the abortion doctor had to be stopped "at all cost[s]."⁵⁴ Fortunately, Dr. Tiller suffered only minor wounds in the arms. His attacker was sentenced to ten years in prison for attempted murder.⁵⁵

Pensacola was again the site of clinic violence in July 1994, when an anti-abortion protestor shot and killed Dr. John Bayard Britton and his escort, James Barrett.⁵⁶ The two men were killed at a clinic that was just down the road from the clinic at which Dr. Gunn was killed a year earlier. June Barrett, who was also escorting Dr. Britton to the clinic (where he had replaced Dr. Gunn), survived the shooting by playing dead in the back seat of the truck in which the victims were shot. The attacker was convicted of violating the Freedom of Access to Clinic Entrances Act of 1994 (FACE) and was sentenced to life in prison.⁵⁷ Soon after, he was tried and convicted in state court for both murder and attempted murder and was sentenced to death.⁵⁸

Most recently, in December 1994, two clinic workers were killed and five others were wounded when a man entered two neighboring women's health care clinics in Brookline, Massachusetts and opened fire.⁵⁹ The attacker, John Salvi, has since been arraigned on both federal and state charges.⁶⁰

Tragic as these shooting were, no one working in the women's health care field was surprised.⁶¹ Both police and pro-choice organizations believe that other shootings of abortion providers have occurred because of the providers' occupations, even though no conclusive evidence of this theory exists.⁶²

53. Griffin, *supra* note 26, at 1A.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Brookline Attacks Continue*, *supra* note 35.

59. *Id.*

60. Christopher Daley, *Suspect in Clinic Shooting Denies U.S. Charges*, WASH. POST, Jan. 7, 1995, at A3. Massachusetts law does not allow the death penalty, thus, the most severe sentence Salvi could receive is life in prison. *Id.*

61. After the shooting of Dr. Gunn, Ron Fitzimmons, the Executive Director of the National Coalition of Abortion Providers, said, "People kept saying, 'I'm sorry it was David, but I knew it was going to happen.'" Sydell, *supra* note 5, at 27.

62. See *Brookline Attacks*, *supra* note 35. A Canadian gynecologist was seriously wounded in November 1994 when he was shot through the window of his home while eating breakfast. *Id.* The Vancouver doctor had been the target of anti-abortion protests in the past, and the provincial government is focusing its investigation on the anti-abortion movement. *Id.*

In response to the shootings, measures are being taken to protect providers. The Department of Justice recently opened an investigation into whether a nationwide conspiracy exists among militant anti-abortion groups.⁶³ Abortion providers are also increasing their personal level of protection. Many providers wear bulletproof vests;⁶⁴ others install bulletproof glass for protection.⁶⁵ Jeri Rasmussen, owner of a women's health clinic providing both abortion and other health services, checks her car muffler every morning for a pipe bomb.⁶⁶

Along with this threat of violence, abortion providers suffer various forms of harassment. Protestors make disturbing telephone calls,⁶⁷ picket providers' homes,⁶⁸ display "wanted" posters plastered with providers' personal information,⁶⁹ employ high-powered microphones to listen to conversations inside clinics,⁷⁰ and pressure providers through their friends, family, and neighbors.⁷¹ The surreal has become real life for abortion

In the United States, several doctors who worked at women's health care clinics have been attacked or violently killed in recent years. Often these crimes are attributed to other motives, such as robbery, but the pro-choice establishment suspects a conspiracy to murder abortion providers. Griffin, *supra* note 26, at 1A. Suspicious incidents have occurred in Mobile, Alabama, Houston, Texas, and Los Angeles. *Id.*

63. Attorney General Janet Reno created a "permanent task force" at the Department of Justice after the shootings in Pensacola, Florida. *Brookline Clinic Slayings*, American Political Network, Jan. 9, 1995, available in LEXIS, Nexis Library, Current News File. As of yet, "no hard evidence that major right-to-life groups have directed or financed the rash of clinic attacks" has surfaced. *Id.*

64. S. REP. NO. 117, *supra* note 9, at 17.

65. *Id.* The cost of a truly protective security system for a women's health care clinic now runs from \$15,000 to \$25,000. *Brookline Clinic Slayings*, *supra* note 63.

66. Sydell, *supra* note 5, at 24.

67. Dr. Norman Tompkins, whose private obstetrics and gynecological practice includes the provision of abortions, receives countless threatening phone calls at home. One message on his answering machine said, "I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off." S. REP. NO. 117, *supra* note 9, at 10.

68. Katherine Welsh, the executive director of a women's health center in Minnesota, sued the abortion foes who repeatedly picketed her home and obtained a two-year restraining order. *See* Welsh v. Johnson, 508 N.W.2d 212, 213-14 (Minn. Ct. App. 1993).

69. Dr. Pablo Rodriguez, the Medical Director of Planned Parenthood of Rhode Island, is the subject of a "wanted" poster, much like the one that featured Dr. Gunn, *see supra* note 51 and accompanying text. S. REP. NO. 117, *supra* note 9, at 10-11.

70. Anti-abortion protestor Meredith Raney admits that his organization uses a high-powered surveillance microphone, capable of listening to conversations hundreds of feet away and through windows, to listen to clinic workers talking to their coworkers. Sydell, *supra* note 5, at 27.

71. "Do you know you live next door to a murderer?" asked an anonymous abortion foe who called the neighbor of an abortion provider at 2:00 a.m. *Id.*

Anti-abortion activists have been known to pressure the families of abortion providers as well. Louise Luck, the wife of a physician who performs abortions, momentarily left the hospital bedside of her elderly, ailing mother. When she returned, she found that protesters had sneaked in and hung rosary

providers.

Considering the violence and harassment endured by abortion providers, it is not surprising that the number of providers has declined.⁷² Statistics show that only seventeen percent of the counties in the United States presently have an abortion provider.⁷³ Some doctors have responded to the attacks by vowing, despite long hours and relatively unrewarding pay, to continue the work that they believe to be moral, legal, and important.⁷⁴ However, the American Medical Association recently warned Congress that the adequacy of health care may be endangered by the abortion protestors' violent activities.⁷⁵

Even if providers are willing to endure the violence and harassment, abortion clinics may nonetheless be forced to close. Insurance companies currently holding property and liability policies on abortion clinics are

beads on her unconscious mother's body. Sydell, *supra* note 5, at 27. Justin White, a fourteen-year-old boy whose mother works at an abortion clinic, accepted a ride from two women who then tried to indoctrinate him about the evils of abortion, telling him that his mother would "die in hell." David Savage, *Abortion Foes Target Doctors for Harassment*, L.A. TIMES, Mar. 14, 1993, at 1A.

72. In 1980, there were 2,758 abortion providers across the country; in 1988, that number had fallen to 2,582. Sydell, *supra* note 5, at 25. In early 1993, two doctors stopped working at a Melbourne, Florida, abortion clinic after receiving death threats. S. REP. NO. 117, *supra* note 9, at 17. Since Dr. David Gunn was shot and killed in March 1993, "at least eight more doctors have stopped offering abortion services." *Id.*

73. H.R. REP. NO. 306, *supra* note 8, at 8. One all-too-common response to the shortage of abortion providers is the "circuit rider." When local doctors decide to give up their abortion practices, clinics search for out-of-town physicians who are willing to spend part of each week on the road. Dr. LeRoy Carhart is one member of this rare breed of physician, as was Dr. David Gunn. Sandy Banisky, *Abortion 'Circuit Rider' Accepts Risks*, ST. LOUIS POST-DISPATCH, Sept. 7, 1993, at 5B.

