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RECENT DEVELOPMENTS

MADSEN AND THE FACE ACT: ABORTION RIGHTS OR TRAFFIC CONTROL?

Evelyn Figueroa* & Mette Kurth**

INTRODUCTION

An aggressive anti-abortion movement developed in the wake of *Roe v. Wade*.¹ Although anti-abortion activism began with lawful pickets and demonstrations in the 1970s, it has since deteriorated into a myriad of unlawful activity, such as the destruction of reproductive health care clinics (“clinics”), the harassment and stalking of patients and clinic staff, and the murder of abortion providers.² In the past seventeen years, clinics and clinic staff have suffered more than 6000 blockades and over 1000 acts of violence,³ including at least 36 bombings, 81 arsons,⁴

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1. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right of privacy — found in the First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, the Ninth Amendment, and the concept of liberty guaranteed by the Fourteenth Amendment — “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

2. Brief of the Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League (NARAL), Women’s Law Project, Women’s Legal Defense Fund, National Women’s Law Center, and American Jewish Committee at 2–12, as *Amici Curiae* in Support of Respondents, *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (No. 93-880) [hereinafter Brief of the Center for Reproductive Law].

3. *Id.*

4. Including attempted arsons and bombings, the number rises to nearly 200 since 1977. *Id.* at 6 n.9.

131 death threats, 84 assaults, 2 kidnappings, and 327 clinic "invasions."⁵

In *Bray v. Alexandria*,⁶ the Supreme Court thwarted efforts to curb these violent anti-abortion protests when it held that federal courts did not have the authority under 42 U.S.C. § 1985(3) to enjoin abortion clinic blockades.⁷ Some anti-abortion protestors saw *Bray* as a license to escalate their efforts.⁸ In the aftermath of *Bray*, anti-abortion fanatics shot five people — fatally wounding two abortion providers.⁹ One result of this violence is a nationwide shortage of trained physicians willing to provide abortions.¹⁰ Vandalism and fire bombings have forced hundreds of clinics nationwide to close or curtail their services.¹¹ The violence has also created a climate of fear and intimidation for wo-

5. *Id.* "During clinic invasions abortion providers have been 'pinched, hit, grabbed, kicked,' slammed against walls, dragged outdoors, crushed by crowds, and terrorized with drive-by shootings." *Id.* at 6 n.10.

6. 113 S. Ct. 753 (1993).

7. *Id.*

8. Brief of the Center for Reproductive Law, *supra* note 2, at 3-4.

9. *See, e.g., infra* notes 43, 45 and accompanying text.

10. Brief of the Center for Reproductive Law, *supra* note 2, at 16. In 1990, only 17% of the counties in the United States had an abortion provider. *Id.* at 16-17. Women's rights groups and organizations attribute this to the anti-abortion movement's systematic efforts to eliminate abortion providers. *Id.* at 16; *see also* Ana Puga, *Radicalizing Right to Life: "Newcomers" Preach Violence*, BOSTON GLOBE, Oct. 30, 1994, at 26.

11. *See, e.g.,* Brief of the Center for Reproductive Law, *supra* note 2, at 17 n.40. The fire bombings have affected all clinics — not just the targeted clinics — because insurance companies have responded to clinic bombings by increasing the cost of fire insurance. Carol McGraw, *Insurance Problems Threaten the Future of Women's Clinics*, L.A. TIMES (San Diego County Edition), Oct. 2, 1987, at 7.

African-American women, as well as young, poor, and other minority women, stand to lose more than their white counterparts if abortion is not accessible. Janet Benshoof, *Planned Parenthood v. Casey: The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, 2254-56 (1993). For minority women, "[a]doption is not an attractive option because [minority] infants are harder to place in foster homes." Toni Y. Joseph, *Blacks No Longer Silent on Abortion*, ORLANDO SENTINEL, Aug. 23, 1992, at G1. Clinic blockades have uniquely burdened women in low-income brackets — the majority of clinic patients. McGraw, *supra*. Most clinic resources are used for programs such as counseling, education, prenatal care for low-income families, and contraceptive research. *E.g.,* Marc Lacey, *Anti-Abortion Group Vows to Halt Planned Parenthood's Clinic*, L.A. TIMES (South Bay Edition), Feb. 10, 1991, at B3. The goal of Planned Parenthood clinics is to help "low-income women achieve self-sufficiency by controlling their [own] reproductive choices." Barbara Tierney, *Planned Parenthood Didn't Plan on This*, BUS. WK., July 3, 1989, at 34.

men seeking abortions and other reproductive health care services.¹²

In response to the violence, Congress passed the Freedom of Access to Clinic Entrances Act (the "FACE Act"), which took effect in May 1994. At first glance, the FACE Act appeared to reinforce a woman's constitutional right to have an abortion, and as such, was a victory for the pro-choice movement. The FACE Act, however, is primarily concerned with traffic control; it simply protects access to "reproductive health services."¹³ To that end, it provides clinic doctors and patients with several remedies against violent anti-abortion protestors: (1) federal injunctions,¹⁴ (2) federal criminal penalties, and (3) a private cause of action.

One month after the FACE Act was enacted, the Supreme Court decided *Madsen v. Women's Health Center*.¹⁵ *Madsen* upheld a state injunction limiting the activities of anti-abortion protestors by providing buffer zones around a Melbourne clinic.¹⁶ These zones protected access to the clinic as well as the safety and well-being of abortion seekers and providers. The decision is particularly significant in that it denied First Amendment protection to expressive conduct.¹⁷ If the Supreme Court had struck down the injunction, those seeking or providing abortion services would have been denied state injunctive remedies.¹⁸ In conjunction with *Bray* and in the absence of the FACE Act,

12. See, e.g., Brief of the Center for Reproductive Law, *supra* note 2; Randolph M. Scott-McLaughlin, *Operation Rescue Versus a Woman's Right to Choose: A Conflict Without a Federal Remedy?*, 32 DUQ. L. REV. 709 (1994).

13. 18 U.S.C.S. § 248(a)(1) (Law. Co-op. 1994). Reproductive services are "services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." *Id.* § 248(e)(5).

14. *Bray* held that federal courts did not have the authority under 42 U.S.C. § 1985(3) to enjoin abortion clinics blockades. See *infra* notes 31, 32 and accompanying text. In providing federal injunctive relief, the FACE Act circumvents but does not overrule *Bray*. Section 248(c)(1)(B) of the FACE Act establishes a new and separate right to enjoin a clinic blockade. See *infra* part II.A.2.

15. 114 S. Ct. 2516 (1994).

16. *Id.* at 2527.

17. Brief for Respondents at 11, *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (No. 93-880) [hereinafter Brief for Respondents]. The purpose of the injunction was to "protect workers and patients at a medical facility from conduct that inhibited access to the Clinic, harassed and threatened people attempting to approach the Clinic, created health risks for individuals undergoing sensitive medical procedures, and blocked traffic on a public roadway. Petitioners' claim is that these activities constitute speech protected by the First Amendment." *Id.*

18. More than forty such injunctions have been issued nationwide. Press Release from The Feminist Majority Foundation (on file at The Feminist Majority Foundation).

such a decision would have foreclosed both federal and state injunctive relief. Constitutional approval of buffer zones at clinics therefore appears, at a cursory glance, to be a meaningful victory for abortion rights.¹⁹ However, the decision in *Madsen* simply allows the states to regulate traffic around clinics by using buffer zones.

In Part I of this Recent Development, we discuss the dual fronts on which the struggle for abortion rights has taken place — the courtroom and the clinic. We also explore how the dynamics of the struggle have led to escalated protests at clinics. In Part II, we discuss the FACE Act, the remedies it has created, and some of the legal challenges brought by anti-abortion groups to have it declared unconstitutional. In Part III, we analyze *Madsen*, its First Amendment implications, and its significance for state injunctive remedies. Finally, in Part IV we discuss how the FACE Act and *Madsen* complement each other and why the FACE Act may not give abortion providers enough protection. *Madsen* and the FACE Act complement each other in the following ways. First, both protect the flow of traffic into clinics, providing a safe environment for abortion seekers and providers, yet neither reaffirms a fundamental right to an abortion. Second, *Madsen* delineates the legal standards which lower courts should look to in assessing the constitutionality of the FACE Act and future injunctions. Third, the federal penalties and awards provided under the FACE Act supplement the state injunctions permitted in *Madsen*. However, the FACE Act has three significant weaknesses. It does not encompass “stalking”; it may not protect third parties; and it defines “intimidation” vaguely, making it difficult to prosecute successfully.

I. DUAL FRONTS: THE COURTHOUSE AND THE CLINIC

After the Supreme Court guaranteed abortion as a fundamental right in *Roe v. Wade*,²⁰ there was a backlash from anti-abortion groups. Initially, anti-abortion activists tried to eliminate lawful abortions by challenging *Roe* in the courts.²¹ Their

19. Cf., David Van Biema, *Keep Your Distance*, TIME, July 11, 1994, at 25 (Eleanor Smeal of the Feminist Majority and Judy Madsen, the anti-abortion activist after whom *Madsen* was named, “were unanimous in their assessment of the *Madsen* verdict, as were their respective comrades. All believed that the . . . decision . . . was a major defeat for antiabortion crusaders.”).

