Land & Water Law Review

Volume 30 | Issue 1 Article 11

1995

Ending the Violence: Applying the Ku Klux Klan Act, RICO, and FACE to the Abortion Controversy

Joy Hollingsworth McMurtry

Patti S. Pennock

ENDING THE VIOLENCE: Applying the Ku Klux Klan Act, RICO, and FACE to the Abortion Controversy

In March of 1993, David Gunn, a doctor who provided abortion services in Pensacola, Florida, was shot and killed.[1] The gunman was a member of Operation Rescue.[2] Recently, doctors who legally perform abortions have felt so threatened that they hire body guards to protect them and to help them gain access to their places of work.[3] Even these drastic measures are sometimes futile. In July of 1994, Dr. John Britton and his volunteer body guard, James Barrett, were both shot and killed[4] outside of an abortion clinic.[5] Once again, the gunman was a member of Operation Rescue.[6] From 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States.[7] These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, one murder, and 327 clinic invasions.[8] In addition, over 6,000 clinic blockades and other disruptions have been reported since 1977.[9] This nationwide campaign of

---

1. James Risen, *Operation Rescue Losing Political Clout; Violence at Clinics Blamed*, ST. PAUL PIONEER PRESS, August 10, 1994, at 5A.

2. *Id.* Operation Rescue is a militant anti-abortion group that mobilized a segment of Christian fundamentalists and brought the tactics of civil disobedience to the conservative cause. *Id.* at 1A.

3. *Id.* at 5A.

4. *Id.* On November 4, 1994, Paul Hill was convicted of first degree murder for the slayings of Dr. Britton and his bodyguard. The jury recommended that he should be executed for his crimes. Mike Clary, *Abortion Foe is Convicted of Brutal Slayings*, LOS ANGELES TIMES, November 3, 1994, Part A at 1.

5. The Florida media indicated that:

> [t]he abortions Dr. Britton was performing [were] legal procedures. Whether they were moral is an issue of individual conscience. When people like Hill act as judge, jury and executioner, and impose their version of right and wrong by taking lives, they clearly are acting both immorally and illegally. The Hill jury has confirmed correctly that society will not tolerate it.

Hill Verdict Proper; Let Sentence Preclude Delusions of Martyrdom, SUN-SENTINEL, November 4, 1994, at 22A.

6. *Live Report* (Cable News Network broadcast, November 3, 1994). Hill's supporters say the killings were much more than opposition to abortion and that they are already planning an appeal for the anti-abortion activist. They are still hoping that they will be able to use justifiable homicide as a defense to the murder of abortion doctors. *Id.*

7. H.R. REP. NO. 103-488 103d Cong., 2d Sess. 1994, at 703-704. Arson, bombings, and firebombings have been documented in at least 28 states. *Id.*

8. *Id.*

9. *Id.* at 704. *See also Abortion Clinic Bombed*, THE FINANCIAL POST, November 4, 1994, at 2 (noting that a bomb exploded near a California abortion clinic on the same day that anti-abortion extremist Paul Hill was convicted of murder) and Risen, *supra* note 1, at 5A (reporting that the number of murders surrounding abortion clinics increased to three in July, 1994).

blockades, invasions, vandalism, threats, and other violence is barring access to facilities that provide reproductive health services, including services arising from the right to choose an abortion.[10]

The violence surrounding abortion clinics centers around the conflict between pro-life and pro-choice groups. The pro-life movement is comprised of people who oppose abortion. The movement spans the United States with the purpose of stopping abortion and opposing legislation that supports abortion.[11] To accomplish these goals, the organization stages demonstrations or rescues[12] at abortion clinics nationwide.[13]

Such demonstrations involve a variety of activities such as picketing, distributing literature, counseling in an attempt to persuade women to carry the fetus to full term, and physically blocking access to abortion clinics.[14] During a demonstration, hundreds of protestors surround the clinic and block entrances and exits, hoping eventually to close the clinic.[15] In addition to staging demonstrations, a splinter group of the movement, Operation Rescue, has taken more violent measures[16] to illustrate their severe opposition to abortion.[17] The pro-life movement believes these actions, including the violent measures, are protected by the First Amendment to the Constitution.[18]

Pro-choice activists directly oppose the philosophy of the pro-life movement. Pro-choice activists believe that a woman should be able to

---

10. *Id.*

11. NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989). Among the activities Operation Rescue pursues to achieve these goals are demonstrations or rescues. In general, a rescue is a demonstration at the site of the clinic where abortions are performed. At a rescue, demonstrators intentionally trespass on the clinic's premises for the purpose of blocking the clinic's entrances and exits, thereby effectively closing the clinic. *Id.* at 1487.

12. The term rescue refers to the demonstrators' attempts to save a fetus from abortion. *Id.*

13. *Id.* at 1490. The court noted that Operation Rescue's demonstrations have taken place all across the country and have been enjoined in New York, Pennsylvania, Washington, Connecticut, California, and the Washington D.C. metropolitan area. *Id.*

14. Brief for Petitioners at 15, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985).

15. *NOW*, 726 F. Supp. at 1489. The court found that demonstration activities of Operation Rescue create a substantial risk that existing or perspective patients may suffer physical or mental harm. *Id.* The court also noted that when vital medical services are postponed, clinic clientele could be subjected to infection, bleeding, and other serious complications. *Id.*

16. *E.g.*, these violent measures include advocating the murder of doctors who provide abortion services. *Activist Convicted of Killing Abortion Doctor*, DEUTSCHE PRESSE-AGENTUR, November 3, 1994, International News Section.