74. Banisky, *supra* note 73. On an average day, Dr. Carhart travels from Nebraska to Pittsburgh by air and then performs 17 abortions in six hours. At night he travels to Ohio, where he performs 21 more abortions in the next two days. *Id.* When abortion foes burned down Dr. Carhart's barn, killing 17 of his horses, it only steeled his resolve further. "The day our barn burned was the day I decided 'I'm going to do this full time,'" Carhart said. *Id.*

75. Dr. James Todd, the Executive Vice President of the American Medical Association, testified in front of the Senate Labor and Human Resources Committee as to the looming health care crisis:

Due to the growing violence against physicians and health care professionals generally, the AMA believes that [legislation addressing these concerns would represent] 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.

S REP. NO. 117, *supra* note 9, at 16.

Additionally, the number of medical schools requiring abortion training has plummeted to 12%. 139 CONG. REC. E178 (daily ed. Jan. 26, 1993) (statement of Rep. Lowey). Nearly one-third of obstetrics-gynecology residency programs do not even offer abortion training. *Brookline Clinic Slayings*, *supra* note 63. In February 1995, the American Council on Graduate Medical Education heard a proposal requiring mandatory abortion training in obstetrics-gynecology residency programs, with exception for those residents or institutions which oppose the training on moral or religious grounds. *Id.*

beginning to cancel existing policies and to refuse to extend new ones.⁷⁶ For example, Travelers Insurance, a nationwide company, changed its underwriting policy in 1990 to exclude abortion clinics.⁷⁷ Although insurance industry officials cite purely business reasons,⁷⁸ public perception is surely a consideration in such decisions.⁷⁹

While abortion foes direct their activities against abortion providers, the women who depend upon abortion clinics for a full spectrum of health care services are the real victims. Often, clinics shut down through protest offered prenatal care and delivery services, childhood immunizations, and counseling on alternatives to abortion, as well as abortion services.⁸⁰ Rural areas are especially vulnerable to attacks by protestors. South Dakota, for example, has only one abortion provider for the entire state.⁸¹ Abortion foes seek to render whole geographic regions abortion-free, using multiple concerted attacks in each area for a short period of time.⁸²

The evidence suggests that anti-abortion protestors are meeting their goals. The availability of abortion services, which is already very limited in many parts of the United States, is becoming increasingly restricted.⁸³ As one abortion provider who has suffered considerable abuse at the hands of abortion foes said, "[P]hysicians are discontinuing the provision of a

76. Delia Rios, *Some U.S. Insurers Refusing Coverage for Abortion Clinics*, HOUSTON CHRON., Sept. 12, 1993, at A30.

77. *Id.* "We felt that it was nearly impossible to properly assess or underwrite this type of business because of the highly sensitive and unpredictable situations that surround these clinics," said a spokeswoman for Travelers Insurance. *Id.*

78. A spokeswoman for Travelers Insurance said that abortion clinics' losses were categorized in the same manner as medical clinics, and that the decision to cancel abortion clinics' coverage was "definitely a business decision not based on politics or anything else." *Id.*

79. An executive at an Illinois insurance company that provides coverage for health professionals in abortion clinics said, "It only takes one physician to be shot [for those in the insurance industry] to say, 'Hey, that could have happened to a client or another member of the staff [of a clinic which we insure].'" *Id.* A general insurance broker in Montana recalled her company's swift cancellation of a clinic's insurance when a local newspaper reported a street demonstration at the clinic. *Id.*

80. S. REP. NO. 117, *supra* note 9, at 6. Such was the case at the Blue Mountain Clinic in Missoula, Montana. An arson fire destroyed the clinic in March 1993, following several years of blockades and demonstrations. *Id.* at 5. The clinic served a great number of Medicaid patients who could not afford prenatal care elsewhere. *Id.* After the fire, many of the clinic's patients had to travel an average of 120 miles to find obstetric care. *Id.* The effects of having to change health care providers can be serious for women seeking obstetric care or abortion services. *Id.* at 15-16.

81. S. REP. NO. 117, *supra* note 9, at 17 n.29.

82. *Id.* at 6. In September 1992, fourteen Michigan clinics were attacked with butyric acid within a two-week period. Similarly, five clinics in San Diego were sprayed with butyric acid on the same day in March 1993. *Id.* See *supra* note 40 for a discussion of the effects of butyric acid attacks.

83. See *supra* note 72.

needed medical service simply out of fear."⁸⁴

III. ALTERNATIVE REMEDIES

In addition to state stalking laws, abortion providers have typically turned to one of three sources for protection: The Federal Access to Crime Entrances Act (FACE), civil suits under the federal Racketeering Influenced and Corrupt Organizations Act (RICO), and existing state criminal statutes. However, the application of each of these sources to the particular needs of abortion providers falls short. While FACE, civil RICO, and state criminal statutes do aid the pro-choice movement as a whole, abortion providers need protection specifically tailored to their unique situation.

A. *The Federal Access to Clinic Entrances Act*⁸⁵

In 1993, members of Congress encountered increasing pressure from their constituents and from women's rights groups to protect a woman's right to an abortion. The murder of Dr. David Gunn⁸⁶ shocked the nation and quickly led to a bipartisan call for legislation⁸⁷ to protect the sanctity of the abortion right. In November 1993, both the Senate⁸⁸ and the House of Representatives voted to approve similar versions of FACE.⁸⁹ President Clinton signed the bill into law in May 1994.⁹⁰ FACE is aimed primarily

84. S. REP. NO. 117, *supra* note 9, at 17 (testimony of Dr. Pablo Rodriguez, the Medical Director of Planned Parenthood of Rhode Island, in front of the Senate Committee on Labor and Human Services on May 12, 1993).

85. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. 103-259, 108 Stat. 694 (1994) (to be codified at 18 U.S.C. § 248) [hereinafter FACE].

86. *See supra* notes 49-52 and accompanying text.

87. Senator Edward Kennedy (D-Mass.) sponsored the legislation, compromising with Senator Bob Smith (R-N.H.) to amend the bill in the Senate. Ana Puga, *Senate OK's Bill to Outlaw Abortion Clinic Blockades*, BOSTON GLOBE, Nov. 17, 1993, at 1.

88. The Senate approved FACE by a vote of 69 to 30. *Id.*

89. The House of Representatives approved FACE by voice vote after Republican opponents to the bill conceded that there was no point in requiring a roll call vote. Kevin Merrida, *House Approves Bill to Combat Violence at Abortion Clinics*, WASH. POST, Nov. 19, 1993, at A11.

90. Ruth Marcus, *President Signs Clinic Access Law; Foes File Lawsuit*, WASH. POST, May 27, 1994, at A10. FACE provides, in relevant part:

(a) Prohibited activities—Whoever —

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

at keeping clinic doors free of obstruction⁹¹ and preserving a woman's right to obtain an abortion.⁹² The Act recognizes publicly that a woman's right to an abortion is constitutionally protected and that the government will guarantee that right where it is most threatened, at clinic doors.

The main focus of FACE is to protect the viability of clinics.⁹³ The legislative history of FACE is replete with discussion on how to maintain physical access to clinics and ensure that clinic services are available to women.⁹⁴ While some portions of the legislative record address the protection of abortion providers,⁹⁵ FACE provides such protection only if the person who threatens the provider expresses a specific intent to harm the provider because of her involvement with abortion services.⁹⁶ Such a motive will be nearly impossible to prove, except in situations in which a violent protestor commits an act of violence against a provider at an abortion clinic⁹⁷ or shouts out anti-abortion sentiments while following or assaulting an abortion provider or her family. Thus, FACE is aimed primarily at protecting access to clinics—its use for protecting providers away from those clinics is substantially limited.

