January 1995

No Place to Hide: Why State and Federal Enforcement of Stalking Laws May Be the Best Way to Protect Abortion Providers

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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 protestors 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

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


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. Today, abortion providers are considered “fair game.” Anti-abortion
groups such as Operation Rescue have declared war on providers,
promising them “No Place to Hide.” 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), 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.

Recent judicial decisions also reflect concern for the safety of abortion
providers and patients. In 1993, in National Organization of Women, Inc.
v. Scheidler, the Supreme Court found in favor of the National Organiza-
tion 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).
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. Almost all of these 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 state 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. Further, most state stalking laws exempt legitimate protest and are narrowly drafted so as to resist constitutional challenge, unlike other available criminal statutes that target the same behavior. 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. In the abortion context, the protestor’s intent is to get at the “weak link” in the armor of abortion rights and force all abortion providers to quit the system. This campaign of terrorism is working: anti-
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 order is the most common remedy used in conjunction with state stalking laws, the restraining order, often proves ineffective because it is simply ignored. 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. Third, stalking laws may face constitutional challenge. 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
structure of today's anti-abortion alliance. 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 1988 and quickly moved to originate a week of blockades at a New York City abortion clinic. Terry and his followers adopted aggressive philosophies, instructing activists to harass all comers to abortion clinics. Soon, mainstream Christian leaders endorsed Operation Rescue's tactics, 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. 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 rehe'g en banc, 917 F.2d 1077 (8th Cir. 1990).


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 Lattay, and Cardinal John J. O'Connor. Id.

prohibitions, 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. Between 1977 and April 1993, over 8,000 clinic blockades and related disruptions were reported. 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.

Operation Rescue's members vary widely in the level of their devotion to the cause of stopping abortions. 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. 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. 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


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:

<table>
<thead>
<tr>
<th>Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death Threats</td>
<td>21.0%</td>
</tr>
<tr>
<td>Bomb Threats</td>
<td>18.1%</td>
</tr>
<tr>
<td>Blockades</td>
<td>16.0%</td>
</tr>
<tr>
<td>Stalkings</td>
<td>14.9%</td>
</tr>
<tr>
<td>Invasions</td>
<td>14.6%</td>
</tr>
<tr>
<td>Chemical attacks</td>
<td>10.3%</td>
</tr>
<tr>
<td>Arson</td>
<td>1.8%</td>
</tr>
</tbody>
</table>

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." Often, however, these rescues turn ugly as protestors invade the clinics themselves and physically attack both the clinic's facilities and those who provide abortions.

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

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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. However, in most cities, the anti-abortion protestors met strong resistance from pro-choice supporters, local police departments, and courts. As a result, the tactics of the pro-life movement shifted away from large clinic blockades and towards dissuading doctors from performing abortions.

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. Prior to his death, Dr. Gunn had been followed, threatened, and harassed for years. Abortion foes distributed "wanted" posters bearing his photograph, home address, home telephone number, and daily work schedule. An anti-abortion activist was convicted of first-degree murder in the case.

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

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. 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. Soon after, he was tried and convicted in state court for both murder and attempted murder and was sentenced to death.

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. The attacker, John Salvi, has since been arraigned on both federal and state charges.

Tragic as these shooting were, no one working in the women's health care field was surprised. 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.
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. Abortion providers are also increasing their personal level of protection. Many providers wear bulletproof vests; others install bulletproof glass for protection. 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.

Along with this threat of violence, abortion providers suffer various forms of harassment. Protestors make disturbing telephone calls, picket providers' homes, display "wanted" posters plastered with providers' personal information, employ high-powered microphones to listen to conversations inside clinics, and pressure providers through their friends, family, and neighbors. 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.

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.

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.

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.

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).

Dr. Pablo Rodriquez, 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.

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.

"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.\textsuperscript{72} Statistics show that only seventeen percent of the counties in the United States presently have an abortion provider.\textsuperscript{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.\textsuperscript{74} However, the American Medical Association recently warned Congress that the adequacy of health care may be endangered by the abortion protestors' violent activities.\textsuperscript{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

\begin{itemize}
  \item 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.
  \item 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.
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  \item 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.
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  \item 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. For example, Travelers Insurance, a nationwide company, changed its underwriting policy in 1990 to exclude abortion clinics. Although insurance industry officials cite purely business reasons, public perception is surely a consideration in such decisions.