17. *See supra* notes 7-9 and accompanying text.

18. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

make her own choices regarding her life and her ability to reproduce,[19] free from the physical blockades and violence associated with pro-life demonstrations. The continuing conflict between pro-life and pro-choice groups[20] involves the socially and morally complex question "should abortion should be a protected right?" However, the real issue underlying this conflict is whether a woman's right to choose an abortion and the pro-life activists' right to free speech can co-exist.[21] This comment will explore this issue by examining the constitutional rights of both pro-choice and pro-life activists, federal legislation that impacts these constitutional rights, and the future of abortion in Wyoming and the United States.

CONSTITUTIONAL ISSUES

Before deciding whether the right to free speech and the right to abortion can co-exist, the history of the constitutional rights of both pro-choice and pro-life activists must be examined. This section will address the progression of the right to choose an abortion and the protection of the right to free speech throughout the history of the American judicial system.

The Right to Abortion

Whether a woman should be guaranteed the right to an abortion is a complex issue with roots in traditional constitutional law. The right to abortion can be traced through several United States Supreme Court decisions that recognized "a guarantee of certain areas or zones of privacy, [that] exist under the Constitution."[22] Initially, the Court recognized child rearing[23] and education[24] as privacy rights guaranteed under

19. *Campaign NEWS No. 1* (Wyoming No on #1 Campaign, Casper, Wyo.), July 1994, at 1.

20. Members of the pro-life movement believe that abortion should not be a protected right and that Paul Hill was justified in killing Dr. Britton. These activists would like to elevate Paul Hill to a martyr level. If he receives the death penalty, it would provoke others to murder abortion doctors. *Florida: Hill Convicted; Will He Now Become a Martyr?* ABORTION REPORT, November 3, 1994, Section: Spotlight Story.

21. "The issue of abortion is something on which people of good conscience can and do disagree. When that disagreement turns to violence, however, civil society has an obligation to crack down hard." *Hill Verdict Proper*, *supra* note 5, at 22A.

22. Roe v. Wade, 410 U.S. 113, 152 (1973). The Supreme Court ruled that state criminal statutes prohibiting abortions at any stage of pregnancy except to save the mother's life were unconstitutional. The Court determined that the right to privacy was implicit in the concept of ordered liberty. The mother's right to privacy, including abortion, and the interest of the state in safeguarding health, maintaining medical standards, and protecting potential lives were balanced in the trimester framework. *Id.* at 150. *See also* Wyoming Nat'l Abortion Rights League v. Karpan, 881 P.2d 281 (Wyo. 1994).

23. Meyer v. Nebraska, 262 U.S. 390 (1923). The Court held that due process guarantees the freedom to exercise those privileges recognized as essential to the pursuit of happiness. Those privileges included the right to: receive an education, get married, rear children, enter into contracts, and work. *Id.* at 399.

24. Pierce v. Society of Sisters, 268 U.S. 510 (1925). A state law that required children to

the Constitution. By 1937, the Court acknowledged that some private rights are fundamental or "implicit in the concept of ordered liberty."[25] The Court gradually incorporated activities relating to procreation,[26] family relationships,[27] marriage,[28] and contraception[29] within the right of privacy guaranteed under the Constitution. In 1965, the Court looked for the specific location of privacy rights within the Constitution and held that they were found in the penumbras of the Bill of Rights.[30]

In 1973, the Supreme Court decided the landmark case of *Roe v. Wade*.[31] This decision, encompassing the elements of the right to privacy previously guaranteed under the Constitution,[32] held that the right to privacy was broad enough to include a woman's decision to have an abortion.[33]

The *Roe* decision[34] recognized the sharp division in the United States between individuals who oppose abortions and those who do not. Although the right to abortion remains a controversial issue, the Constitution protects everyone's right to peacefully express their ideas to the public.[35]

---

attend public schools was held unconstitutional. The protected right was the ability to choose how to raise and educate one's own children. *Id.* at 535.

25. Palko v. Connecticut, 302 U.S. 319 (1937). Only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in the constitutional guarantee of personal privacy. *Id.* at 325.

26. Skinner v. Oklahoma, 316 U.S. 535 (1942). A statute providing for the sterilization of repeat offenders of moral turpitude crimes violated the Equal Protection Clause. *Id.* at 541-542.

27. Prince v. Massachusetts, 321 U.S. 158 (1944). The Court recognized the private realm of family life, but also recognized that the state has the right to provide for the health and welfare of children. *Id.* at 166.

28. Loving v. Virginia, 388 U.S. 1 (1967). A statute prohibiting whites from marrying nonwhites was held to violate the Equal Protection Clause. The Court found that the right to choose whom one marries was a protected private right. *Id.* at 12.

29. Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court held that the right of privacy included the right of the individual, married or single, to be free from governmental intrusion when determining whether to bear a child. *Id.* at 453-454.

30. Griswold v. Connecticut, 381 U.S. 479 (1965). The Court held that a Connecticut law that prohibited the use of contraceptives was unconstitutional. The law invaded the protected freedom of privacy in marriage, a right found in the penumbras of the Bill of Rights. *Id.* at 484-485.