An additional problem with FACE is that it draws intense opposition, including constitutional challenges, from legislators and anti-abortion groups. Many legislators have challenged FACE from its inception, arguing that FACE limits the free speech of abortion protestors based on the

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of worship . . . shall be subject to [both civil and criminal penalties].

Freedom of Access to Clinic Entrances Act of 1994, Pub. L. 103-259, 108 Stat. 694 (to be codified at 18 U.S.C. § 248) (1994).

91. See SEN. REP. NO. 117, *supra* note 9, at 17-25.

92. *Id.*

93. "Congress finds that . . . women are being denied access to . . . vital reproductive health services . . . [and] such conduct subjects women to increased medical risks and thereby jeopardizes the public health and safety . . ." 139 CONG. REC. s15,655 (daily ed. Nov. 16, 1993) (Congressional Statement of Findings and Purpose).

94. See generally H.R. REP. NO. 306, *supra* note 8; S. REP. NO. 117, *supra* note 9.

95. See S. REP. NO. 117, *supra* note 9, at 22.

96. See *supra* note 90.

97. As of February 1995, Paul Hill, the man who murdered Dr. Britton and his escort in Pensacola, Florida, see *supra* notes 56-58 and accompanying text, is the only person to be convicted under FACE. The Justice Department has filed one other FACE suit against an Ohio man accused of making death threats to an abortion provider. *Suspect in Abortion Clinic Deaths Indicted*, CHI. TRIB., Jan. 4, 1995, at 4. The U.S. Attorney's office is still deciding whether to use FACE against John Salvi, the man who killed two and injured five in Brookline, Massachusetts Daly, *supra* note 60, at A3.

content of their speech.⁹⁸ Anti-abortion groups also oppose FACE on the grounds that it violates the constitutionally protected right to practice peaceful civil disobedience.⁹⁹ So far, FACE has been found constitutionally sound.¹⁰⁰ However, neither the Supreme Court nor the federal circuit courts have addressed these issues.

Perhaps the most frustrating problem with FACE is that police officers and prosecutors may simply choose not to enforce it.¹⁰¹ Federal, state, and local law enforcement officials have each refused, in some situations, to enforce the law, claiming that one of the other two police groups has the primary responsibility to do so.¹⁰² Similarly, at least one United States

98. See, e.g., H.R. REP. 306, *supra* note 8, at 18-19. "Congress has selected a single point of view—opposition to abortion—and subjected it to penalties applied to no other point of view." *Id.* (quoting Professor McConnell of the University of Chicago School of Law); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-3, 12-7 (2d ed. 1988) (citing Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 41 (1973) (noting that a statute with an overly narrow purpose or interest may create a conclusive presumption that the state interest advanced by the state is actually an anti-speech interest or objective rather than a nonspeech interest or objective)).

99. H.R. REP. NO. 306, *supra* note 8, at 20-21.

100. See *United States v. Brock*, 863 F. Supp. 851, 866 (E.D. Wis. 1994) (holding that FACE is not constitutionally overbroad); *American Life League, Inc. v. Reno*, 855 F. Supp. 137, 141-42 (E.D. Va. 1994) (holding FACE is not constitutionally overbroad or vague); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1431-32 (S.D. Cal. 1994) (holding that FACE does not violate the First or Fifth Amendments); *Cook v. Reno*, 859 F. Supp. 1008, 1011 (W.D. La. 1994) (holding that FACE does not violate the First, Fifth, Eighth or Fourteenth Amendments).

101. Prior to FACE, local police often willfully refused to act in response to anti-abortion violence. For example, when Sheriff James Hickey of Nueces County, Texas, testified before a House of Representatives committee studying this problem, Sheriff Hickey stated that "[t]he law of the Supreme Court . . . that makes it legal to murder babies, is wrong." When directly questioned as to whether he would enforce the law against those protestors whose conduct violated the law, Sheriff Hickey replied, "I will not." S. REP. NO. 117, *supra* note 9, at 19. In an attempt to redress such recalcitrant attitudes, Representative Nita Lowey introduced the Reproductive Freedom Protection Act, H.R. 519, 103d Cong., 1st Sess. (1993). The Act would require local governments to enforce existing harassment and disorderly conduct laws against protestors who violated those laws as a condition of their receipt of federal community development block grant funds. 139 CONG. REC. E178 (daily ed. Jan. 26, 1993) (statement of Rep. Lowey).

Even where local police are willing to enforce laws against anti-abortion protestors, the sheer number of blockaders can overwhelm small city or rural officials' capacity. Once protestors are arrested, the city must prosecute all misdemeanor offenses, a time-consuming and expensive process. Finally, the penalties for violations of most laws imposed upon anti-abortion blockaders are often quite small and provide little or no deterrent effect. S. REP. NO. 117, *supra* note 9, at 20.

102. In Pensacola, the director of a women's health care clinic tried to have local and federal police arrest a particularly harassing anti-abortion protestor under FACE. Eisler, *supra* note 10. Local police told her that it was the federal marshals' duty to do so, and the federal marshals told her that it was a matter for local police. *Id.* That same militant protestor murdered Dr. John Britton six weeks later at the same clinic. *Id.* Similar reports of law enforcement officials refusing to prosecute anti-abortion

Attorney has declined to enforce a federal injunction ordered under FACE.¹⁰³ Without the cooperation of enforcement officials, the purpose of FACE will not be properly effectuated.

B. *Civil Use of RICO*

In *National Organization for Women, Inc. v. Scheidler*,¹⁰⁴ the Supreme Court found that the Racketeering Influenced and Corrupt Organizations Act (RICO) could be used to assess damages against anti-abortion groups that conspired to shut down abortion clinics.¹⁰⁵ Abortion rights advocates hailed this decision as a valuable tool to wield against anti-abortion protestors, because it allows clinics to recover treble damages¹⁰⁶ from entire anti-abortion organizations if the pro-choice advocates can prove property damage or business loss at the clinic that directly resulted from a "pattern of racketeering."¹⁰⁷ Huge cash settlements strike fear at the very heart of groups like Operation Rescue, because they hit anti-abortion organizations where they are weakest—the pocketbook.¹⁰⁸

Yet the ability of clinics to sue large organizations does not assist the individual abortion provider. Few individual providers have the financial wherewithal to sue a large anti-abortion organization under RICO and prove that it conducts a pattern of racketeering activity. In addition, the civil nature of the remedy does little for the abortion provider who is threatened with imminent physical harm.

C. *Existing State Criminal Statutes*

For many years, states have struggled to address the problem of anti-abortion protestors who violate the privacy of abortion providers. To address this problem, states utilize existing criminal laws, such as those that proscribe harassment to stop overzealous protestors.¹⁰⁹ Other criminal

protestors have surfaced in Mississippi and in Milwaukee. *Id.*

103. *Id.*

104. 114 S. Ct. 798 (1994).

105. *Id.* at 802-03; see 18 U.S.C. §§ 1961-1968 (1988).

106. See 18 U.S.C. § 1964(c) (1988).

107. See *id.* § 1961(5). Under RICO, a "pattern" consists of at least two acts of racketeering activity committed within a ten-year period. *Id.* This pattern must also evidence a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

108. See generally Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protestors and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341 (1990).