20. 410 U.S. 113, 153 (1973).

21. Brief of the Center for Reproductive Law, *supra* note 2, at 3–4.

efforts paid off when, in *Planned Parenthood v. Casey*,²² the Court strengthened the state's ability to regulate first trimester abortions so long as the regulations do not unduly burden women seeking abortions.²³

Outside of the courtroom, anti-abortion activists protested at clinics in order to draw attention to their cause and to discourage women from seeking abortions.²⁴ They targeted health care centers and clinics by trespassing, blocking access to the clinics, overloading the telephone lines so that appointments could not be scheduled, and creating an intimidating atmosphere for both clinic staff and patients.²⁵ These tactics were somewhat successful — some patients rescheduled, but others never returned.²⁶

In response to anti-abortion tactics, various women's groups established "clinic defense programs," which provided volunteers to escort patients into clinics and to form physical buffers between patients and clinic staff and the anti-abortion protestors.²⁷ With anti-abortion and pro-choice groups in such close proximity, fights and small riots erupted frequently, and demonstrators often obstructed the flow of traffic.²⁸ Nonetheless, the clinic defense programs were often effective in reassuring patients by dif-

22. 112 S. Ct. 2791 (1992).

23. *Id.*

24. See Brief of the Center for Reproductive Law, *supra* note 2; Brief of the American College of Obstetricians and Gynecologists, The American Medical Women's Association, The American Psychiatric Association, and The California Medical Association as *Amici Curiae*, in support of Respondents, *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (No. 93-880) [hereinafter Brief of the OBGYNS]; Marilyn Achiron & Phoebe W. Howard, *Twisting the Knife*, PEOPLE, Oct. 25, 1993, at 201-02.

25. See Brief of the OBGYNS, *supra* note 24; Brief for Respondents, *supra* note 17, at 1-11; Kurt Chandler, *Operation Rescue's Minnesota Training Is Off to a Quiet Start*, STAR TRIB., June 15, 1993, at 5B.

26. Brief of the OBGYNS, *supra* note 24, at 4; Brief of the Center for Reproductive Law, *supra* note 2, at 14.

27. Michael D. Hinds, *Anti-Abortion Drive Surprisingly Quiet*, N.Y. TIMES, July 15, 1993, at A6; Jennifer Warren, *33 Arrested During Protest at Health Clinic*, L.A. TIMES, July 15, 1993, at A3, A18.

The clinics also turned to law enforcement for protection. This drained local funds. For instance, Wichita, Kansas spent approximately \$1,000,000 to arrest about 2750 anti-abortion demonstrators in July and August of 1991; Milwaukee spent approximately \$1,500,000 to arrest about 2100 demonstrators between June of 1992 and September of 1993; and San Jose spent approximately \$1,000,000 to arrest about 100 people in June of 1993. David Van Biema, *Your Activist, My Monster*, TIME, Feb. 7, 1994, at 32-33.

28. See Brief for the National Abortion Federation at 5-15, *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (No. 93-880) (discussing five clinics which have received injunctions for relief from these problems).

fusing the anti-abortion protestors' intimidating tactics. Pro-choice advocates also fought back in the courts, obtaining a number of strong federal injunctions under 42 U.S.C § 1985(3).²⁹

Fueled by their inability to prevent abortions or close down the clinics,³⁰ anti-abortion groups challenged the validity of the federal injunctions. They succeeded in *Bray v. Alexandria*.³¹ *Bray* held, by a five to four majority, that federal courts do not have authority under section 1985(3) to enjoin abortion clinic blockades.³² This decision effectively removed all federal protection for patients and clinic staff and gave the anti-abortion movement renewed energy.³³

Some anti-abortion advocates interpreted *Bray* as a sign that they would not be held accountable for their harassing and intimidating tactics at clinics.³⁴ Several anti-abortion groups turned to radical, even terrorist-like activity.³⁵ They targeted cities where anti-abortion sentiment was well-entrenched and small towns where they could overwhelm local law enforcement.³⁶ They used fire-bombs and butyric acid to vandalize and destroy abortion clinics, causing millions of dollars in damage.³⁷ Additionally, some anti-abortion activists set up training centers that grouped anti-abortion protestors into IMPACT Teams³⁸ and taught them how to vandalize clinics and harass clinic staff and patients without implicating themselves.³⁹

29. See Scott-McLaughlin, *supra* note 12, at 709-10; *Bray v. Alexandria*, 113 S. Ct. 753, 799 (1993) (O'Connor, J., dissenting) (stating the purposes behind the enactment of 42 U.S.C. § 1985(3)).

30. See, e.g., Scott-McLaughlin, *supra* note 12.

31. *Bray*, 113 S. Ct. at 753.

32. *Id.*

33. See *infra* notes 34-39 and accompanying text.

34. Brief of the Center for Reproductive Law, *supra* note 2, at 3-4.

35. See generally Scott-McLaughlin, *supra* note 12 (arguing that Operation Rescue's activities are similar to the Ku Klux Klan's activities during the Reconstruction Era). See also Van Biema, *supra* note 19, at 33 (Rev. Keith Tucci of Operation Rescue points out that RICO may send protestors "underground."). One of the problems patients and clinic employees face is that the more violent activity is harnessed through legal means such as the FACE Act, RICO, and injunctions, the more dangerous the activity of anti-abortion protestors becomes. *Cf. id.*

36. Scott-McLaughlin, *supra* note 12, at 709.

37. Brief of the Center for Reproductive Law, *supra* note 2, at 7 n.11.

38. "IMPACT" is the "Institute of Mobilized Prophetic Activated Christian Training . . . a nationally recruited group designed to [h]elp equip, train and lead [the impact teams] into true spiritual warfare." Brief for Respondents, *supra* note 17, at 3 n.6 (citation omitted). A brochure advertising the boot camps stated it was looking for "Christians with a serious attitude problem." Hinds, *supra* note 27, at A16.

39. Brief of the Center for Reproductive Law, *supra* note 2, at 11-12 n.27.

Furthermore, anti-abortion protestors determined it would be more effective to concentrate their energy on forcing the limited number of clinic employees to abandon their profession than to prevent thousands of women from entering clinic doors annually.⁴⁰ Thus, without abandoning the activities directed specifically at women and clinics, anti-abortion protestors shifted the majority of their energy to targeting doctors and clinic workers.⁴¹ Some of the more radical anti-abortion organizations and leaders stated that murdering abortion providers was an acceptable means of eliminating abortion.⁴² A few took this directive to heart; thus far, anti-abortion protestors have killed two doctors and one escort.⁴³

Several prominent anti-abortion organizations have publicly denounced these murders and acts of violence.⁴⁴ However, doctors and other clinic employees fear further attacks.⁴⁵ Many

40. Telephone Interview with Katherine Spillar, National Coordinator of the Feminist Majority Foundation (Sept. 5, 1994).

41. See Melinda Beck et al., *Propaganda Made Me Do It*, NEWSWEEK, Feb. 28, 1994, at 34 (documenting the murder of Dr. David Gunn which occurred during a protest organized by Rescue America); Patrick Rogers & Spencer Reiss, *Is Murder "Justifiable Homicide?"*, NEWSWEEK, Aug. 8, 1994, at 22; see also Brief of the Center for Reproductive Law, *supra* note 2, at 18 n.41 ("Randall Terry, the founder of Operation Rescue, vowed, 'to do everything we can to torment [abortion providers] . . . to expose them for the vile, blood-sucking hyenas that they are . . . to humiliate them, to disgrace them, which is our right.'") (citing Sandra Boodman, *Abortion Foes Strike at Doctor's Home Lives—Illegal Intimidation or Protected Protest?*, WASH. POST, Mar. 12, 1993, at E3)).

42. Rogers & Reiss, *supra* note 41.

43. During his trial for the murder of Dr. Gunn, Michael Griffin claimed that anti-abortion propaganda convinced him that murdering Gunn was "biblically supported." The propaganda he offered as evidence included "graphic videos of aborted fetuses and a handbill calling for Dr. Gunn to be stopped." Beck, *supra* note 41, at 34. Paul Hill, a former minister and the founder of Defense Action, a small, militant anti-abortion group, was convicted of the murder of Dr. John Britton and his escort. Mireya Navarro, *Experts Debating Case of Man Who Killed Abortion Doctor: Some Are Troubled by Condemned Killer's Lack of Defense*, DALLAS MORNING NEWS, Nov. 27, 1994, at 41A. Hill is notorious for advocating the murder of abortion providers. He stated that Dr. Gunn's murder was "a fulfillment of the commandment of Christ [because, if] an abortionist is about to violently take an innocent person's life, [one is] entirely morally justified in trying to prevent him." Rogers & Reiss, *supra* note 41, at 22. Mainstream anti-abortion groups, however, have long disavowed this type of violence. *Id.*

44. Rev. Patrick Mahoney has stated, "Paul Hill is a pariah, a vigilante with only a handful of supporters." Rogers & Reiss, *supra* note 41, at 22.