31. 410 U.S. 113 (1973).

32. *See supra* notes 24-31 and accompanying text.

33. *Roe*, 410 U.S. at 153. The Supreme Court held that the right to have an abortion was within the general right to privacy, which was implicit in the concept of ordered liberty. *Id.*

34. The *Roe* decision was upheld in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). The *Casey* Court reaffirmed the "essential holding" of *Roe* which consisted of 1) a recognition of the "right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State"; 2) a confirmation of a state's power to restrict abortion after fetal viability, if the state law contained exceptions for pregnancies that endangered the woman's life or health; and 3) a recognition of the state's "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus." *Id.* at 2796-2797.

35. *See, e.g.*, Brief for Respondents at 4; Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). Both sides are protected by the First Amendment when they disburse information, distribute literature and contraceptive devices, engage in peaceful demonstrations, and conduct meetings. *Id.*

Pro-life activists maintain that their actions in opposing abortion are protected by the First Amendment.[36] Alternatively, pro-choice activists have utilized section 1985(3) of the Ku Klux Klan Act (KKKA),[37] the RICO Statutes,[38] and the Freedom of Access to Clinic Entrances Act[39] to

---

36. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

37. 42 U.S.C. § 1985(3) (1988). Originally enacted as part of the Ku Klux Klan Act of 1871, § 1985(3) was the congressional response to the organized lawlessness that enveloped the South following the emancipation of the slaves. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). Paragraph (3) of the KKKA provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(Section 1985(3) will be referred to as the KKKA in this comment.)

38. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (1988), provides that it is:

> (a) unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity to use the income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities which affect interstate commerce, (b) unlawful for any person through the a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, (c) unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt, (d) unlawful for any person to conspire to violate any of the provisions of (a), (b), or (c) of this section.

39. FACE provides in relevant part, that:

> Whoever, 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 or who intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services shall be subject to criminal and civil penalties.
>
> Whoever violates FACE shall be fined and imprisoned not more than one year, except in an offense involving exclusively nonviolent physical obstruction, where the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months. In cases where bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

guarantee women access to abortion clinics and to prevent violent demonstrations that threaten the safety of these women.

The Right of Free Speech

The rights of women seeking abortions and the rights of anti-abortion activists are not mutually exclusive. Each group can exercise its protected rights without infringing on the rights of others.[40] However, pro-life activists allege that injunctions against anti-abortion demonstrations infringe upon their right to free speech,[41] which is guaranteed by the First Amendment to the United States Constitution.[42]

The Supreme Court specifically addressed the issue of the pro-life activists' First Amendment rights in *Madsen v. Women's Health Center*.[43] The Court formulated a new test to determine the constitutionality of content-neutral injunctions that restrict expression in a public forum.[44] In applying this new test, the Court upheld portions of an injunction prohibiting abortion protestors from demonstrating at a clinic in Florida.[45]

The Second Circuit, following the reasoning in *Madsen*, upheld portions of an injunction prohibiting certain anti-abortion activities in *Pro-Choice Network v. Schenck*.[46] In *Schenck*, the court upheld provisions that

---

> The court may award appropriate relief [in a civil action], including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses.

Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994).

40. The First Amendment does not protect joining with others to deprive third parties of their lawful rights. *See* Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516, 2519 (1994).

41. *Id.* at 2523.

42. U.S. CONST. amend. I.

43. 114 S. Ct. 2516 (1994). The Court held that a portion of a state court injunction that affected those acting in concert with anti-abortion protestors did not impermissibly limit the protestors' freedom of association guaranteed by the First Amendment. *Id.* at 2530.

44. *Id.* at 2525. By applying the *Madsen* test, courts can determine whether the "challenged provisions of the injunction burden no more speech than necessary to serve an important government interest." *Id.* Courts can also use the test to decide whether the governmental interests are significant and whether protecting one groups' rights will infringe on the rights of another group. *Id.*

45. *Id.* at 2521. The Court upheld portions of the injunction that did not burden more speech than necessary. These portions included noise restrictions and a 36 foot buffer zone around clinic entrances and driveways. *Id.* at 2527.

46. 34 F.3d 130 (2d Cir. 1994). The injunction prohibited demonstrators from trespassing on the clinic premises, impeding ingress into and egress from the facility, demonstrating within fifteen feet of the clinic and within fifteen feet of persons and vehicles seeking access to the clinic, and physically abusing or touching persons going into or leaving the clinic. The injunction allowed only two demonstrators to enter the fifteen foot "bubble zone" to engage in sidewalk counseling of clinic clients. The injunction allowed the clients an absolute right to walk away from the counseling at which time the counselors had to cease and desist further counseling attempts. Finally, the injunction prohibited demonstrators from impeding law enforcement officials in maintaining public order. *Id.* at 134 n.1.

protected women seeking abortions and that did not infringe upon First Amendment activities but removed provisions that violated the protestors' First Amendment rights.[47] These decisions demonstrate that a court can uphold anti-abortion protestors' First Amendment rights while guaranteeing women the right to seek abortions.

STATUTES AFFECTING THE PROTECTED RIGHTS

Several federal statutes affect the right to free speech while protecting the right to abortion. Courts have applied the Ku Klux Klan Act, RICO, and FACE to anti-abortion demonstrations in an attempt to end violence while protecting the right to protest. This section will explore the history and effect of these federal statutes on abortion.