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. Rural areas are especially vulnerable to attacks by protestors. South Dakota, for example, has only one abortion provider for the entire state. Abortion foes seek to render whole geographic regions abortion-free, using multiple concerted attacks in each area for a short period of time.

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. As one abortion provider who has suffered considerable abuse at the hands of abortion foes said, "[P]hysicians are discontinuing the provision of a

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."

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

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 Gunn shocked the nation and quickly led to a bipartisan call for legislation to protect the sanctity of the abortion right. In November 1993, both the Senate and the House of Representatives voted to approve similar versions of FACE. President Clinton signed the bill into law in May 1994. FACE is aimed primarily

84. S. REP. No. 117, supra note 9, at 17 (testimony of Dr. Pablo Rodriquez, the Medical Director of Planned Parenthood of Rhode Island, in front of the Senate Committee on Labor and Human Services on May 12, 1993).
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 obstruction and preserving a woman’s right to obtain an abortion. 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. 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. While some portions of the legislative record address the protection of abortion providers, 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. 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 clinic 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].


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).
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. Anti-abortion groups also oppose FACE on the grounds that it violates the constitutionally protected right to practice peaceful civil disobedience. So far, FACE has been found constitutionally sound. 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. 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. 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)).


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 protestors 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 protestors 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. Attorney has declined to enforce a federal injunction ordered under FACE. 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, 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. Abortion rights advocates hailed this decision as a valuable tool to wield against anti-abortion protestors, because it allows clinics to recover treble damages 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." 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.

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. Other criminal

protestors have surfaced in Mississippi and in Milwaukee. Id. 103. Id.
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,\textsuperscript{110} loitering,\textsuperscript{111} terrorism,\textsuperscript{112} trespassing,\textsuperscript{113} and other similar physical crimes.\textsuperscript{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.\textsuperscript{115} Although several courts have upheld the use of harassment statutes to protect abortion providers and their families from unwanted attention,\textsuperscript{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.\textsuperscript{117} Second, harassment statutes are subject to overbreadth and vagueness challenges.\textsuperscript{118} Third, harassment statutes provide only misdemeanor sentencing,\textsuperscript{119} which is alarming or distressing conduct in a manner which he knows is likely to provoke a violent or disorderly response").

\textsuperscript{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”).

\textsuperscript{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”).


\textsuperscript{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).

\textsuperscript{115} See supra note 21 and accompanying text for a discussion on restraining orders.


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

\textsuperscript{118} See infra notes 167-91 and accompanying text for a discussion of constitutional challenges to statutes.

\textsuperscript{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. An obsessed fan haunted Schaeffer for over two years, finally shooting her at the gate of her Los Angeles apartment. Her highly publicized murder took place just before five other Orange County, California, women were murdered by crazed former lovers. These events combined to inspire California’s legislature to create the nation’s first criminal stalking law in 1990. 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. The remaining three


121. Gilligan, supra note 120, at 285.


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.

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


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.\textsuperscript{129} California also requires that the "course of conduct" at issue would distress a reasonable person and that it actually causes substantial distress.\textsuperscript{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.\textsuperscript{131} The victim must suffer some level of emotional injury, usually that which a reasonable person would suffer.\textsuperscript{132} Finally, the statutes specifically exclude constitutionally protected activity;\textsuperscript{133} this exemption is often contained within a statute's general definition of "harassment."\textsuperscript{134}

Like the California law, the Florida statute contains a specific exclusion for some types of picketing and organized protests.\textsuperscript{135} Florida's statute differs from California's, however, the Florida statute distinguishes "stalking"\textsuperscript{136} from "aggravated stalking,"\textsuperscript{137} the latter offense being...
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.\textsuperscript{138} In contrast, the aggravated stalking provision requires a reasonable fear from a credible threat.\textsuperscript{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.\textsuperscript{140}

Virginia's stalking law\textsuperscript{141} is significantly broader than California's. The Virginia statute does not require a credible threat for a stalking conviction.\textsuperscript{142} Virginia also does not require that the victim suffer emotional injury\textsuperscript{143} and does not set any time limit upon the pattern of behavior required.\textsuperscript{144} In fact, Virginia's law does not define much by way of substantive law,\textsuperscript{145} making it one of the broadest stalking statutes in the nation.