45. One demonstrator at the Aware Women for Choice Clinic stood on a ladder and shouted over a fence at Ruth Arick, a clinic employee, "Ruth, Ruth, I pray that God strikes you dead. . . . I pray for your death in the name of Jesus." Brief for Respondents, *supra* note 17, at 4. Arick testified that she feared being murdered by an anti-abortion protestor "swept up in the fervor of the demonstrations." Brief of

wear bullet proof vests to and from work.⁴⁶ Some have hired personal bodyguards.⁴⁷ Others have simply resigned.⁴⁸ They also receive harassing and threatening letters and phone calls.⁴⁹ They are described as "baby killers" in flyers distributed by protestors.⁵⁰

Overall, the constant fervor of anti-abortion activities outside clinics has detrimentally affected patients. For example, in order to get through a blockade, patients must typically contend with: (1) loud and menacing crowds, (2) fear of being injured or killed by a protestor, (3) fear of being stalked when leaving the clinic, and (4) apprehension about having hate mail sent to friends, neighbors, and family.⁵¹ As a result, clinic workers often find symptoms of "extreme distress" in the women who manage to make their way through a blockade.⁵² These women "exhibit evidence of adrenergic 'fight-or-flight' reaction such as

the OBGYNS, *supra* note 24, at 9-11. Prior to Dr. David Gunn's murder there were other shootings. For example, "in December of 1991, a man in a ski mask opened fire with a sawed-off shotgun at a clinic in Springfield, Missouri. He wounded two clinic staff, including the office manager who is paralyzed as a result of the shooting." Brief of the Center for Reproductive Law, *supra* note 2, at 8 n.17 (citing Richard Lacayo, *One Doctor Down, How Many More?*, TIME, Mar. 22, 1993, at 46).

46. Dr. John Britton was wearing a bullet proof vest when he was shot and killed. Rogers & Reiss, *supra* note 41, at 22.

47. NOW had provided Dr. Britton with an escort and a ride to and from work. Tom Junod, *The Abortionist*, GQ, Feb. 1994, at 155.

48. Brief for Respondents, *supra* note 17, at 5.

49. *Id.* at 8-11. "Death threats to abortion providers include statements like: 'hey * * * [Dr.] Boyd. Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very soon—and you won't know when—like the babies don't. Get ready your [sic] dead.'" *Id.* at 9 n.20. Dr. Norman Tompkins, a Dallas abortion provider, received this message on his answering machine: "I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off * * *." *Id.* at 9 n.21.

50. *Id.* at 10 n.21. For example, an anti-abortion group called the Lambs of Christ passed out leaflets at the school of a Minnesota doctor's child which stated "Sonja's Mom Kills Babies." *Id.* at 9-10 n.21.

51. Achiron & Howard, *supra* note 24, at 201. Dr. Remer is the only private doctor in central Iowa who provides a full range of obstetric and gynecological care, including abortions. Operation Rescue members stand outside his office, take down the license-plate numbers of his patients, contact the Iowa Department of Transportation to obtain their home addresses, then send letters to the patients which are intended to evoke pain and guilt. The letters are sent out without even verifying the reason for the patient's visit. For example, Karen Thomas Stewart received such a letter after she went to Dr. Herbert Remer to save her child when she began to cramp and bleed during her pregnancy. *Id.*

52. Brief of the Center for Reproductive Law, *supra* note 2, at 12-13. An unwanted pregnancy is a particularly stressful life event. Protests accompanied by violent and threatening behavior affect patients' already-anxious emotional state, causing elevated blood pressure, increased rates of perspiration, and rapid heart-

pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention.”⁵³

The increased level of anxiety can produce serious complications, even death, during the abortion procedure.⁵⁴ For instance, “urinary retention makes it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in the preoperative evaluation.”⁵⁵ Furthermore, “tension affects the degree of pain experienced and the difficulty of the procedure itself.”⁵⁶ Patients experiencing high levels of anxiety require higher than average amounts of sedation. This, in turn, increases the risk of the surgery.⁵⁷ In some cases, physicians have been forced to postpone surgery because the patient’s anxiety-related symptoms were so acute.⁵⁸

In response to the escalation of anti-abortion activity after the *Bray* decision, pro-choice groups turned to Congress and to state courts for protection.

II. THE FACE ACT: FREEDOM OF ACCESS TO CLINIC ENTRANCES

On May 26, 1994, in response to pro-choice lobbying and the public outcry over the murder of Dr. Gunn, a clinic physician, Congress enacted the Freedom of Access to Clinic Entrances Act (the “FACE Act”).⁵⁹ The FACE Act recognizes a federal interest in promoting public safety and health by ensuring that women have access to reproductive health care clinics.⁶⁰ To accomplish this, the FACE Act prohibits anyone from using force, the threat of force, or physical obstruction to intentionally injure, intimi-

beats. Some are in tears, and “many appeared to be extremely anxious, fearful or agitated.” Brief of the OBGYNS, *supra* note 24, at 7.

53. Brief of the OBGYNS, *supra* note 24, at 8.

54. *Id.* at 6–8.

55. *Id.* at 8.

56. *Id.* (citation omitted).

57. *Id.* at 9.

58. *Id.* Abortion itself is a relatively safe medical procedure. Federal health statistics place the death rate during a first trimester abortion at one per 100,000 patients, compared to three per 100,000 for tonsillectomies. McGraw, *supra* note 11, at 10. However, about 5000 women a year do suffer serious complications. Brief of the OBGYNS, *supra* note 24, at 2. Moreover, the risks increase as the pregnancy progresses. *Id.* at 4.

59. 18 U.S.C. § 248; see *Hearings on S. 636 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 103d Cong., 1st Sess. (1993) [hereinafter *Hearings on S. 636*].

60. It says nothing about a woman’s right to receive an abortion, *per se*.

date, or interfere with someone because that person is obtaining or providing reproductive health services or in order to prevent that person from doing so.⁶¹ It also prohibits anyone from intentionally damaging or destroying a facility's property because that facility provides reproductive health services.⁶²

A. *Enforcement*

The FACE Act creates civil and criminal penalties⁶³ as well as a private cause of action.⁶⁴ While the FACE Act empowers federal law enforcement agencies to take action against violent or obstructionist anti-abortion activity, some fear that federal agencies will be hesitant to use these powers. The private cause of action, however, empowers the pro-choice movement by giving physicians, clinic workers, and patients two effective weapons — federal injunctions and monetary damages.

1. Government-Imposed Penalties

If convicted under the FACE Act, protestors are subject to one year in prison or up to \$10,000 in fines, or both, for an initial violation.⁶⁵ For a second violation, the penalty may be up to three years in prison, up to \$25,000 in fines, or both.⁶⁶ If bodily injury or death results from a violation of the FACE Act, the offender may be sentenced to up to ten years or "any term of years or for life" in prison, respectively.⁶⁷ For "exclusively nonviolent physical obstructions," however, the penalties are lower: up to six months in prison, up to \$10,000 in fines, or both for an

61. 18 U.S.C.S. § 248(a)(1) (Law. Co-op. 1994).

62. 18 U.S.C.S. § 248(a)(3) (Law. Co-op. 1994).

63. 18 U.S.C.S. § 248(b) (Law. Co-op. 1994).

64. 18 U.S.C.S. § 248(c)(1)(A)-(B) (Law. Co-op. 1994).

65. 18 U.S.C.S. §§ 248(b), 248(c)(2)(B)(i) (Law. Co-op. 1994).

66. 18 U.S.C.S. §§ 248(b)(2), 248(c)(2)(B)(ii) (Law. Co-op. 1994).

67. 18 U.S.C.S. § 248(b)(2) (Law. Co-op. 1994). Although the injury must result from a violation of the FACE Act, the Act does not explicitly limit bodily injury to those providing or seeking reproductive health services. *Id.* Thus, protestors may be criminally liable for injuries they inflict on third parties while violating the FACE Act. Compare this with the civil cause of action discussed *infra* in part II.A.2. Courts may interpret § 248(b)(2) as a strict liability provision, particularly since the legislature failed to include an intent provision here after inserting one in § 248(a). See *supra* note 59 and accompanying text. Because the penalties increase when bodily injury results, however, courts may read in an intent requirement, particularly where the violation consists only of physical obstruction. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.8(a) (2d ed. 1986).

initial violation⁶⁸ and up to eighteen months in prison, up to \$15,000 in fines, or both for subsequent violations.⁶⁹

In the aftermath of the recent double-murder at a Pensacola clinic, however, many are asking if the FACE Act does enough.⁷⁰ Paul Hill⁷¹ openly advocated violence against abortion doctors and frequently demonstrated outside of the Pensacola Ladies Clinic ("Pensacola Clinic").⁷² About four weeks after the FACE Act took effect, Pensacola Clinic officials asked the FBI to arrest Hill.⁷³ The FBI did not arrest Hill because his actions, taken individually, did not satisfy all of the elements required by the FACE Act.⁷⁴ Six weeks later, Hill shot and killed Dr. John Bay-

68. 18 U.S.C.S. §§ 248(b), 248(c)(2)(B)(i) (Law. Co-op. 1994).

69. 18 U.S.C.S. §§ 248(b)(2), 248(c)(2)(B)(ii) (Law. Co-op. 1994).