The Ku Klux Klan Act

Pro-choice groups initially attempted to stop the violent activities of pro-life demonstrators by applying 42 U.S.C. § 1985(3).[48] Originally enacted as part of the Ku Klux Klan Act of 1871,[49] section 1985(3) of the KKKA was the congressional response to the organized lawlessness that enveloped the south following the emancipation of the slaves.[50] The Act applied to any citizen of the United States and was designed to "protect [the citizen's] right to privacy and to guarantee [the citizen] equal protection of the laws or equal privileges and immunities under the laws."[51] While the Civil War amendments provided protection from the states, the Act of 1871 provided protection from private groups like the Ku Klux Klan.[52]

---

47. *Id.* at 142. The court ruled that the ban on demonstrations within 15 feet of the clinic or within 15 feet of any person or vehicle seeking access to the clinic and the portion of the injunction providing that "no one is required to accept or listen to sidewalk counseling, and . . . [that] all persons seeking to counsel that person. . . shall cease and desist from such counseling" were unconstitutional. *Id.* The court found the provisions unconstitutional because they burdened more speech than necessary to serve the identified significant government interests. *Id.*

48. *Id.*

49. Ku Klux Klan Act, Ch. 22, §2, 17 Stat. 13 (1871).

50. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (J. Stevens, dissenting). The Bray Court indicated that it was important to consider whether a controversy has a purely local character or the kind of federal dimension that gave rise to the legislation when a question arises concerning the statute's coverage. *Id.* at 779.

51. 42 U.S.C. § 1985(3). The elements of a KKKA claim are: 1) A conspiracy, 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws, 3) an act in furtherance of a conspiracy, and 4) an injury to person or property, or a deprivation of having and exercising any right or privilege of a citizen of the United States. *See also* Griffin v. Breckenridge, 403 U.S. 88 (1971).

52. Both clauses of the KKKA address the requirement for a conspiracy of "two or more persons." The conspiracy requirement suggests that there must be a concerted effort by a group to prevent others from exercising their privileges and rights under the law. 42 U.S.C. § 1985(3).

Although the forty-second Congress was motivated by racial discrimination in the south, the Act has recently been applied in lower court cases involving other types of discrimination.[53] Specifically, the Act has been applied to situations where abortion clinics are the targets of demonstrations and blockades.[54] However, the Supreme Court has not yet expanded the KKKA to apply to non-racially motivated animosity.[55]

A KKKA claim requires that the victim of an alleged conspiracy be deprived of a protected right.[56] Previous Supreme Court decisions have established that this right must be protected against government and private impairment.[57] In *Bray v. Alexandria Women's Health Clinic*,[58] the Supreme Court held that elements of a general right to privacy are not protected against private impairment by the KKKA deprivation clause.[59] The Court found that, because the right to abortion is an element of the right to privacy,[60] the right to abortion is not protected against private impairment. Therefore, under current Supreme Court interpretation,[61] the deprivation clause of the KKKA cannot be used to stop violent anti-abortion demonstrators.

---

53. For example, in N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), the Court of Appeals found that abortion protestors acted within the scope of the KKKA by engaging in a conspiracy to prevent women from obtaining access to abortion facilities. The district court in Cousin v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989), found that abortion clinics had standing to sue under the KKKA and that women seeking abortions were a cognizable class of persons. In Portland Feminist Women's Health Ctr v. Advocates for Life, 712 F. Supp. 165 (D. Or. 1988), the court found that the KKKA protected the right to travel from encroachment by private conspiracies and that women seeking abortions were a protected class. The court in Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989), also found that women seeking abortions were a protected class.

54. Prior to Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), the Supreme Court did not have the opportunity to review the application of the KKKA to cases involving pro-choice and pro-life groups. The Court did, however, review two other cases involving KKKA claims: Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 336 (1979) (refusing to extend the reach of the KKKA to equal opportunity in employment); and United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983) (disallowing the KKKA to provide relief for conspiracies motivated by an economic bias).

55. *See supra* note 54 and accompanying text and Griffin v. Breckenridge, 403 U.S. 88, 102 n.9 (1971).

56. 42 U.S.C. § 1985(3).

57. *E.g., Carpenters*, 463 U.S at 833. The court determined that the KKKA constitutionally can and does protect rights from interference by purely private conspirators. The Court noted that the protected rights included thirteenth Amendment and fourteenth Amendment rights and the right to travel. *Id.*

58. 113 S. Ct. 753 (1993).

59. *Id.* at 780.

60. *Id.* Although Roe v. Wade, 410 U.S. 113 (1973) established that the right to abortion is a privacy right guaranteed under the Constitution, *Planned Parenthood v. Casey* characterized the right to an abortion as a fourteenth amendment liberty. 112 S. Ct. 2791 (1992). A fourteenth amendment liberty is an "element" of the general right to privacy. *See Roe*, 410 U.S. at 153.

61. *Roe*, 410 U.S. at 166. The Supreme Court did not specifically state, however, that abortion was not afforded constitutional protection.

Although the Supreme Court held that the KKKA's deprivation clause does not apply to abortion protestors, the Court did not decide if the KKKA's prevention clause would be applicable in ending the violent demonstrations. However, lower courts[62] specifically have addressed the application of the prevention clause of the KKKA to anti-abortion protestors and found that pro-choice activists adequately alleged violations of the prevention clause.[63] These opinions indicate that the prevention clause of the KKKA is applicable to anti-abortion demonstrations.