109. See, e.g. DEL. CODE ANN. tit. 11, § 1311(1) (Supp. 1994) (providing that a person is guilty of harassment when "he insults, taunts or challenges another person or engages in any other course of

statutes invoked include those which proscribe menacing,¹¹⁰ loitering,¹¹¹ terrorism,¹¹² trespassing,¹¹³ and other similar physical crimes.¹¹⁴ However, to the extent that these statutes require that the provider suffer some level of physical attack, they do not relieve the provider from harassment or the threat of attack.

Harassment statutes have proved to be the most effective type of criminal statute to address problematic anti-abortion behavior. Typical remedies provided by harassment statutes are temporary restraining orders and injunctions ordering the protestor to maintain a certain distance from the provider.¹¹⁵ Although several courts have upheld the use of harassment statutes to protect abortion providers and their families from unwanted attention,¹¹⁶ these statutes are singularly inappropriate for use in the abortion context. First, harassment statutes allow prosecution on the basis of mere speech. Thus, abortion foes have challenged and will continue to challenge these statutes on the grounds that state prosecutors violate protestors' First Amendment right to free speech by discriminating against them based on the content of their message.¹¹⁷ Second, harassment statutes are subject to overbreadth and vagueness challenges.¹¹⁸ Third, harassment statutes provide only misdemeanor sentencing,¹¹⁹ which is

alarming or distressing conduct in a manner which he knows is likely to provoke a violent or disorderly response").

110. See, e.g., ALA. CODE § 13A-6-23 (1994) (providing that "a person commits the crime of menacing if by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury").

111. See, e.g., COLO. REV. STAT. ANN. § 18-9-112 (West 1992) (providing that to loiter means "to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public place").

112. See, e.g., CAL. PENAL CODE §§ 186.20-.28 (West Supp. 1994); GA. CODE ANN. § 16-11-37 (1992); MINN. STAT. ANN. § 609.713 (West Supp. 1994).

113. See, e.g., ALA. CODE § 13A-7-2-4 (1994); CONN. GEN. STAT. ANN. § 53a-107-110 (West Supp. 1994); ILL. ANN. STAT. ch. 720, para. 5/21-3 (Smith-Hurd Supp. 1993); see also *State v. Rein*, 477 N.W.2d 716, 720 (Minn. Ct. App. 1991).

114. Other state criminal statutes used to combat stalking behaviors include those prohibiting intimidation, see, e.g., MONT. CODE ANN. § 45-5-203 (1991), and threatening, see, e.g., GA. CODE ANN. § 16-11-37 (Supp. 1994).

115. See *supra* note 21 and accompanying text for a discussion on restraining orders.

116. See *Welsh v. Johnson*, 508 N.W.2d 212, 216-17 (Minn. Ct. App. 1993); *State v. Harrington*, 504 N.W.2d 500, 504 (Minn. Ct. App. 1993).

117. See, e.g., *Welsh*, 508 N.W.2d at 216-17 (holding that the grant of a temporary restraining order prohibiting an abortion protester from contacting a clinic employee under a harassment statute was not an unconstitutional imposition on the right to free speech).

118. See *infra* notes 167-91 and accompanying text for a discussion of constitutional challenges to statutes.

119. E.g., MINN. STAT. § 609.749(2) (Supp. 1994) provides, in relevant part, that "a person who harasses another . . . is guilty of a gross misdemeanor."

unlikely to deter a fervent anti-abortion protestor. Finally, the lenient bail procedures contained in most harassment statutes usually leave victims of harassment hesitant to pursue prosecution.

IV. STALKING STATUTES: THE MOST EFFECTIVE METHOD FOR PROTECTING ABORTION PROVIDERS

Although state stalking statutes were originally enacted in response to stalking behavior outside the abortion context, these statutes offer the particular protections that abortion providers need. Stalking laws enjoy advantages over FACE, civil RICO, and existing state criminal statutes. Because stalking laws do not require a specific anti-abortion animus, can be easily used by individual providers, and provide immediate relief and a severe punishment. Although constitutional challenges have been made, if properly drafted, stalking statutes offer an effective means by which abortion providers can protect themselves and their families.

A. History

Almost all recent state stalking laws trace their creation to the 1989 murder of actress Rebecca Schaeffer.¹²⁰ An obsessed fan haunted Schaeffer for over two years, finally shooting her at the gate of her Los Angeles apartment.¹²¹ Her highly publicized murder took place just before five other Orange County, California, women were murdered by crazed former lovers.¹²² These events combined to inspire California's legislature to create the nation's first criminal stalking law in 1990.¹²³ As other states became aware of similar situations occurring within their own borders, their legislatures moved quickly to enact stalking laws. At present, forty-seven states have enacted stalking laws.¹²⁴ The remaining three

120. See Matthew J. Gilligan, Note, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285 (1992); see also Darrell Dawsey & Eric Malnic, *Actress Rebecca Schaeffer Fatally Shot at Apartment*, L.A. TIMES, July 19, 1989, at 1.

121. Gilligan, *supra* note 120, at 285.

122. Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 991 (1993).

123. Gilligan, *supra* note 120, at 287. For an exceptionally thorough review of stalking laws, their histories and future, see McAnaney et al., *supra* note 19.

124. ALA. CODE § 13A-6-90 to -94 (1994); ALASKA STAT. § 11.41.260, .270 (Supp. 1994); ARK. CODE ANN. § 5-71-229 (Michie 1993); CAL. PENAL CODE § 646.9 (West Supp. 1994); COLO. REV. STAT. ANN. § 18-9-111 (West Supp. 1993); CONN. GEN. STAT. ANN. § 53a-181c (West Supp. 1994); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1994); FLA. STAT. ANN. § 784.048 (West Supp. 1994); GA. CODE ANN. § 16-5-90-92 (Supp. 1994); HAW. REV. STAT. § 711-1106.5 (Supp. 1994); IDAHO CODE § 18-7905 (1994); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to -7.4 (Smith-Hurd Supp. 1993); IND. CODE

states, Arizona, Maine and New York have amended their harassment statutes to prohibit stalking behavior.¹²⁵ In addition, several states have passed civil stalking laws, which allow damages for pain and suffering to victims.¹²⁶

B. The Mechanics of State Stalking Laws

A core group of states have based their criminal stalking laws on parts of California's stalking law, developing their statutes around a similar set of definitions. These states typically define the act of "stalking" to include "harassing" behavior, a "course of conduct," and "harm to the victim." "Stalking" is usually defined in these state statutes as willfully, maliciously and repeatedly following or harassing someone.¹²⁷ "Harassing" behavior is a knowing, willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes the person, and which serves no legitimate purpose.¹²⁸ A "course of conduct" is a pattern of