70. See, e.g., *Abortion Clinic Access: Hearing on the FACE Act Before the Subcomm. on Crime and Criminal Justice of the House of Representatives Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (testimony of Officer William Walsh of the Fort Wayne Police Department, Sept. 22, 1994), available in LEXIS, Legis Library, CNGTST file (Sergeant William Walsh expressed concern that only federal marshals, not local police, can enforce federal injunctions under the FACE Act.); Elsa Brenner, *Can a New Law Curtail Protests Over Abortions?*, N.Y. TIMES, July 17, 1994, § 13 (Westchester Weekly), at 1, 9 (Francine Stein, executive director at the White Plains offices of Planned Parenthood of Westchester-Rockland, expressed concern that "with the multiple layers of enforcement agencies, the trail from the front door of clinics to the courtroom [will not] be swift and smooth."); Ronald Smothers, *Suspect in Abortion Clinic Killings is Charged*, N.Y. TIMES, July 31, 1994, at 26 (Eleanor Smeal of the Feminist Majority expressed frustration with federal agencies for failing to investigate links between Hill and other anti-abortion agencies.); Jane Sutton, *Clinic Director Pleaded for Help to Control Suspect*, Reuters W. Service, July 31, 1994, available in LEXIS, Nexis Library, WIRES file (Linda Taggart, director of the Pensacola Ladies Clinic, complained about the FBI's inaction after Hill's activities at the clinic.); *Weekend Edition: Second Shooting Occurs in Florida at Abortion Clinic* (NPR radio broadcast, July 30, 1994) (Michael Lawson [sp], Co-President of a National Organization for Women chapter, said that "local law enforcement officials should have paid more attention to the danger that Hill posed.").

71. See *supra* note 43 for comments on Hill's role in the anti-abortion movement.

72. Smothers, *supra* note 70. During one protest, Hill was screaming through the clinic windows so loudly that "patients inside became concerned and 'the staff had trouble completing their ultrasound procedures.'" Pierre Thomas, *Abortion Rights Activists Ask Why Law Failed: Pensacola Slayings Underscore Federal Agents' Difficulties in Preventing Clinic Violence*, WASH. POST, Aug. 5, 1994, at A3.

73. Sutton, *supra* note 70.

74. *Id.*; see *infra* note 78. The elements of a FACE Act violation are: (1) the use of force, the threat of force, or physical obstruction, (2) to intentionally injure, intimidate, or interfere with someone, (3) because that person is obtaining or providing reproductive health care services, or (4) in order to prevent that person from doing so. See *supra* note 61 and accompanying text.

ard Britton and his escort as they arrived to work at the Pensacola Clinic.⁷⁵

In hindsight, it seems easy to say that Hill posed a serious threat to the clinic workers. As this incident illustrates, however, one of the greatest weaknesses of the FACE Act's criminal provisions is that "intimidation," as defined in the FACE Act, is a vague standard.⁷⁶ Law enforcement agencies, which are already "navigat[ing] a minefield of constitutional questions involving free speech, religion and privacy,"⁷⁷ are likely to be cautious in bringing charges under the FACE Act when conduct is not clearly violent. Moreover, nothing in the FACE Act allows law enforcement agencies to take into consideration a *pattern* of behavior, which may only seem intimidating when viewed as a whole.⁷⁸

Nonetheless, the FACE Act has changed the political and legal climate for pro-choice and anti-abortion protestors. First, the FACE Act has provided new impetus to a year-long Justice Department investigation into a possible conspiracy among anti-abortion groups.⁷⁹ Second, prosecutions of protestors under the FACE Act⁸⁰ may have a ripple effect, deterring future abortion

75. Smothers, *supra* note 70, at 26 (the shootings occurred on July 29, 1994). Hill has been convicted under the FACE Act. Laura Griffin, *Violence Taken Seriously Now*, ST. PETERSBURG TIMES, Oct. 24, 1994, at 7A. A jury has also convicted Hill of murder and recommended a death sentence. Navarro, *supra* note 43.

76. Thomas, *supra* note 72, at A3. Intimidation is behavior that "place[s] a person in *reasonable apprehension* of bodily harm to him- or herself or to another." 18 U.S.C.S. § 248(e)(3) (emphasis added).

77. Thomas, *supra* note 72.

78. *Id.* at A3 ("[The] standards are too rigid If a person advocates 'justifiable homicide . . . [and] stalks someone, the pattern of his actions should be considered.' ") (quoting Eleanor Smeal, president of the Feminist Majority). For example, the FBI considered separately each encounter between Hill and the clinic staff. Because any one incident did not rise to the level of intimidation required under the FACE Act, the FBI did not arrest Hill. See Smothers, *supra* note 70, at 26.

79. Thomas, *supra* note 72.

80. Hill is the second person to be charged with violating the FACE Act. *Ex-Minister Indicted of Abortion Law Violation*, CHI. TRI. (Evening Edition), Aug. 12, 1994, at 2. On June 6, 1994, six people were arrested in Milwaukee, *Anti-Abortionist Charged Under New Federal Law*, PHILA. INQUIRER, Aug. 13, 1994, at A10, after cementing a car to the pavement in front of a clinic entrance and chaining themselves to it, Rogers Worthington, *Marshal Keeps Watch Over Abortion Hot Spot*, CHI. TRIB., Aug. 5, 1994, at 6.

clinic blockades.⁸¹ Third, the Justice Department has sent a clear message that it will rigorously enforce the FACE Act.⁸²

2. Private Cause of Action

Any person involved in providing or obtaining reproductive health services who is injured by conduct prohibited under the FACE Act may bring a civil action against the violator.⁸³ The court may award injunctive relief, actual or statutory compensatory damages, punitive damages, attorney's fees, and the costs of suit.⁸⁴ The court may also award federal injunctive relief, thus circumventing *Bray*.⁸⁵

If damages are large enough and consistently applied, they might discourage violent and threatening anti-abortion activities.⁸⁶ Jury awards in several cases brought against anti-abortion protestors under tort law and racketeering charges for conduct similar to that proscribed by the FACE Act suggest that the liability for FACE Act violations may be considerable.⁸⁷ In June of 1994 a Houston jury ordered Rescue America and Operation Rescue to pay approximately \$205,000 in compensatory dam-

81. Brenner, *supra* note 70, at 1, 9 (statement by New York State Attorney General, G. Oliver Koppell). Koppell was the first to invoke the FACE Act's civil penalties. He filed lawsuits seeking \$10,000 in penalties from each of 21 Lambs of Christ protestors arrested for attaching bicycle locks to a clinic's gates and door and then lying down in front of the clinic entrances. *Id.* U.S. Attorney Paula J. Casey is considering charging 30 demonstrators arrested in Little Rock, Arkansas with violations under the FACE Act. *Id.* at 9.

82. For example, after Dr. Britton's death, Attorney General Janet Reno deployed U.S. marshals to protect abortion clinics throughout the nation. Thomas, *supra* note 72, at A3. The marshals, who will remain "as long as necessary," *id.*, have not yet withdrawn, *Abortion Clinic Access: Hearing on the FACE Act Before the Subcomm. on Crime and Criminal Justice of the House of Representatives Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (testimony of Jo Ann Harris, Asst. Att'y Gen. Criminal Div. and Deval Patrick, Asst. Att'y Gen. Civil Rights Div., Sept. 22, 1994), available in LEXIS, Legis Library, CNGTST File [hereinafter Harris Testimony].

83. 18 U.S.C.S. §§ 248(a)(1), 248(c)(1)(A) (Law. Co-op. 1994).

84. 18 U.S.C.S. § 248(c)(1)(B) (Law. Co-op. 1994).

85. 18 U.S.C.S. § 248(c)(2)(B) (Law. Co-op. 1994); *cf. supra* note 14.

86. In fact, recent violence has alienated the anti-abortion movement from the fundamentalist community, which had provided their primary funding. With volunteers and contributions dwindling, some anti-abortion organizations may be on the verge of collapse. See James Risen, *Abortion Clinic Slayings May Kill Operation Rescue*, L.A. TIMES, Aug. 10, 1994, at A1.

87. See Bruce Nichols & Bruce Tomaso, *Damages Assessed in Protests Against Abortion Foes: Jury Penalizes Group for Blocking Access During '92 GOP Convention*, DALLAS MORNING NEWS, May 10, 1994, at 15A.

ages⁸⁸ and over \$1 million in punitive damages to Planned Parenthood for tortious interference with the clinic's operations in 1992.⁸⁹ In the same month, a Florida court ordered several anti-abortion organizations to pay about \$216,000 in attorney's fees to the attorney for the National Organization for Women after he successfully prosecuted these anti-abortion organizations for violating state racketeering laws and causing intentional emotional distress to clinic patients.⁹⁰

The private cause of action under the FACE Act is specifically limited to persons involved in providing or obtaining reproductive health services,⁹¹ including medical, surgical, counseling, or referral services.⁹² In other words, the FACE Act protects physicians, clinic staff, and patients — but it may not protect their escorts.⁹³ Escorts, however, are also in the line of fire.⁹⁴ Several women's organizations have lobbied Congress to amend the FACE Act to include escorts.⁹⁵

88. *Id.* (compensatory damages awarded for security costs, vandalism, and loss of business).