Some stalking statutes defy categorization. Connecticut's statute,\textsuperscript{146} which addresses only literal stalking behaviors, not harassment in general, is one such statute.\textsuperscript{147} Connecticut requires no credible threat; it provides merely that the stalker must intend to cause the victim to fear for her physical safety.\textsuperscript{148} West Virginia's statute\textsuperscript{149} 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.\textsuperscript{150}

\section*{C. Effectiveness}

Several state legislatures and courts have begun to recognize the

\begin{itemize}
\item \textsuperscript{139} Id. § 748.048(1)(c).
\item \textsuperscript{141} Va. Code Ann. § 18.2-60.3 (Michie Supp. 1994).
\item \textsuperscript{142} Id. § 18.2-60.3(A); see also Idaho Code § 18-7905 (1994).
\item \textsuperscript{143} Va. Code Ann. § 18.2-60.3(A) (Michie Supp. 1994).
\item \textsuperscript{144} Id.
\item \textsuperscript{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.
\item \textsuperscript{147} The Connecticut statute outlaws willful and repeated following or lying in wait. Id.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} W. Va. Code § 61-2-9a (Supp. 1994).
\item \textsuperscript{150} Id. § 61-2-9a(a).
\end{itemize}
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 providers \^155 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


\^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 procedures and temporary restraining orders.

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.

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.

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 Duchschere, Sentencing Commission Urges Stiffer Stalking Penalties, MINNEAPOLIS STAR TRIB., Oct. 22, 1993, at 7B.

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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


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.


notify the victim upon the stalker’s release or escape from prison. 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: overbreadth and vagueness.

1. Overbreadth

To survive challenges for overbreadth, statutes must not criminalize innocent behavior or behavior otherwise protected by the Constitution. The primary harm that legislatures must avoid in drafting stalking statutes is the “chilling effect” 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.”

In the past, when constitutionally protected rights were burdened by a statute suspected to be overbroad, the Supreme Court automatically applied
"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.\(^\text{173}\)

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.\(^\text{174}\) Second, because most stalking laws define stalking as a pattern of specific conduct\(^\text{175}\) that may include speech, challengers argue that stalking statutes are substantially overbroad in their proscriptions of speech.\(^\text{176}\)

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 "'constitutively protected activity is not included within the meaning of 'course of conduct.' Such constitutionally protected activity includes picketing and other organized protests.'"\(^\text{177}\) Many stalking statutes currently in effect contain similar provisions.\(^\text{178}\)


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); Woelfolk 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).


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." 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. Thus, state legislatures can narrowly craft their stalking statutes to avoid constitutional challenges for overbreadth.

2. Vagueness

A stalking statute may also violate constitutional guarantees if its terms are overly vague. The vagueness doctrine encompasses two Due Process Clause 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. Thus, stalking statutes must outlaw conduct with enough detail that citizens of ordinary intelligence can understand what is legal and what is not. Legislators must also set out clear guidelines that will require police, prosecutors, and juries to enforce the statutes consistently.

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

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. The Supreme Court has held that a "scienter requirement may mitigate a law's vagueness." 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.

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. 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 injur[...]. . . 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.
191. See supra note 181 and accompanying text.
192. See supra notes 26-62 and accompanying text.

corporate level. Others, like FACE, are most effective to guard the sanctity of the clinic itself, to keep clinic doors open and free of illegal blockade. Still others, like the various criminal statutes already used to stop similar criminal behavior, 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. 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. 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. Finally, although stalking laws are subject to constitutional challenge, legislators can overcome these challenges through narrow drafting and exemption of constitutionally protected activities. 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." 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.
arsenal. Anti-abortion protestors may have won some initial battles, but they have not yet won the war.

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