The RICO Statutes

In response to the denial of their KKKA deprivation clause claims, the pro-choice movement turned to the Racketeer Influenced and Corrupt Organizations Act (RICO).[64] RICO is part of the Organized Crime Control Act,[65] which Congress enacted in 1970. The purpose for enacting this statute was to "seek eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[66]

RICO provides for both criminal penalties[67] and civil remedies[68] for the commission of (1) investing income derived from racketeering in an

---

62. *See* National Abortions Fed'n v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993) (holding that the evidentiary record showed defendants hindering and preventing law enforcement officials from maintaining access to the clinic); Portland Feminist Women's Health Ctr. v. Advocates for Life, 34 F.3d 845 (9th Cir. 1994) (utilizing the dissenters' opinions in *Bray* to determine that the elements of the prevention clause were met in this case).

63. The prevention clause of the KKKA provides:

> If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

42 U.S.C. § 1985(3).

64. *See supra* note 38, for the text of RICO.

65. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941 (1970).

66. United States v. Turkette, 452 U.S. 576, 589 (1981). In addition to criminal penalties, RICO also provides for a private cause of action to recover treble damages for injuries sustained as a result of racketeering activities. *See infra* note 69, for the definition of racketeering activity.

67. 18 U.S.C. § 1962 (1988).

68. 18 U.S.C. § 1964(c). RICO is an attractive remedy against anti-abortion protestors because a plaintiff who wins under this RICO provision may be awarded treble damages. The statute provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.*

interstate enterprise; (2) acquiring or maintaining an interest in such an enterprise through a pattern of racketeering activity;[69] (3) conducting an enterprise through a pattern of racketeering activity; and (4) conspiring to violate any of the above provisions.[70]

The main controversy surrounding the use of RICO in the prosecution of anti-abortion protestors involves the characterization of these groups as the type of organization Congress intended to reach in passing RICO.[71] Although the Supreme Court has not decided whether anti-abortion protestors fall within the definitions of RICO, it has held that RICO does not require proof that either the racketeering enterprise or predicate acts of racketeering be motivated by an economic purpose.[72] Since the Court held that economic motivation is unnecessary to prove a RICO violation, RICO remains a viable and powerful option in prosecuting violent anti-abortion protestors.

Freedom of Access to Clinic Entrances Act

In response to the *Bray* Court's refusal to apply existing federal legislation to the increasing rate of violence aimed at abortion clinics, care providers, and clients, Congress enacted the Freedom of Access to Clinic Entrances Act (FACE).[73] The purpose for enacting FACE was to stop violence surrounding health service clinics[74] by subjecting violators to a criminal statute which provides for both criminal and civil penalties and civil remedies.[75]

---

69. Racketeering activity includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A) (1988).

70. 18 U.S.C. §§ 1962(a)-(d) (1988). *See also supra* notes 68-69, for relevant RICO provisions.

71. *See* Northeast Women's Health Ctr, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989) (holding that a civil RICO claim could be appropriately applied to defendant's intimidation and harassment resulting in the destruction of property); West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990) (determining that the town could not establish a pattern of underlying acts of extortion to have a successful RICO claim).

72. Nat'l Org. for Women v. Scheidler, 114 S. Ct. 798 (1994). The Court found that nowhere in either § 1962(c), or in the RICO definitions in § 1961, is there any indication that an economic motive is required. *Id.* at 804.

73. *Id.* On May 26, 1994, President Clinton signed the new law into effect. In enacting FACE, President Clinton said,

> This bill is designed to eliminate violence and coercion. It is not a strike against the first amendment. . . . We simply cannot, we must not continue to allow the attacks, the incidents of arson, the campaigns of intimidation upon law-abiding citizens that has given rise to this law. No person seeking medical care, no physician providing that care should have to endure harassments or threats or obstruction or intimidation or even murder from vigilantes who take the law into their own hands because they think they know what the law ought to be.

President's Remarks on Signing the Freedom of Access to Clinic Entrances Act of 1994, 30 WEEKLY COMP. PRES. DOC. 1165 (May 26, 1994).

74. H.R. REP. NO. 103-259, 103d Congress, 1st Sess. (1994), at 703-704.

75. This statute provides:

Whoever—(1) by force or threat of force or by physical obstruction, intentionally injures,

The enactment of FACE represents the beginning of additional federal involvement in the area of growing abortion violence.[76] Although FACE has been challenged in various district courts,[77] none of its provisions have been held to violate the Constitution.[78] FACE promises to be another viable option to be used in ending the pro-life violence surrounding the abortion debate.

ANALYZING THE ISSUES

The Ku Klux Klan Act, RICO, and FACE each provide effective methods for ending the violence that surrounds abortion clinics. However, application of the Ku Klux Klan Act, RICO, and FACE requires an analysis into each statute's effect on the constitutionally protected rights of pro-life protestors and the rights of women seeking abortions. This section of the comment explores how each statute can be effectively used by the judicial system to protect both the right to free speech and the right to choose an abortion.