89. Van Biema, *supra* note 19, at 25; Matt Schwartz, *Abortion Protestors Must Pay*, Hous. Post, May 10, 1994, at A11 (Rescue America's director and Operation Rescue's former leader were also personally liable for damages.). See generally Keeble v. Hickeringill, 103 Eng. Rep. 1127 (Q.B. 1706) (awarding damages for tortious interference with business); Tuttle v. Buck, 119 N.W. 946 (1909) (rejecting claim of tortious interference with business).

90. Christine Stapleton, *Abortion Foes Must Pay NOW Lawyer \$216,000*, PALM BEACH POST, June 9, 1994, at 1B. See generally Steven E. Soule & Karen R. Weinstein, *Racketeering, Anti-Abortion Protestors, and the First Amendment*, 4 UCLA WOMEN'S L.J. 365 (1994) (analyzing the Court's opinion in *National Organization of Women, Inc. v. Scheidler* and arguing that the First Amendment does not preclude application of RICO to violent protest behavior); Hao-Nhien Q. Vu, *A Response to Soule and Weinstein: National Organization for Women v. Scheidler Is Just Hard Facts Making Bad Law*, 4 UCLA WOMEN'S L.J. 399 (1994) (arguing that RICO may be void for overbreadth and for chilling free expression when used in this context).

91. "[A]n action may be brought . . . only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . ." 18 U.S.C.S. § 248(c)(1)(A); see also Stephen Braun, *Abortion's Wary Line of Defense*, L.A. TIMES, Aug. 11, 1994, at A1.

92. "[R]eproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C.S. § 248(e)(5).

93. Hill's motion to dismiss the charges against him contended, in part, that the FACE Act was improperly drafted and that it did not cover escorts. *Hill Seeks Dismissal of Federal Charges*, MIAMI HERALD, Sept. 1, 1994, at 5B. Compare with government penalties discussed *supra* note 70.

94. During the recent attack on Dr. Britton, for example, one of his escorts was killed and the other wounded. Smothers, *supra* note 70, at 26.

95. *Id.*; see, e.g., Harris Testimony, *supra* note 82.

B. *Legal Challenges: Freedom of Expression and First Amendment Issues*

Several anti-abortion groups have filed actions attacking the FACE Act as facially unconstitutional.⁹⁶ They argue that the FACE Act is not within Congress's commerce powers and that it violates the First Amendment.⁹⁷ Though all of the courts which have considered these questions have upheld the FACE Act,⁹⁸ some trial courts have not yet ruled⁹⁹ and at least one appeal has been filed.¹⁰⁰

1. A Valid Exercise of the Commerce Power

Under the Commerce Clause, Congress has a broad, plenary power to legislate if the regulation bears any rational relationship to interstate commerce and if the regulation is reasonably related to a legitimate legislative purpose.¹⁰¹ While this is an extremely permissive test, it is noteworthy that Congress expressly enacted the FACE Act to "protect and promote . . . activities affecting

96. At least six anti-abortion organizations have filed cases. *Anti-Abortion Group Appeals FACE Ruling*, PROPRIETARY TO THE UNITED PRESS INT'L 1994, Aug. 16, 1994, available in LEXIS, News Library, WIRES File [hereinafter *Group Appeals*].

97. *Riely v. Reno*, No. CIV-94-1058-PHX-RGS, 1994 U.S. Dist. LEXIS 11463, at *47 (D. Ariz. Aug. 12, 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994); *American Life League v. Reno*, 855 F. Supp. 137, 141 (E.D. Va. 1994).

98. *E.g., Riely*, 1994 U.S. Dist. LEXIS 11463, at *52-53; *Cook v. Reno*, No. 94-0980, 1994 U.S. Dist. LEXIS 11355, at *2 (W.D. La. Aug. 5, 1994); *American Life League*, 855 F. Supp. at 137; *Council for Life*, 856 F.Supp. at 1422.

99. Michael Kirkland, *Judge Rules FACE Constitutional*, UPI, June 16, 1994, available in LEXIS, News Library, WIRES File. Randall Terry, founder of Operation Rescue, filed a case that is pending in Washington, D.C. and Judy Madsen is one of the plaintiffs in a case pending in Florida. *Id.*

100. The American Life League has appealed its trial court ruling to the 4th Circuit Court of Appeals. *Group Appeals*, *supra* note 96. The American Center for Law and Justice also plans to appeal its trial court decision. *FACE: Federal Judge Dismisses ACLJ Arizona Challenge*, ABORTION REP., Aug. 16, 1994.

101. U.S. CONST., art. I, § 8; *see, e.g., Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964) (holding that Congress may regulate "local" businesses to protect interstate travel); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 245 (1964) (holding that the Commerce power includes the power to promote the general welfare); *United States v. Darby*, 312 U.S. 100, 115, 121 (1941) ("[R]egulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause . . . [and Congress] may choose the means reasonably adapted to the attainment of the permitted end."); *see also Scott-McLaughlin*, *supra* note 12, at 736-40.

interstate commerce,"¹⁰² not to protect a woman's right to an abortion.

The three trial courts that have considered the issue have found that there is a rational relationship between the activity regulated by the FACE Act and interstate commerce.¹⁰³ For example, both anti-abortion organizations¹⁰⁴ and patients¹⁰⁵ cross state lines in order to reach clinics, and many clinics purchase equipment, goods, and services through interstate commerce.¹⁰⁶ These courts have held that "[b]ecause the Act focuses solely on conduct that involves violence or physical obstruction . . . the means Congress chose to effectuate legitimate ends were reasonably adapted to that purpose."¹⁰⁷

2. Freedom of Speech

The most serious constitutional challenges¹⁰⁸ to the FACE Act are that it violates the First Amendment because it is content- or viewpoint-based and that it is overbroad.¹⁰⁹ So far, trial courts faced with freedom of speech challenges to the FACE Act have followed the Supreme Court's direction in *Madsen*,¹¹⁰ which applied the traditional test set forth in *Ward v. Rock Against Racism*.¹¹¹ Under the *Ward* standard, "a regulation of

102. Priv. L. No. 103-259, 108 Stat. 694 (1994).

103. *Riley v. Reno*, No. CIV-94-1058-PHX-RGS, 1994 U.S. Dist. LEXIS 11463, at *47 (D. Ariz. Aug. 12, 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1431 (S.D. Cal. 1994); *American Life League v. Reno*, 855 F. Supp. 137, 141 (E.D. Va. 1994).

104. *E.g.*, *Council for Life*, 856 F. Supp. at 1431; *American Life League*, 855 F. Supp. at 141 (citing *Hearings on S. 636*, *see supra* note 59 and *infra* note 105)

105. *E.g.*, *Hearings on S. 636*, *supra* note 59; *see Riely*, 1994 U.S. Dist. LEXIS 11463, at *46; *American Life League*, 855 F. Supp. at 141.

106. *Riely*, 1994 U.S. Dist. LEXIS 11463, at *46.

107. *Scott-McLaughlin*, *supra* note 12, at 740; *see Riely*, 1994 U.S. Dist. LEXIS 11463, at 19; *American Life League*, 855 F. Supp. at 141; *Council for Life*, 856 F. Supp. at 1431; *Hearings on S. 636*, *supra* notes 59, 105.

108. Anti-abortion groups have also challenged the FACE Act on the grounds that it is unconstitutionally vague and that it violates religious freedom. *See, e.g.*, *Riely*, 1994 U.S. Dist. LEXIS 11463, at *33-38, *51-52; *American Life League*, 855 F. Supp. at 141-44; *Council for Life*, 856 F. Supp. at 1428-31.

109. *See American Life League*, 855 F. Supp. at 141-43 (arguing that the FACE Act penalizes, or chills, free expression by focusing sanctions on particular viewpoints); *see also Cook v. Reno*, No. 94-0980, 1994 U.S. Dist. LEXIS 11355, at *2-3 (W.D. La. Aug. 5, 1994); *Council For Life*, 856 F. Supp. at 1422; *Cheffer v. Reno*, No. 94-0611-CIV-ORL-18 (July 26, 1994), *cited in Cook*, 1994 U.S. Dist. LEXIS 11355, at *8 n.2.

110. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2523-24 (1994). *See generally* discussion *infra* part III.B.1-2.

111. 491 U.S. 781 (1989).

the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so."¹¹²

(a) *Content-Neutrality*

Under *Ward*, a statute which regulates expression must be content-neutral if it is to avoid strict scrutiny.¹¹³ "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."¹¹⁴ Anti-abortion groups have argued that the FACE Act is content-based because, by prohibiting only conduct which intentionally interferes with individuals *because* they are seeking or providing reproductive health services, it effectively inhibits only the conduct of those with an anti-abortion message.¹¹⁵

The district courts, however, have determined that Congress enacted the FACE Act because of its concern over the impact of violence at abortion facilities rather than a desire to curb a particular abortion message.¹¹⁶ Moreover, they have determined that the FACE Act punishes anyone who interferes with access to reproductive health services with the requisite intent, regardless of ideology.¹¹⁷ For instance, the FACE Act *would* "apply to an individual who spray paints the words KEEP ABORTION LEGAL on a facility providing counseling regarding abortion alternatives."¹¹⁸

112. *Ward*, 491 U.S. at 798; *see also Madsen*, 114 S. Ct. at 2524 (requiring a significant government interest).

113. *Ward*, 491 U.S. at 791.