ANN. § 35-45-10-1 to -5 (West Supp. 1994); IOWA CODE ANN. § 708.11 (West Supp. 1993); KAN. STAT. ANN. § 21-3438 (Supp. 1993); KY. REV. STAT. ANN. § 508.130 - .150 (Baldwin 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1995); MD. ANN. CODE art. 27, § 121B (Supp. 1994); MASS. ANN. LAWS ch. 265, § 43 (Law. Co-op. Supp. 1994); MICH. COMP. LAWS ANN. § 750.411h, .411i (West Supp. 1994); MINN. STAT. ANN. § 609.749 (West 1994); MISS. CODE ANN. § 97-3-107 (1994); MO. ANN. STAT. § 565.225 (Vernon Supp. 1994); MONT. CODE ANN. § 45-5-220 (1993); NEB. REV. STAT. § 28-311.03 (Supp. 1994); NEV. REV. STAT. ANN. § 200.575 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 933:3-a (Supp. 1994); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1994); N.M. STAT. ANN. § 30-3A-3 (Michie Supp. 1994); N.C. GEN. STAT. § 14-277.3 (Supp. 1993); N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1993); OHIO REV. CODE ANN. §§ 2903.211-.215 (Anderson Supp. 1993); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1995); OR. REV. STAT. § 163.732 (Supp. 1994); 18 PA. CONST. STAT. ANN. § 2709 (Supp. 1994); R.I. GEN. LAWS §§ 11-59-1 to -3 (Supp. 1994); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 22-19A-1 to -6 (Supp. 1994); TENN. CODE ANN. § 39-17-315 (Supp. 1994); TEX. CODE CRIM. PROC. ANN. art. 56.11 (West Supp. 1995); UTAH CODE ANN. § 76-5-106.5 (1994); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1994); VT. STAT. ANN. tit. 13, § 1061 (1993); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1994); W. VA. CODE § 61-2-9a (Supp. 1994); WIS. STAT. ANN. § 940.32 (West Supp. 1994); WYO. STAT. § 1-1-126, 6-2-506, 7-3-506-511 (Supp. 1994).

125. ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1994); ME. REV. STAT. ANN. tit. 5, § 4651 (West Supp. 1994); N.Y. PENAL § 240.25 (Consol. Supp. 1994).

126. See, e.g., CAL. CIV. CODE § 1708.7 (West Supp. 1995) (allowing people who are stalked to file civil suits seeking monetary damages when the state's anti-stalking law is violated); OR. REV. STAT. § 30.866 (Supp. 1994) (allowing plaintiffs to recover special and general damages, including damages for emotional distress, punitive damages, attorney fees, and costs).

127. In California, a stalker is a person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family. CAL. PENAL CODE § 646.9(a) (West Supp. 1994).

128. *Id.* § 646.9(d). Stalking statutes are unique in their focus upon the victim's perception of the

conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.¹²⁹ California also requires that the "course of conduct" at issue would distress a reasonable person and that it actually causes substantial distress.¹³⁰ The stalker must make a "credible threat," which means a threat made with the intent and apparent ability to carry it out so as to cause the victim to reasonably fear for her safety or the safety of her immediate family.¹³¹ The victim must suffer some level of emotional injury, usually that which a reasonable person would suffer.¹³² Finally, the statutes specifically exclude constitutionally protected activity;¹³³ this exemption is often contained within a statute's general definition of "harassment."¹³⁴

Like the California law, the Florida statute contains a specific exclusion for some types of picketing and organized protests.¹³⁵ Florida's statute differs from California's, however, the Florida statute distinguishes "stalking"¹³⁶ from "aggravated stalking,"¹³⁷ the latter offense being

offensive conduct.

129. *See, e.g., id.*

130. *Id.*

131. CAL. PENAL CODE § 646.9(e) (West Supp. 1994). Hawaii goes even further, protecting threats of "damage to the property of the [victim] or another." *See* HAW. REV. STAT. § 711-1106.5(1)(b) (Supp. 1992).

132. CAL. PENAL CODE § 646.9(e) (West Supp. 1994).

133. California's statute specifically exempts labor picketing. *Id.* § 646.9(f). Minnesota exempts behavior that is protected by license, compelled by court order, or that pertains to an employment duty or valid contract. MINN. STAT. ANN. § 609.749 (7) (West 1994).

134. For example, California's statute requires that harassment have "no legitimate purpose," CAL. PENAL CODE § 646.9(d) (West Supp. 1994), a clear attempt to exclude constitutionally protected activity.

135. FLA. STAT. ANN. § 784.048(1)(b) (West Supp. 1994).

136. *Id.* § 784.048(2),(3). For the purposes of both the stalking and aggravated stalking laws, "harassing" is defined as "[engaging in] a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." *Id.* § 784.048(1)(a). A "course of conduct" is "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." *Id.* § 784.048(1)(b). "Stalking" is a misdemeanor, and is defined as "willfully, maliciously, and repeatedly follow[ing] or harass[ing] another person." *Id.* § 784.048(2).

137. "Aggravated stalking" is defined as "willfully, maliciously, and repeatedly follow[ing] or harass[ing] another person, and mak[ing] a credible threat with the intent to place that person in reasonable fear of death or bodily injury." *Id.* § 784.048(3). This heightened punishment for aggravated stalking is intended to break the "endless cycle of misdemeanors that has rendered traditional legal remedies ineffective against stalking behavior." Guy, *supra* note 122, at 1005. *See* ALASKA STAT. §§ 11.41.260, .270 (Supp. 1994) for another example of a two-tiered statutory stalking scheme.

Twenty other states provide felony penalties if a restraining order already in place prohibits the stalker's conduct or if the stalker has been convicted previously for the same offense within a given time period. *See infra* note 161 for a listing of the fifteen states that provide felony penalties.

punishable as a felony. The Florida stalking provision requires "substantial emotional distress" in a victim, but the victim's fear need not be objectively reasonable.¹³⁸ In contrast, the aggravated stalking provision requires a reasonable fear from a credible threat.¹³⁹ Florida's aggravated stalking provision is broad in scope nonetheless, because it does not require the stalker to harbor any apparent ability to carry out her threats, an element present in the California statute.¹⁴⁰

Virginia's stalking law¹⁴¹ is significantly broader than California's. The Virginia statute does not require a credible threat for a stalking conviction.¹⁴² Virginia also does not require that the victim suffer emotional injury¹⁴³ and does not set any time limit upon the pattern of behavior required.¹⁴⁴ In fact, Virginia's law does not define much by way of substantive law,¹⁴⁵ making it one of the broadest stalking statutes in the nation.

Some stalking statutes defy categorization. Connecticut's statute,¹⁴⁶ which addresses only literal stalking behaviors, not harassment in general, is one such statute.¹⁴⁷ Connecticut requires no credible threat; it provides merely that the stalker must intend to cause the victim to fear for her physical safety.¹⁴⁸ West Virginia's statute¹⁴⁹ is also unusual because it is extremely narrow, allowing a stalking charge only if the victim once resided or engaged in a sexual or intimate relationship with the stalker.¹⁵⁰

C. Effectiveness

Several state legislatures and courts have begun to recognize the

138. FLA. STAT. ANN. § 784.048(1)(a) (West Supp. 1994).

139. *Id.* § 748.048(1)(c). "Credible threat means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety." *Id.*

140. Compare FLA. STAT. ANN. § 784.048 (West Supp. 1994) with CAL. PENAL CODE § 646.9(e) (West Supp. 1994).

141. VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1994).

142. *Id.* § 18.2-60.3(A); see also IDAHO CODE § 18-7905 (1994).