The Ku Klux Klan Act

Actions aimed at ending violent protests at abortion clinics originally were brought under the deprivation clause of the KKKA.[79] Prior to the Supreme Court's decision in *Bray v. Alexandria Women's Health Center*,[80] lower courts found that the actions of anti-abortion protestors fit within the scope of the deprivation clause.[81] However, in *Bray*, the Su-

---

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 shall be subject to criminal penalties and civil remedies.

Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994).

76. Within days of Paul Hill's FACE conviction in October of 1994, attacks were reported at three abortion clinics in California and Montana. *Pipe Bomb Explodes Outside Abortion Clinic*, ABORTION REPORT, November 3, 1994, Section: State Reports.

77. *See* Reily v. Reno, 860 F. Supp. 693 (D. Ariz. 1994) (determining that FACE was passed in furtherance of a compelling government interest in proscribing conduct that harms individuals, damages property, and burdens interstate commerce); Harnsberger v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994) (holding that the prohibitions in FACE are a reasonable and appropriate means to address the problem of violence at reproductive health service facilities); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994) (explaining that FACE is a valid exercise of legislative power designed to curb violence without stifling the freedom of speech); American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994) (showing that FACE avoids infringing on legitimate first Amendment rights).

78. *Supra* note 77, for cases that determined that the provisions of FACE were constitutional.

79. 42 U.S.C. § 1985(3) (1988).

80. 113 S. Ct. 753 (1993).

81. *See supra* note 37, for the text of the deprivation clause.

preme Court held that the deprivation clause of the KKKA did not apply to the actions of the pro-life movement.[82]

The central issues in applying the KKKA to anti-abortion demonstrations are: 1) defining "person or class of persons" for the purposes of relief in a KKKA claim and 2) applying the KKKA to the activities of the demonstrators.

The language of the KKKA specifically states that the statute pertains to "any person or class of persons"[83] and not only to a racial group or other cognizable class of people. This language is broad enough to encompass individuals as well as classes or groups of people.[84]

Congressional debates surrounding the enactment of the KKKA support applying the statute to protect women as a class.[85] For example, Representative Buckley stated, "The proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women."[86] Arguably, Congress intended to include women as a protected class under the KKKA.

Although Congress defined women as a class, the *Bray* Court declined to decide whether women were a protected class[87] and based its opinion on whether "women seeking abortions" were a protected class.[88]

---

82. Specifically, the Court found the following: 1) the movement's intent was to prevent abortions and this intent did not qualify as discrimination against women in general; 2) women seeking abortions were not a person or class of persons for the purposes of the KKKA; 3) the demonstrations did not affect a woman's federally protected right to interstate travel; 4) depriving women of the federal right to abortion could not serve as a private conspiracy; and 5) the issue of whether anti-abortion demonstrations were intended to prevent law enforcement officials from securing equal protection to all was not suitable for review. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 759-760, 763-67 (1992). The Court did not rule on the application of the provisions of the prevention clause to the petitioners' activities. *Id.*

83. *See supra* note 37. The statute simply indicates that "any person or class of persons" is protected from the deprivation of rights. It does not indicate that the targeted person or class must be a racial class or that there be a discriminatory animus directed at the targeted person or class. *Id.*

84. *Bray*, 113 S. Ct. at 797. In Justice Stevens' dissent, he contended that the prevention clause should be construed as "a large scale conspiracy that violates the victims' constitutional rights by overwhelming the local authorities and that, by its nature, victimizes predominantly members of a particular class." *Id.* He concludes that this description applies to anti-abortion protestors "who have conspired to deprive women of their constitutional right to choose an abortion by overwhelming the local police and by blockading clinics with the intended effect of preventing women from exercising a right only they possess." *Id.* at 798.

85. Cong. Globe, 42nd Cong., 1st Sess. 478 (1871).

86. *Id.*

87. *Bray*, 113 S. Ct. at 759. The Court determined that deciding whether women were a qualified class under the KKKA was unnecessary. The Court found that the animus requirement could not be met by maliciously motivated discrimination against women. *Id.*

88. *Id.* The Court determined that the meaning of class for purposes of the KKKA suggests more than a group of individuals who share a desire to engage in conduct that another group disfavors. *Id.*

The Court's decision was based on the premise that "women seeking abortions" were not a class and could not be granted relief under the KKKA.[89] The fact that anti-abortion protestors target every area of the clinic and not just the rooms where abortions are performed reinforces the conclusion that they are denying all women the freedom to use the services of the clinics.[90] Therefore, anti-abortion protestors are targeting all women and not only women who are seeking abortions.[91]

The protestors in *Bray* argued that the intent of their demonstrations was to save the victims of abortion and not to deprive women of a protected right.[92] Because deprivation of a right was not their intent, the anti-abortion protestors argued that they did not discriminate against all women.[93] They contended that they only target clinics because of the abortions performed there.[94] However, as Justice Stevens suggested, only women can get pregnant, only women can choose an abortion, and when a clinic is targeted by protestors, then they are targeting women in general.[95]

In addition, the *Bray* Court determined that pro-choice activists must prove that anti-abortion demonstrations are conspiracies aimed at interfering with a federally protected right before the deprivation clause of the KKKA can apply.[96] After analyzing the origin of abortion law, the Court found that the right to abortion was an element of the general right to privacy[97] and not protected against private conspira-

---

89. *Id.* at 760-761. The Court did not address the actual language of the statute that protects any "person." *Id.*

90. *See supra* note 15, at 1489.

91. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 788 (1993) (J. Stevens, dissenting). Justice Stevens stated that the protestors' "conduct is designed to deny *every* woman the opportunity to exercise a constitutional right that *only* women possess." (emphasis in original). *Id.*

92. *Id.* at 759-60. Operation Rescue defines their activities as the physical intervention between abortionists and innocent victims. *Id.*

93. *Bray*, 113 S. Ct. at 759. Pro-life activists offer this argument in support of their allegation that they are not discriminating against women. *Id.*

94. *Id.* at 759.

95. When an abortion clinic is targeted by a demonstration, the entire clinic is closed down, not just the rooms in which abortions are performed. In addition to abortion services, the clinics provide gynecological exams, contraception, pregnancy tests, and prenatal counseling and care. Rather than being simply abortion clinics, the centers are really gynecological facilities. Any woman can use the services of the clinics, not just women seeking abortions. Therefore, women in general are effected by the petitioners' demonstrations. *See* Brief for Petitioners at 4, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985); Nat'l Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488-1489; and *Bray*, 113 S. Ct. at 780-781.

96. *Bray*, 113 S. Ct. at 758.

97. *Id.* at 764. Abortion is not a right that is specified in the Constitution, but may be in the penumbras of the Bill of Rights. The Court held that the right to an abortion was an element of the right to privacy and did not reach the level of a federally protected right. *Id.* Since the right to an abortion was not enumerated in the Constitution, the Court found that it was not a constitutional right. *Id.*

cies.[98] Therefore, according to the Court, anti-abortion demonstrators did not violate the deprivation clause of the KKKA by interfering with a woman's right to abortion.

Pro-choice activists argued that, in addition to interfering with the right to abortion, a woman's right to interstate travel was affected by Operation Rescue's activities.[99] The Court, applying its reasoning in *Carpenters*,[100] found that a woman's right to interstate travel, a federally protected right, was only incidentally affected by the protestors' activities.[101] However, the language of the KKKA does not require the protected right to be the specific target of the conspirators' actions.[102] As Justice Stevens indicated in his dissent, the right to interstate travel is impaired if it is directly or indirectly affected.[103]

The *Bray* Court should have allowed the use of the deprivation clause of the KKKA to help stop violent anti-abortion protestors. The Court could have found the requisite elements of a KKKA claim by holding either that the conspiracy affected women as a class or that the language of the Act included women seeking abortions as a protected class. In addition, the Court should have found that the protestors' private conspiracy interfered with a federally protected right.

In addition to misapplying the deprivation clause[104] of the KKKA,

---

98. *Id.* The Court held that the KKKA deprivation claim failed because pro-choice activists did not identify a right protected against private action that had also been the object of the alleged conspiracy. *Id.*

99. *Id.* at 762. The Court stated that whether one agrees or disagrees with the goal of preventing abortion, that goal, in itself, does not remotely qualify for such harsh description and for such derogatory association with racism. *Id.*

100. United Bhd. of Carpenters and Joiners of Am. Local 610 v. Scott, 463 U.S. 825 (1983).

101. *Carpenters*, 463 U.S. at 833. The Court held that the aim of the petitioners' conspiracy must be the impairment of the deprived right in order for the right to be burdened. The Court indicated the conscious objective of the conspiracy must be the imposition of the right. *Id.* at 832.

102. 42 U.S.C. § 1985(3) (1988).

103. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 793 (1993) (J. Stevens, dissenting). Justice Stevens pointed out that, in *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held that the right to seek abortion services in another state is protected by the Privileges and Immunities Clause of the United States Constitution, Article IV, section 2. In his opinion, a woman's right to engage in interstate travel for the purpose of seeking an abortion is entitled to respect for two reasons: 1) the woman "is exercising a constitutional right" and 2) "the restrictive rules in her home state may make travel to another state imperative." *Id.* Justice Stevens indicated that the right to travel to seek an abortion was also paramount in the minds of the Justices who decided *Roe v. Wade*. *Id.* at 792, n. 31. He noted that even Justices Rehnquist and White, dissenters in *Roe*, found that interstate travel to seek an abortion deserved strong protection. *Id.* The dissenting Justices agreed that the diversity among the states regarding the regulation of abortions amplified the importance of unimpeded access to out-of-state abortion facilities. *Id.* at 780, 800.

104. The deprivation clause refers to the portion of the KKKA that provides relief when two or more persons go on the premises of another for the purpose of depriving any person or class of persons the equal protection of the laws or the equal privileges and immunities under the laws. 42 U.S.C. § 1985(3).

the *Bray* Court erred in holding that the issue of the prevention clause[105] was not suitable for review. Justice Souter, in his concurring and dissenting opinion, indicated that this issue was suitable for review because the issue was addressed by the district court. Additionally, it had been included in the questions presented for certiorari.[106] By virtue of these findings, the prevention clause should have been reviewed by the Court.