114. *Id.*; *see also Madsen*, 114 S. Ct. at 2523 (1994); *Council for Life*, 856 F. Supp. at 1427.

115. *E.g.*, *Cook v. Reno*, No. 94-0980, 1994 U.S. Dist. LEXIS 11355, at *6; *Council for Life*, 856 F. Supp. at 1427; *American Life League v. Reno*, 855 F. Supp. 137, 143; *see supra* notes 61, 62, 67, and accompanying text for summation of the intent requirements.

116. *Council for Life*, 856 F. Supp. at 1427; *American Life League*, 855 F. Supp. at 143; *see also Scott-McLaughlin*, *supra* note 12, at 740.

117. *Council for Life*, 856 F. Supp. at 1427; *American Life League*, 855 F. Supp. at 143.

118. *Riely v. Reno*, No. CIV-94-1058-PHX-RGS, 1994 U.S. Dist. LEXIS 11463, at *26-27 (D. Ariz. Aug. 12, 1994); *see also Cook*, 1994 U.S. Dist. LEXIS 11355, at *6; *Council for Life*, 856 F. Supp. at 1427; *American Life League*, 855 F. Supp. at 143-44. This also encompasses services such as treatment of sexually transmitted diseases and "controversial conception treatments, such as in vitro fertilization of

(b) *The FACE Act is Narrowly Tailored and Regulates Unprotected Conduct, Not Pure Speech*

The second inquiry is whether the regulation is overbroad.¹¹⁹ Anti-abortion groups argue that the FACE Act needlessly "chills" speech by criminalizing forms of expression — such as praying and sidewalk counseling — "that merely present[] one point of view."¹²⁰ Many anti-abortion protestors, however, intend for their praying and counseling to "injure" patients by causing emotional pain (*i.e.*, shame, distress, and guilt).¹²¹ Because the FACE Act does not define the term "injure," anti-abortion groups fear that "injury" could include these psychological or emotional injuries, thus criminalizing and "chilling" pure speech.¹²²

Before reaching the question of injuries, however, the FACE Act requires a prohibited action.¹²³ The trial courts have held that the FACE Act does not prohibit pure speech, such as picketing, praying, or the expression of views regarding abortion; the Act proscribes only "conduct that involves violence or physical obstruction."¹²⁴ Moreover, Congress specifically provided that "[n]othing in [the FACE Act] shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment."¹²⁵ The trial courts have held that this

surrogate mothers and thawing of frozen embryos." *American Life League*, 855 F. Supp. at 144.

119. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A statute is overbroad if it "include[s] protected First Amendment activity along with unprotected conduct." *American Life League*, 855 F. Supp. at 141 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

120. *Cook*, 1994 U.S. Dist. LEXIS 11355, at *4; *see also Council for Life*, 856 F. Supp. at 1427; *American Life League*, 855 F. Supp. at 140–42.

121. *American Life League*, 855 F. Supp. at 139–42.

122. *Id.* at 141.

123. The FACE Act applies only to "[w]hoever by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with" a protected person. 18 U.S.C.S. § 248(a)(1) (Law. Co-op. 1994) (emphasis added).

124. *Riely v. Reno*, No. CIV-94-1058-PHX-RGS, 1994 U.S. Dist. LEXIS 11463, at *17, *19 (D. Ariz. Aug. 12, 1994); *see, e.g., Cook*, 1994 U.S. Dist. LEXIS 11355, at *4–5 & n.1; *Council for Life*, 856 F. Supp. at 1427; *American Life League*, 855 F. Supp. at 142. In other words, anti-abortion groups may still "carry signs, pass out literature, and attempt oral persuasion, but they may not do so in a manner that involves violence, threats, physical obstruction, intentional injury, and property destruction." *Cook*, 1994 U.S. Dist. LEXIS 11355, at *4–5.

125. 18 U.S.C.S. § 248(d)–(d)(1).

removes any possible ambiguity — the FACE Act does not “chill” pure speech.¹²⁶

Moreover, the trial courts have “reject[ed] as insupportable any suggestion that shootings, arson, death threats, vandalism, or other violent and destructive acts addressed by FACE are protected by the First Amendment merely because those engaged in such conduct ‘intend[] thereby to express an idea.’”¹²⁷ According to the trial courts, the important government interest in abating this violence “sufficiently justifies the incidental limitations FACE may impose on the speech component of such activity.”¹²⁸

III. MADSEN V. WOMEN’S HEALTH CENTER

On June 30, 1994, one month after Congress enacted the FACE Act, the Supreme Court decided *Madsen v. Women’s Health Center*.¹²⁹ Petitioners Judy Madsen, Ed Martin, and Shirley Hobbs, who were all officers of Rescue America,¹³⁰ argued that an injunction issued against them by a Florida District Court was an unconstitutional restriction on their First Amendment right of free speech.¹³¹ Respondent, Women’s Health Center,

126. *American Life League*, 855 F. Supp. at 143. Some speech may constitute intentional infliction of emotional distress under tort law. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 46(1) (1964) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability . . .”). However, many courts require that the distress result in bodily harm. *See, e.g.*, *George v. Jordan Marsh Co.*, 268 N.E. 2d 915 (Mass. 1971). *But see, e.g.*, *Agis v. Howard Johnson Co.*, 355 N.E. 2d 315 (Mass. 1976).

127. *Council for Life*, 856 F. Supp. at 1426 (citations omitted); *see also American Life League*, 855 F. Supp. at 142 (“The First Amendment protects the plaintiffs’ rights to hold and express beliefs opposing abortion; it does not give them unfettered license to express those beliefs in conduct.”). *See generally Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (upholding statute preventing picketing that “interfere[s] with free ingress or egress to and from any . . . courthouse[]”).

128. *Riely*, 1994 U.S. Dist. LEXIS 11463, at *19; *Council for Life*, 856 F. Supp. at 1428; *e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (“[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.”); *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) (“Clearly, threats to patients or their families . . . are proscribable under the First Amendment.”).

129. 114 S. Ct. 2516 (1994).

130. “The Florida injunction was also directed at Operation Rescue, Operation Goliath, Operation Rescue America, their officers, agents, members, employees and servants, and . . . Bruce Cadle, Pat Mahoney, Randall Terry, . . . and all persons acting in concert or participation with them, or on their behalf.” *Id.* at 2521 n.1. However, only Judy Madsen, Ed Martin, and Shirley Hobbs are parties to this appeal.

131. *Id.* at 2523–24.

Inc., contended that the injunction was directed at petitioners' conduct and not their speech.¹³²

A. *Facts and Procedural History*

The Aware Woman Center for Choice in Melbourne (the "Clinic"), the only women's health clinic in Brevard County, Florida, had been continuously targeted since Operation Rescue-National arrived in Central Florida in 1991.¹³³ On September 30, 1992, a district court issued a permanent injunction against Operation Rescue based on findings that petitioners "are individuals and organizations, acting in concert, who have planned a nationwide campaign which they call 'Operation Rescue' . . . directed towards closing down abortion clinics and providers throughout the country."¹³⁴ The court also found that the protestors posed a threat to (1) the Clinic's business relationships with its clients, (2) the Clinic's property interests, and (3) patients' right to an abortion guaranteed by the Florida Constitution.¹³⁵ Thus, the court determined that an injunction was necessary to maintain unobstructed access to the Clinic and to prevent the harassment and intimidation of the Clinic's staff and patients.¹³⁶

However, after the court issued the permanent injunction, anti-abortion activity intensified at the Clinic.¹³⁷ The Clinic was hit with butyric acid and its doors were "disabled with super glue."¹³⁸ Dr. Snyder, a doctor at the Clinic, began receiving threats.¹³⁹ In addition, he and other Clinic staff were subjected to residential picketing.¹⁴⁰ In January 1993, the IMPACT Team arrived, significantly increasing the number of protestors outside the Clinic and residences of the Clinic staff.¹⁴¹ Protestors repeat-

132. Brief for Respondents, *supra* note 17, at 15.

133. *Id.* at 1.

134. *Id.* at 1-2.

135. *Id.* at 2.

136. *Id.* at 1-10. The injunction was also needed to prevent others from joining Operation Rescue's and Rescue America's activities against the Clinic. *Id.* at 2.

137. Brief for Respondents, *supra* note 17, at 2-8.

138. *Id.* at 3.

139. *Id.* On one occasion, a member of the IMPACT Team followed Dr. Snyder when he left the Clinic and chased him by car until he pulled off the road. The team member then pulled up next to Dr. Snyder, rolled down the car window, and pretended to shoot him. *Id.* at 3 n.5.

140. *Id.* at 3.