143. VA. CODE ANN. § 18.2-60.3(A) (Michie Supp. 1994).

144. *Id.*

145. Virginia's law states only that "[a]ny person who on more than one occasion engages in conduct with the intent to place, or with knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's spouse or child shall be guilty of [stalking]." *Id.*

146. CONN. GEN. STAT. ANN. § 53a-181c (West Supp. 1994).

147. The Connecticut statute outlaws willful and repeated following or lying in wait. *Id.*

148. *Id.*

149. W. VA. CODE § 61-2-9a (Supp. 1994).

150. *Id.* § 61-2-9a(a).

particular applicability of stalking laws in the abortion context. Both California and Oregon recently passed legislation enabling stalking victims to sue their stalkers for pain and suffering.¹⁵¹ The sponsor of the California legislation wrote the bill in order to discourage anti-abortion protestors from threatening providers with bodily harm.¹⁵² California also eliminated the fee that courts charge victims who apply for restraining orders against their stalkers, recognizing that the stalking laws' protections should be available to all who need it.¹⁵³ Judges issuing injunctions to protect abortion clinic property have already invoked stalking laws in several instances.¹⁵⁴ In addition, prosecutors in a number of cities either have utilized the statutes to prosecute abortion protestors for stalking providers¹⁵⁵ or have indicated their willingness to do so.¹⁵⁶

Due to their ready adaptability to the abortion protest context, state stalking laws offer better protection to abortion providers than do FACE, civil RICO, or existing state criminal statutes. While FACE provides protection only if a harasser expresses a specific intent to harm the provider because of her involvement with abortion services, stalking statutes protect the provider regardless of the reason for the protestor's actions; it is violent

151. See CAL. CIV. CODE § 1708.7 (West Supp. 1995); OR. REV. STAT. § 30.866 (Supp. 1994); see also *supra* note 126.

152. *New Laws Will Aid Stalker Victims*, SAN DIEGO UNION-TRIB., Sept. 30, 1993, at A7.

153. CAL. CIV. PROC. CODE § 546.5(a) (West Supp. 1994).

154. For example, a Minnesota judge ordered a protective zone around each abortion clinic in anticipation of a massive Operation Rescue protest in July 1993. See *At Abortion Clinics, Protect Women and Speech*, MINNEAPOLIS STAR TRIB., July 2, 1993, at 16A; see also *supra* note 47.

155. Florida prosecutors have been quick to utilize their state stalking law against anti-abortion providers. The first abortion protestor to be arrested under the stalking law was prosecuted and convicted, but was only given probation. He soon violated his probation by demonstrating at the clinic where his victim worked. *Stalker Is Accused of Violating Probation*, MIAMI HERALD, Dec. 23, 1993, at 5B.

In South Carolina, prosecutors charged Cathy Ann Rider under an anti-stalking law after she was accused of telling an abortion clinic director that the director "might be next" to be shot. Maria Puente, *Clinic Protestors Under Pressure from Stalking Laws*, USA TODAY, May 10, 1993, at 2A.

Prosecutors charged Brian Oates under Minnesota's anti-stalking statute after he was arrested in June 1993 for repeatedly following a volunteer guard at a local abortion clinic. Tatsha Robertson, *Abortion Foes Say Stalking Law Is Not Constitutional*, MINNEAPOLIS STAR TRIB., Oct. 21, 1993, at 1B.

An Omaha judge dismissed a stalking charge filed by an abortion provider against anti-abortion activist Sharon McKee after the judge found that the complaint had not been specific enough under the conduct requirements. *Judge Dismisses Doctor's Stalking Charges*, American Political Network, Nov. 1, 1993, available in LEXIS, Nexis Library, Current News File. See *supra* notes 124-31 and accompanying text for a discussion of stalking statute conduct requirements.

156. For example, the Cook County, Illinois State's Attorney "will not hesitate to use" the stalking laws if a health facility worker receives a credible threat. William Recktenwald, *Stalking Law May Be Used on Abortion Protestors*, CHI. TRIB., Mar. 20, 1993, at 11.

behavior itself that is proscribed. This focus on conduct allows providers to rely on stalking statutes for protection against a wider range of antagonistic behavior. Furthermore, local police can use state stalking statutes to act swiftly to aid abortion providers in danger, whereas FACE requires additional coordination between federal, state, and local law enforcement officials.

Similarly, stalking statutes offer more immediate physical protection than does civil RICO. While civil RICO offers a monetary remedy to prosperous clinics that can afford to pursue anti-abortion organizations in protracted litigation, this remedy is not an effective solution to existing harassment. By contrast, stalking statutes offer individual providers immediate physical protection through the use of imminent arrest procedures¹⁵⁷ and temporary restraining orders.¹⁵⁸

State stalking laws also enjoy several advantages over state criminal statutes. First, giving providers a specific remedy separate from other criminal statutes is an important step toward keeping abortion providers in their profession. A specific statutory recognition of the abuse that the provider encounters legitimizes her feelings and fears. Anti-stalking laws offer abortion providers the satisfaction of realizing that they are the subjects of a new and terrifying type of crime and that they are not alone in their predicament. The existence and enforcement of stalking laws against anti-abortion protestors recognizes that harassing acts against providers are more than impassioned, they are criminal.¹⁵⁹

Second, stalking laws provide more stringent penalties than do other criminal laws that prohibit similar behavior. Many states now recognize that stalking deserves a harsher penalty than those provided for by existing crimes like harassment. Accordingly, a number of states have implemented graduated sentencing schemes for stalking.¹⁶⁰ Fifteen states presently

157. Under most criminal statutes, a police officer cannot arrest a stalking suspect until an actual attack takes place. With a stalking statute in place, however, a police officer can arrest a stalker who threatens to attack a victim. Therefore, stalking statutes allow for the imminent arrest of potential attackers. See Gilligan, *supra* note 120, at 301.

158. See *supra* note 21 and accompanying text; see also *infra* note 162 and accompanying text.

159. "[A]nti-stalking laws recognize that actions as seemingly innocent as 'following,' when done repeatedly [sic] and when targeted at an individual, generate fear and warrant prosecution." McAnaney et al., *supra* note 19, at 890.

160. Minnesota's Sentencing Guidelines Commission recently increased the recommended sentence for felony stalking. The Commission raised penalties for repeated phone calls and repeated violations of stalking laws up to the same level as crimes such as third-degree assault and motor vehicle theft. Kevin Duchscher, *Sentencing Commission Urges Stiffer Stalking Penalties*, MINNEAPOLIS STAR TRIB., Oct. 22, 1993, at 7B.

impose felony penalties for aggravated stalking behavior.¹⁶¹

Finally, stalking laws provide better immediate protection for the endangered provider than do other state criminal statutes. Because stalking laws enable the victim to seek early and effective law enforcement before an attack actually takes place, the statutes offer greater protection than other criminal statutes that require a physical contact or assault to occur before police action can be taken. Temporary restraining orders are always available in conjunction with stalking statutes, and a few states are now speeding up the use of restraining orders by making sure that each police officer and judge has sentencing information when she needs it.¹⁶²

Temporary restraining orders used in conjunction with existing criminal statutes have been criticized as ineffective remedies for stalking behavior; statistics show that many orders are simply ignored.¹⁶³ However, stalking statutes address this weakness in the system by providing additional statutory protections for the victim. Different stalking statutes have different protections: Iowa presumes stalkers are ineligible for bail,¹⁶⁴ Arkansas requires the court to enter a protective order upon the pretrial release of the stalker,¹⁶⁵ and both Texas and Washington require state authorities to

161. ALASKA STAT. § 11.41.260(c) (Supp. 1994); CONN. GEN. STAT. ANN. § 53-181c(b) (West Supp. 1994); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1994); FLA. STAT. ANN. § 784.048(3) (West Supp. 1994); IDAHO CODE § 18-7905(c) (Supp. 1994); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd Supp. 1993); KY. REV. STAT. § 508.140(2) (Baldwin 1992); MASS. ANN. LAWS ch. 265, § 43 (Law. Co-op. Supp. 1994); NEB. REV. STAT. § 28-311.04 (Supp. 1994); N.C. GEN. STAT. § 14-277.3(b) (1993); OHIO REV. CODE ANN. § 2903.214 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 1173 (Supp. 1995); R.I. GEN. LAWS § 11-59-2(b) (Supp. 1994); S.D. CODIFIED LAWS ANN. § 22-19A-2 (Supp. 1994); TENN. CODE ANN. § 39-17-315(b)(2) (Supp. 1994); VT. STAT. ANN. tit. 13, § 1063 (1993).