141. *Id.* at 3-8. By March 1993, as many as four hundred protestors crowded the street. *Id.* at 4. The Clinic is located on Dixie Way, a very narrow residential street about 21 feet wide. The public right-of-way on either side is about 14 feet. *Id.* at 4 n.7.

edly overwhelmed the Clinic's telephone lines in order to block calls from patients.¹⁴² Cars attempting to enter the Clinic were forced to slow down or stop, and anti-abortion protestors tried to push literature into any open windows.¹⁴³ In addition, protestors used ladders to reach over the Clinic's eight-foot "privacy fence" in order to shout at patients and staff, and to display signs with the names of patients and their escorts.¹⁴⁴

Due to the increased protest activity, the Clinic returned to court. On April 8, 1993, Judge McGregor issued the amended permanent injunction.¹⁴⁵ Petitioners appealed, and the case was certified to the Florida Supreme Court, which unanimously upheld the injunction, stating that petitioners did not "seriously question the technical validity of the amended injunction or the factual findings on which it is based."¹⁴⁶ Nonetheless, the court reviewed the record and found support for the factual findings of the trial court.¹⁴⁷

The petitioners then filed a writ of certiorari for review by the Supreme Court of the United States.¹⁴⁸ Petitioners argued the injunction was content- or viewpoint-based because it restricted only the speech of the anti-abortion demonstrators.¹⁴⁹ Accordingly, they urged that the injunction should be evaluated under the strict scrutiny standard.¹⁵⁰ Respondents contended that the injunction was directed at conduct and not speech.¹⁵¹

142. Brief for Respondents, *supra* note 17, at 4.

143. *Id.*

144. *Id.*

145. See *id.* at 6-10, for a detailed account of the trial court's findings.

146. Brief for Respondents, *supra* note 17, at 11.

147. *Id.* at 11.

148. *Id.*

149. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2523 (1994). See Brief of Respondents, *supra* note 17, at 18-20 n.21 for a discussion of *Cheffer v. McGreggor* and its relevance to *Madsen*. See also *Cheffer v. McGreggor*, 6 F.3d 705 (11th Cir. 1993).

150. *Madsen*, 114 S. Ct. at 2523.

151. The Court rejected petitioners' contention that the injunction is an unconstitutional prior restraint on speech. *Id.* at 2524 n.2 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980)). Petitioners also challenged the portion of the injunction which referred to persons or groups "acting in concert" with the named parties for vagueness and overbreadth. Because petitioners are named parties in the injunction, however, they lack standing to challenge the portion of the injunction directed at those who are not parties. *Id.* at 2530 (citing *Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)).

B. *Holding*

The Supreme Court upheld the constitutionality of the injunction because it was directed at restricting conduct and not speech protected by the First Amendment.¹⁵² In particular, the Court upheld the injunction's prohibitions against blocking access to the Clinic and residences of the Clinic staff, physical abuse or intimidation of abortion providers and seekers, and too much noise created by the protestors outside the Clinic.¹⁵³ The Court also held that the appropriate standard of review for a content-neutral injunction is whether "no more speech than necessary [is burdened] to serve a significant government interest."¹⁵⁴

With respect to the challenged provisions of the injunction, the Court upheld both the thirty-six-foot buffer zone¹⁵⁵ around the Clinic entrances and driveway and the noise restrictions.¹⁵⁶ However, the private property buffer zone to the north and west of the Clinic,¹⁵⁷ the "images observable" clause,¹⁵⁸ the 300-foot no-approach zone around the Clinic,¹⁵⁹ and the 300-foot buffer

152. "[N]one of the restrictions imposed by the court were directed at the contents of petitioner[s]' message." *Id.* at 2523. "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *Id.* at 2530.

153. *Id.* at 2521-22. In balancing the state's interest with the First Amendment claims of petitioners, the Court noted the failure of the first injunction, stating that this is a valid consideration when evaluating a broader, subsequent order. *Id.* at 2527.

154. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2525 (1994).

155. The 36-foot buffer zone was necessary to protect the state's interest in unobstructed access to the Clinic and parking lot and to maintain the free flow of traffic on Dixie Way. *Id.* at 2526-27.

156. The noise level restrictions, applicable during surgery and recovery periods, served the state's interest in protecting the health and well-being of the patients. The Court held that the "nature of [a] place" determines the type of regulations which are "reasonable." *Id.* at 2528 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)).

157. The north and west sides of the Clinic border private property. The Court determined that the record lacked evidence to prove the state's interest in unobstructed access and traffic flow was threatened with respect to these areas. Thus, the 36-foot buffer zone did not encompass them. *Id.*

158. The Court found threats to patients or their families communicated in the form of signs or otherwise "are prescribable under the First Amendment." *Id.* at 2529. However, the injunction swept too broadly because it placed a blanket ban on all images displayed by the protestors, not just those which were threatening. *Id.*

159. This provision of the injunction prevented petitioners from physically approaching anyone seeking the Clinic's services "unless [the] person indicate[d] a desire to communicate." *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994). The Court held that the state interest in preventing "stalking" and "shadowing" of patients, while valid, did not warrant a blanket ban on all uninvited contact because it prohibited even contact that is not hostile. *Id.*

zone around the residences¹⁶⁰ were held to be unconstitutional “because these provisions [swept] more broadly than necessary to accomplish the permissible goals of the injunction.”¹⁶¹

The importance of the holding is its recognition of the state’s right to enjoin conduct which threatens or harasses even if the conduct is expressive. In doing so, *Madsen* does not address abortion rights but merely expands the state’s authority to regulate access to the clinics. Thus, the state may impose restrictions on expressive conduct — if it threatens, intimidates, or obstructs — by enjoining groups or individuals in order to ensure access to a reproductive health facility. The state may, under its traditional authority to control traffic, demand that driveways, entrances, streets, and even groups and individuals not be obstructed.

1. Injunction is Content-Neutral

The Court rejected petitioners’ argument that the injunction was necessarily content- or viewpoint-based because it restricted only the speech of the anti-abortion demonstrators.¹⁶² The Court explained that the principle inquiry in deciding content neutrality is “whether the government has adopted a regulation of speech ‘without reference to the content of the regulated speech.’”¹⁶³ The Court clearly stated that petitioners’ conduct, not their speech, violated the rights of the abortion providers and patients.¹⁶⁴ The Court also noted that nothing in the record sug-

160. This provision prohibited the use of sound amplification as well as pickets and demonstrations outside the residences of the Clinic’s staff. *Id.* at 2529–30. With respect to the noise, the Court held: “[T]he state may simply demand that the petitioners turn down the volume if the protests overwhelm the neighborhood.” *Id.* at 2529. (citing *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)). However, despite the state’s interest in protecting the “well-being, tranquility, and privacy of the home” the Court struck down this provision because the buffer zone “would ban [g]eneral marching through residential neighborhoods or even walking a route in front of an entire block of houses.” *Id.* at 2530 (citing *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)). By contrast, the prohibition in *Frisby* was limited to “focused picketing taking place solely in front of a particular residence.” *Id.*

161. *Id.* at 2530.

162. “To accept petitioners’ claim would be to classify virtually every injunction as content or viewpoint-based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group.” *Id.* at 2523.

163. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

164. *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516, 2523 (1994).

gests that similar conduct outside of the abortion context would not be enjoined.¹⁶⁵

2. Standard of Review

The Court rejected review of the injunction under the strictest standard of scrutiny because it was not content- or viewpoint-based.¹⁶⁶ Having found the injunction to be content-neutral, the Court held that a content-neutral injunction does require "a somewhat more stringent application of general First Amendment principles" than a statute.¹⁶⁷ Because injunctions target particular groups or individuals, the Court held that injunctions carry a greater risk of censorship and discriminatory application.¹⁶⁸ Thus, when reviewing a content-neutral injunction, the appropriate standard is whether "no more speech than necessary is burdened to serve the significant government interest."¹⁶⁹

3. State Interests

In upholding certain provisions of the injunction, the Supreme Court recognized the state's interests in: (1) ensuring

165. *Id.*

166. *Id.*

167. *Id.* at 2524. ("Ordinances represent a legislative choice regarding the promotion of particular societal interests," and as such, they are directed at the general public. "Injunctions, by contrast, are imposed for violations (or threatened violations) of a legislative or judicial decree" and are directed at specific groups or individuals.); *see also supra* note 153; discussion *supra* part II.B.2.

168. *See generally* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2538-39 n.40 (1994). Justice Scalia believes that content-neutral injunctions deserve the strict scrutiny applied to content-based restrictions because 1) injunctions may be issued to suppress speech rather than to achieve any legitimate government aim, 2) injunctions are imposed by individual judges rather than the legislature, and 3) "injunction[s] are] more powerful weapon[s] than statute[s]. *Id.* at 2539. Injunctions require that the person or persons against whom the injunction is issued have the time and money to appeal. *Id.* Otherwise, they are effectively silenced. *Id.* Thus, an injunction must be necessary to serve a compelling state interest and must be narrowly drawn to serve that end. *Id.* Justice Stevens agrees that a different standard should be applied to a content-neutral injunction, but disagrees as to the appropriate standard. According to Stevens, injunctions should be judged by a more lenient standard than statutes because they "apply solely to the individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty — the normal consequence of illegal activity." *Id.* at 2531 (Stevens J., concurring).

169. *Id.* at 2525. The restrictions this standard imposes on speech are consistent with the general rule "that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs." *Id.* (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

public safety and order,¹⁷⁰ (2) promoting the free flow of traffic on public streets and sidewalks,¹⁷¹ (3) protecting citizens' property rights,¹⁷² and (4) assuring medical privacy.¹⁷³ Additionally, *Madsen* recognized the state's interest in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy."¹⁷⁴ Unlike Florida, however, all states do not guarantee a woman's right to an abortion. Yet, this is not an essential prerequisite to obtaining an effective injunction.¹⁷⁵

C. Significance of *Madsen*

In *Madsen*, the Supreme Court resolved an ongoing dispute between anti-abortion and pro-choice advocates. The Court held that conduct that was threatening, harassing, or obstructed traffic would not be entitled to First Amendment protection even if the protestors intended for this conduct to be expressive. The *Madsen* decision is of great importance in that it speaks to the constitutionality of over forty similar injunctions which have been issued nationwide.¹⁷⁶ In addition, *Madsen* expressly allows clinics, abortion providers, and abortion patients to obtain relief from local courts.¹⁷⁷ Furthermore, *Madsen* enables the states to regulate noise levels and effectively protect patients from experiencing high levels of anxiety, which can lead to serious complications during surgical procedures. A limited buffer zone similar to

170. *Id.* at 2526 (citing *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d. 664, 672 (1993)).

171. *Id.* at 2526.

172. *Id.*

173. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994). The Court agreed with the Florida Supreme Court that the interest in residential privacy acknowledged in *Frisby v. Schultz*, 487 U.S. 474 (1988), applied by analogy to "medical privacy." *Id.* In *Frisby*, the Court found that the targeted picketing of the home threatened the psychological well-being of the "captive" resident. Here the Court found the targeted picketing of the Clinic threatened the psychological *as well as* the physical well-being of the "captive" patient. *Id.*

174. *Id.* at 2526.

175. See Brief for National Abortion Federation and Planned Parenthood Federation of America, Inc. as *Amici Curiae* in support of Respondents, 114 S. Ct. 2515 (1994) (No. 93-880), for an account of other locations where similar injunctions have been successful.

176. Press Release from The Feminist Majority Foundation (on file at The Feminist Majority Foundation).

177. The importance of the right to a state injunctive remedy cannot be overlooked. When *Madsen* was brought to court, the FACE Act had not been enacted and *Bray* was the controlling authority. If Congress had not enacted the FACE Act, *Madsen* would have been the only recourse for clinics, abortion seekers, and abortion providers.

the one upheld in *Madsen* may also provide protection to abortion providers forced to pass through blockades and protestors on a daily basis. Additionally, an appropriately tailored injunction may be used to create a buffer zone around the residences of the clinic staff.

Madsen is not an affirmation of federal abortion rights but rather a declaration that, while abortion is legal, the state may protect access to this procedure. This protection is important since the right to an abortion is a hollow one without access to medical facilities or trained abortion providers.

IV. MADSEN AND THE FACE ACT: THE "ONE-TWO PUNCH"

*Madsen v. Women's Health Center, Inc.*¹⁷⁸ and the FACE Act are not about a woman's right to have an abortion. The standards established in *Roe v. Wade*¹⁷⁹ and *Planned Parenthood v. Casey*¹⁸⁰ are still controlling. *Madsen* and the FACE Act concern the flow of traffic — in other words, physical access. *Madsen* ensures access to clinics by expanding the state authority to control traffic. It affirms a state's ability to enjoin any conduct which physically obstructs access to entrances, driveways, or streets. The FACE Act establishes a federal interest in maintaining access to reproductive health care clinics. This is justified by the clinic's role in interstate commerce, not by a woman's fundamental right to an abortion.

Both *Madsen* and the FACE Act offer significant remedies to women seeking access to reproductive health care clinics blockaded by anti-abortion protestors. For instance, injured parties may now choose either state or federal injunctive relief. *Madsen* allows local courts to enjoin conduct which threatens, harasses, or obstructs access to a reproductive health care clinic.¹⁸¹ Injured parties may also seek federal injunctions under the FACE Act.

The FACE Act's civil and criminal penalties reinforce the injunctive remedies by providing substantial prison sentences,

178. 114 S. Ct. 2516 (1994).

179. 410 U.S. 113 (1973).

180. 112 S. Ct. 2791 (1992).

181. Additionally, the injunction prohibited the "harassing, intimidating, or physically abusing, assaulting or threatening" of any present or former clinic worker or patient. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2522 (1994). Besides proscribing violence or threats of violence, these provisions ensure "psychological access" to the clinics.

monetary penalties, and the threat of compensatory or punitive damages for conduct similar to that enjoined in *Madsen*. These penalties may serve as effective deterrents. If awarded compensation, clinics could use their awards to rebuild damaged or destroyed facilities. Additionally, knowing that their funds are likely to be passed on to the very clinics they hope to destroy may discourage supporters from donating to radical anti-abortion groups.¹⁸²

Moreover, *Madsen* set the tone for analyzing constitutional challenges to the FACE Act and future injunctions. First, *Madsen* held that a content-neutral injunction is subject to a degree of scrutiny that falls between the intermediate scrutiny applied to a content-neutral statute and the strict scrutiny applied to a content-based statute.¹⁸³ Second and more importantly, *Madsen* established that the type of conduct involved at the Pensacola anti-abortion protests does not qualify as expressive conduct protected by the First Amendment. Thus far, the trial courts have followed the Supreme Court's lead in *Madsen* and have held that the FACE Act, which proscribes the same type of conduct that the court considered in *Madsen*, is constitutional on its face because it prohibits only unprotected conduct.¹⁸⁴

Nevertheless, there are at least two apparent weaknesses to the FACE Act. First, it does not encompass the "stalking" of physicians. Physicians may seek protection under state stalking laws, but many already consider these laws to be ineffective.¹⁸⁵ An alternative would be to make it more difficult for protestors

182. See *supra* note 86.

183. *Madsen*, 114 S. Ct. at 2523-25.

184. See *supra* part II.B. See generally *Riely v. Reno*, No. CIV-94-1058-PHX-RGS, 1994 U.S. Dist. LEXIS 11463 (D. Ariz. Aug. 12, 1994); *Cook v. Reno*, No. 94-0980, 1994 U.S. Dist. LEXIS 11355 (W.D. La. Aug. 5, 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994); *American Life League v. Reno*, 855 F. Supp. 137 (E.D. Va. 1994).

185. See Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims*, 15 CARDOZO L. REV. 525 (1993); Matthew J. Gilligan, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285 (1992); Melissa Perrell Phipps, *North Carolina's New Anti-Stalking Law: Constitutionally Sound, but Is It Really a Deterrent?*, 71 N.C.L. REV. 1933 (1993); Silvija A. Strikis, *Stopping Stalking*, 81 GEO. L.J. 2771 (1993); James C. Wickens, *Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry*, 1994 DET. C.L. REV. 157. While the application of stalking laws to the group activities raises unique concerns, such as issues regarding freedom of association, some authors have already noted that there is a potential for anti-stalking laws to reach certain anti-abortion activity. See Kathleen G. McAnaney, et al., *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 829 n.42 (1993).

to locate physicians. For instance, reporting requirements for abortion providers could be eliminated or at least not made public.¹⁸⁶ In order to counteract the growing shortage of abortion providers,¹⁸⁷ regulations could be amended to allow trained nurse-practitioners, certified midwives, or physician assistants to perform first-trimester abortions, a minor surgery.¹⁸⁸

Second, the FACE Act's application to third parties is limited. Because an abortion is a surgical procedure, patients are often accompanied by family and friends who must drive them to and from the clinics. Bodyguards and volunteer escorts often accompany physicians.¹⁸⁹ Because they are neither seeking nor providing reproductive health care services, the language of the FACE Act excludes these people from its civil cause of action, and they might not be covered by its government-imposed penalties.¹⁹⁰ Yet, these third parties are potential victims of the clinic violence that the FACE Act is designed to prevent.

CONCLUSION

Despite the fact that *Madsen* and the FACE Act are justified as traffic control measures and are not an affirmation of abortion rights, the judicial and legislative recognition of the right to clinic access may prove to be a broad victory for the pro-choice movement. Together, they provide clinics with both state and federal injunctive relief for blockades. The FACE Act also established significant criminal penalties and the potential of hefty civil dam-

186. For example, Pennsylvania law requires that the names of all physicians performing abortions must be reported, along with the names of staff, directors, and affiliated organizations. Benshoof, *supra* note 11, at 2250. Pennsylvania also requires quarterly reports of the number of abortions performed in each trimester of pregnancy. *Id.* If the clinic receives state funds, this information must all be made a matter of public record. *Id.* The Abortion Control Act will consolidate all of this information about abortion providers, making them easy targets for anti-abortion groups. *Id.* at 2255.

187. For a discussion of the anti-abortion movement's largely successful efforts to force clinic employees and physicians to abandon their profession, see *supra* part I. and Brief of the Center for Reproductive Law, *supra* note 2, at 2.

188. See Benshoof, *supra* note 11, at 2257. Perhaps the main obstacle which women in low-income brackets face is the lack of funds to pay for an abortion. See Toni Y. Joseph, *Blacks No Longer Silent on Abortion*, ORLANDO SENTINEL, Aug. 23, 1992, at G1. Permitting certified midwives or trained nurse practitioners to provide abortions may help to lower the costs of the procedure for two reasons. First, it will increase the supply of abortion-providers, driving the price of the service down. Second, nurse-practitioners and certified midwives are not as highly educated or as highly compensated as physicians are.

189. See *supra* note 47 and accompanying text.

190. See *supra* part II.A.1-2.

ages against protestors who engage in threatening or obstructive conduct — regardless of its expressive content.