162. Massachusetts is an example of a state constantly seeking to better serve those stalking victims seeking temporary restraining orders. Last year, Massachusetts implemented a computerized database, present in every courtroom, listing temporary restraining orders and the circumstances under which they were given. Gilligan, *supra* note 120, at 336 n.347. This court reform was prompted by the tragic death of Boston resident Kristin Lardner, who was killed after her ex-boyfriend was released from arrest despite the existence of several restraining orders against him. McAnaney et al., *supra* note 19, at 875 n.277.

Colorado is another state searching for new ways to better protect stalking victims. Colorado puts electronic bracelets on stalkers to warn former victims and police of a temporary restraining order violation. Gilligan, *supra* note 120, at 336 n.347.

Minnesota also attempted to speed up the use of restraining orders by reforming its treatment of stalking as a crime. First, all police officers receive training about crimes of violence before being licensed as peace officers. *Id.* § 626.8451 (West Supp. 1994). Second, district court judges are trained on stalking issues. *Id.* § 480.30.

163. See *supra* note 23 and accompanying text.

164. IOWA CODE ANN. § 811.1(3) (West Supp. 1994).

165. ARK. CODE ANN. § 5-71-229(a)(2) (Michie Supp. 1993).

notify the victim upon the stalker's release or escape from prison.¹⁶⁶ Furthermore, in states with strong stalking laws, a victim does not even need an injunction to get immediate protection, for once the stalker commits the requisite criminal acts, the police have the authority to arrest the stalker.

D. Constitutional Challenges to Stalking Laws

For stalking laws to be effective, they must withstand constitutional scrutiny. When defendants challenge stalking laws, their challenges are usually based on two grounds: overbreadth¹⁶⁷ and vagueness.¹⁶⁸

1. Overbreadth

To survive challenges for overbreadth,¹⁶⁹ statutes must not criminalize innocent behavior or behavior otherwise protected by the Constitution.¹⁷⁰ The primary harm that legislatures must avoid in drafting stalking statutes is the "chilling effect"¹⁷¹ an overbroad statute may have upon citizens' constitutionally protected behavior. That is, people might refrain from engaging in innocent conduct if they fear arrest. The Supreme Court's standard for overbreadth is that "a governmental purpose to control or prevent activities . . . may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."¹⁷²

In the past, when constitutionally protected rights were burdened by a statute suspected to be overbroad, the Supreme Court automatically applied

166. TEX. CODE CRIM. PROC. ANN. art. 56.11 (West Supp. 1995); WASH. REV. CODE ANN. § 9.94A.155 (West Supp. 1994).

167. See generally *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). In *Coates*, the Court invalidated a statute prohibiting "three or more persons to assemble . . . and . . . conduct themselves in a manner annoying to persons passing by . . ." *Id.* at 611. The Court noted that such a broad law would prohibit peoples' right to gather in public for legitimate reasons. Some individuals would be inhibited from exercising their constitutionally protected rights of free assembly and association. *Id.* at 615.

168. See *id.* at 614. The *Coates* Court also found the Cincinnati bylaw vague because the term "annoying" was too ambiguous. *Id.*

169. For a general discussion of the overbreadth doctrine, see GERALD GUNTHER, CONSTITUTIONAL LAW, 1191-1202 (12th ed. 1991).

170. Closely protected constitutional rights include freedom of speech, freedom of expression, and the right to assemble. See U.S. CONST. amend. I.

171. See GUNTHER, *supra* note 169, at 1202.

172. Gilligan, *supra* note 120, at 306 (quoting *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964)).

“strict scrutiny” and forced a state or city to prove that it had a compelling governmental interest and that the means used to achieve that interest were necessary. In recent years, however, the Supreme Court has relaxed its standard of review to a “substantial overbreadth” test, which asks whether the law challenged reaches a substantial amount of constitutionally protected conduct, not whether it reaches any protected conduct at all.¹⁷³

Two overbreadth arguments have been made with respect to stalking statutes. First, challengers allege that stalking statutes infringe upon a protestor’s right of mobility, a right that the Supreme Court has long protected.¹⁷⁴ Second, because most stalking laws define stalking as a pattern of specific conduct¹⁷⁵ that may include speech, challengers argue that stalking statutes are substantially overbroad in their proscriptions of speech.¹⁷⁶

To avoid such overbreadth challenges in the future, state legislators can use several methods in carefully drafting their stalking statutes. First, legislators can specifically exempt constitutionally protected activities from the statute’s coverage. By explicitly excluding otherwise constitutional behavior from a stalking law’s definition of “stalking” or “harassment,” state legislatures can reduce the possibility that the statute chills that constitutional right. For example, Florida’s statute provides that “[c]onstitutionally protected activity is not included within the meaning of ‘course of conduct.’ Such constitutionally protected activity includes picketing and other organized protests.”¹⁷⁷ Many stalking statutes currently in effect contain similar provisions.¹⁷⁸

173. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

174. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-64 (1972). In *Papachristou*, the Supreme Court struck down a state vagrancy law as overbroad because it prohibited such plebeian behaviors as walking or strolling without purpose, which the Court said were worthy of constitutional protection. *Id.*

175. See *supra* notes 129-30 and accompanying text for California’s statutory definition of “course of conduct.”

176. See *Pallas v. State*, 636 So. 2d 1358 (Fla. Dist. Ct. App. 1994) (upholding state stalking statute against overbreadth challenge to statute’s potential application to speech as prohibited conduct); *Woolfolk v. Commonwealth*, 447 S.E.2d 530 (Va. Ct. App. 1994) (rejecting overbreadth challenge to state stalking statute, holding that any application of the statute to speech was insubstantial).

177. FLA. STAT. ANN. § 784.048(1)(b) (West Supp. 1994).

178. See, e.g., ARK. CODE ANN. § 5-71-229(d)(1)(B) (Michie Supp. 1993); CAL. CIVIL CODE § 1708.7(e) (West Supp. 1994); IND. CODE ANN. § 35-45-10-1 (West Supp. 1994); MINN. STAT. ANN. § 609.749(7) (West Supp. 1994); MO. ANN. STAT. § 455.010(10) (Vernon Supp. 1994); NEV. REV. STAT. § 200.575(5)(b) (Michie Supp. 1993); WYO. STAT. § 6-2-506(c) (Supp. 1994).

Some states attempt to exempt protected activity by including only the phrase “with no legitimate purpose.” See, e.g., OR. REV. STAT. § 163.732(1) (Supp. 1994); GA. CODE ANN. § 16-5-90(a) (Supp.

A second method by which to avoid an overbreadth challenge is to define stalking in clear and recognizable terms, e.g., as conduct that would cause substantial harm to a "reasonable person."¹⁷⁹ In requiring a certain level of harm as perceived by a certain type of victim, the statute limits only that conduct that is easily recognizable and easily identifiable.¹⁸⁰ Thus, state legislatures can narrowly craft their stalking statutes to avoid constitutional challenges for overbreadth.¹⁸¹

2. *Vagueness*

A stalking statute may also violate constitutional guarantees if its terms are overly vague. The vagueness doctrine¹⁸² encompasses two Due Process Clause¹⁸³ guarantees: (1) the average citizen should be able to understand what conduct is proscribed by a given law, and (2) definite legislative standards should restrain government officials from arbitrary or discriminatory use of the statute.¹⁸⁴ Thus, stalking statutes must outlaw conduct with enough detail that citizens of ordinary intelligence can understand what is legal and what is not.¹⁸⁵ Legislators must also set out clear guidelines that will require police, prosecutors, and juries to enforce the statutes consistently.¹⁸⁶

Due to the very nature of those behaviors prohibited under stalking laws, however, it is difficult for legislators to predict exactly what types of specific situations will arise in violation of the statutes. Indeed, for a legislature to draft a stalking statute narrowly to proscribe only one

1994); HAW. REV. STAT. ANN. § 711-1106.5(1)(a) (Supp. 1994); N.C. GEN. STAT. § 14-277.3(a) (Supp. 1993).

179. See *People v. Harvey*, 123 N.E.2d 81, 83 (N.Y. 1954) (upholding a statute because it required "substantial interference with . . . the reasonable man").

180. See CAL. PENAL CODE § 646.9 (West Supp. 1994) for an example of a stalking statute that requires emotional distress. See FLA. STAT. ANN. § 784.048 (West Supp. 1994) for an example of a stalking statute that requires a victim's fear to be reasonable.

181. In fact, most stalking statutes have been upheld in the face of overbreadth challenges, see, e.g., *Minnesota v. Brian William Oates*, No. 93042334, slip op. at 26 (D. Minn. Dec. 7, 1993); *State v. Tremmel*, 664 So. 2d 102 (Fla. 1994).

182. For a general discussion of the vagueness doctrine, see TRIBE, *supra* note 98, § 12-31.

183. U.S. CONST. amend. XIV, § 1.

184. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-64 (1972) (holding that a law that proscribes wandering about "without any lawful purpose or object" may be a trap for innocent acts, and that the "amenities of life as we have known them" deserve constitutional protection).

185. See *Connally v. General Constr. Co.*, 269 U.S. 385, 391-93 (1926). A statute is void for vagueness if men of common intelligence must guess at its meaning. *Id.*

186. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (invalidating an anti-loitering statute on grounds that the statute provided no standard for determining how to satisfy its requirements).

situation or behavior would defeat the purpose of the statute—to adapt its proscriptions to fit a variety of circumstances.¹⁸⁷ Fortunately, the Supreme Court recognized this paradox and held that the Constitution does not require total specificity in statutory language.¹⁸⁸

Nonetheless, to create stalking statutes that will survive challenges for vagueness, state legislators must walk a fine line. The statute must be specific enough for the ordinary citizen to know with clarity which behaviors are prohibited, yet broad enough to encompass a variety of behaviors. State legislators can help to protect their stalking statutes against vagueness challenges by including the element of scienter or intent.¹⁸⁹ The Supreme Court has held that a “scienter requirement may mitigate a law’s vagueness.”¹⁹⁰ Many existing stalking statutes include a knowledge requirement, and that element appears to have made them resistant to vagueness challenges: courts have upheld such tightly drawn statutes over constitutional challenges.¹⁹¹

VI. CONCLUSION

Admittedly, the problem of overzealous anti-abortion protestors is extremely complex, and no one statute can solve all providers’ problems. Many fine remedies exist for defusing the peculiar and dangerous situations that can result when anti-abortion activists exceed the legal boundaries of protest.¹⁹² If used together, these remedies can curb provider abuse and clinic harassment on many fronts. Some, such as civil RICO, are well-suited to dealing with large organizations like Operation Rescue at the

187. See TRIBE, *supra* note 98, at 1011-22, for a discussion of the dangers of drafting statutes narrowly.

188. See *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).

189. Scienter is defined as “knowingly.” BLACK’S LAW DICTIONARY 1345 (6th ed. 1990). This requirement that a person act knowingly is distinguishable from the intent requirement that makes FACE troublesome. See *supra* notes 95-97 and accompanying text. Under California’s stalking statute and many others, a person must have “intent to place the plaintiff in reasonable fear for his or her safety.” CAL. CIVIL CODE § 1708.7(a)(3)(A) (West Supp. 1994). Under FACE, a person must “intentionally injure[] . . . any person . . . because that person . . . is obtaining or providing reproductive health services.” 18 U.S.C.A. § 248(a)(1) (1994). Therefore, a scienter requirement is content-neutral and easier to prove than FACE’s specific requirement of proving anti-abortion sentiment.

190. *Hoffman Estates*, 455 U.S. at 499. *Accord* *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (acting “knowingly”); *Screws v. United States*, 325 U.S. 91 (1945) (acting “willfully”); *State v. Koetting*, 616 S.W.2d 822 (Mo. 1981) (acting “purposely”); *Commonwealth v. Duncan*, 363 A.2d 803 (Pa. Super. Ct. 1976) (acting “intentionally”).

191. See *supra* note 181 and accompanying text.

192. See *supra* notes 26-62 and accompanying text.

corporate level.¹⁹³ Others, like FACE, are most effective to guard the sanctity of the clinic itself, to keep clinic doors open and free of illegal blockade.¹⁹⁴ Still others, like the various criminal statutes already used to stop similar criminal behavior,¹⁹⁵ are most effective as default protections for the abortion provider. Nonetheless, stalking laws are the best means by which to handle the specific harassment and threats of violence that abortion providers encounter from anti-abortion protestors. First, and most important, state stalking statutes offer immediate and effective physical protection to vulnerable abortion providers.¹⁹⁶ Law enforcement authorities and courts can respond quickly to threatened acts of violence before the violence actually occurs. Second, stalking statutes offer extended protection to individual abortion providers because they contain heavy misdemeanor sentences, graduated sentencing schemes, and felony sentences for aggravated stalkers.¹⁹⁷ Third, the bail procedures in many stalking statutes are "victim-friendly," requiring police officials to notify former stalking victims before their former stalkers are released from police custody.¹⁹⁸ Finally, although stalking laws are subject to constitutional challenge, legislators can overcome these challenges through narrow drafting and exemption of constitutionally protected activities.¹⁹⁹ All states that currently have or are considering enacting stalking laws should use those laws to prosecute anti-abortion protestors who exceed the constitutionally protected limits of protest and intrude into abortion providers' private lives.

The abortion provider today is not safe anywhere, solely due to his or her choice to help women exercise their constitutionally guaranteed right to an abortion. Anti-abortion activists like John Burt, the regional director of Rescue America, have laid down the gauntlet. "I think it's going to be like a war, a holy war, and people are going to get hurt on both sides."²⁰⁰ These threats have deterred some abortion providers, but many dedicated doctors and clinicians continue their work despite violence directed at themselves and their families. In the critical effort to keep abortion providers alive and well, no state can afford to ignore the effectiveness of stalking statutes. State stalking statutes may be the last, best weapons in the

193. See *supra* notes 104-08 and accompanying text.

194. See *supra* notes 85-103 and accompanying text.

195. See *supra* notes 109-19 and accompanying text.

196. See *supra* notes 162-66 and accompanying text.

197. See *supra* notes 160-62 and accompanying text.

198. See *supra* notes 164-66 and accompanying text.

199. See *supra* notes 177-81, 189-91 and accompanying text.

200. *Nightline*, *supra* note 1.

arsenal. Anti-abortion protestors may have won some initial battles, but they have not yet won the war.

Amy M. Sneirson