Other courts have specifically addressed whether the prevention clause of the KKKA provided a federal cause of action against anti-abortion demonstrators.[107] In *Nat'l Abortion Federation v. Operation Rescue*,[108] the Ninth Circuit held that the complaint sufficiently alleged a cause of action for conspiracy under the prevention clause of the KKKA.[109] Several months later, the Ninth Circuit affirmed this decision in *Portland Feminist Women's Health Ctr v. Advocates For Life, Inc.*[110] The Court held that the evidentiary record confirmed there was adequate support for a claim under the prevention clause.[111]

In the wake of *Bray*, many federal district courts have retained jurisdiction to grant injunctive relief under established state and federal law. For instance, in *Pro-Choice Network v. Schenck*,[112] the court retained pendent jurisdiction over an injunction restricting abortion demonstrations.[113] Regardless of whether an injunction is granted under federal law

---

105. The prevention clause of the KKKA provides relief when two or more persons conspire for the purpose of preventing or hindering the constituted authorities from giving or securing to all persons the equal protection of the laws. *Id.* The Court, in its discussion of the KKKA, found that the prevention clause claim was not suitable for review because the respondent had not set forth a claim under this clause. *Bray*, 113 S. Ct. at 764.

106. *Id.* at 779. *See also* Nat'l Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1495 and n.4 (E.D. Pa. 1989). The facts in *NOW* show that Operation Rescue's activities "typically overwhelm police forces and render them unable to provide the protection guaranteed to all" and that the demonstrations create a substantial risk of harm to women seeking the services of the clinics. *Id.* Justice Souter suggested that the Court reject any "limiting constructions that stare decisis does not require" when applying the KKKA. *Id.* He also suggested that by restricting the language of the KKKA and placing limits on its application, the Court would render the clause inoperable. *Bray*, 113 S. Ct. at 771.

107. *Id.*

108. 8 F.3d 680 (9th Cir. 1993).

109. *Id.* at 687. The court found that the complaint alleged a nationwide conspiracy to prevent or hinder law enforcement officials from securing and protecting women in their exercise of a constitutional right. The court further stated that Operation Rescue's activities are analogous to the type of conspiracy that brought about the original enactment of the Ku Klux Klan Act. *Id.*

110. 34 F.3d 845 (9th Cir. 1994).

111. *Id.* at 850. The evidentiary record showed pictures of the protestors blocking entrances to the clinics and preventing law enforcement officials from maintaining the peace. *Id.*

112. 34 F.3d 130 (2d Cir. 1994).

113. *Id.* at 137. In refusing to vacate the injunction, the court stated that "[t]he Court's decision to exercise pendent jurisdiction over the state law claims, regardless of the § 1985(3) claim, leaves without question the viability and continued enforceability of the preliminary injunction." *Id.*

or state injunctive relief, the constitutionality of an injunction must be determined[114] or it will not be upheld.

Besides utilizing the deprivation and prevention clauses of the KKKA and established law concerning injunctive relief, pro-choice activists have turned to the federal system to protect their right to abortion. At the federal level, the activists have utilized both existing federal law[115] and newly created federal statutes.[116] These statutes allow courts to protect both access to abortion clinics and the right to peacefully protest.

The RICO Statutes

The first federal statute that pro-choice activists turned to after the Court's decision in *Bray* was the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970.[117] In *Nat'l Org. for Women v. Scheidler*,[118] the Supreme Court established that RICO does not require that either the racketeering enterprise or the predicate acts of racketeering be motivated by an economic purpose.[119] To bring an action[120] claiming that anti-abortion protestors are violating RICO, the claimant will have to establish that the demonstrators' acts fall into a pattern consistent with the language of the RICO statute.[121]

Although the Supreme Court has yet to decide whether anti-abortion protestors can be successfully prosecuted under RICO, other courts have

---

114. The Supreme Court has a newly enunciated test for determining the constitutionality of content neutral injunctions restricting expression in a public forum: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2525 (1994).

115. *See supra* note 38, for the text of RICO.

116. *See supra* note 39, for the text of FACE.

117. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941 (1970).

118. 114 S. Ct. 798 (1994).

119. *Id.* at 806.

120. A civil claim for damages under RICO requires that a plaintiff allege a violation of the criminal RICO statute and prove an injury to the plaintiff's business or property by reason of this violation. A criminal violation of RICO requires allegations that the defendant, through the commission of two or more acts constituting a pattern of "racketeering activity" directly or indirectly invests or maintains an interest in, or participates in an enterprise, the activities of which affect interstate commerce. Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983).

A "pattern of racketeering activity" as defined by RICO, 18 U.S.C. § 1961(5), consists of the commission of two acts of racketeering activity within ten years of one another. "Racketeering activity" means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. 18 U.S.C. § 1961(1)(A) (1988).

121. "RICO has evolved into a creature much different from that envisioned by its creators . . . [i]nstead of a weapon for derailing the activities of the archetypal, intimidating mobster, the RICO statute has become a method for redressing virtually all means of wrongdoing." Northeast Women's Ctr, Inc. v. McMonagle, 670 F. Supp. 1300, 1306 (E.D. Pa. 1987).

examined this issue.[122] Some district courts have found that pro-choice activists were unable to prove the requisite elements of RICO to be successful in prosecuting violent anti-abortion protestors.[123] However, other courts have held pro-life protestors liable under RICO for their intimidation and harassment of clinics resulting in destruction of its property.[124]

Pro-choice activists will be successful in prosecuting violent protestors under the statute if they establish all elements of a RICO claim.[125] First, they must demonstrate that anti-abortion protestors fall within section 1961's definition of racketeering[126] because of their continued violent activities at abortion clinics.[127] Second, pro-choice activists must establish section 1962's requirement of extortionate conduct by offering proof of the protestors' unlawful activities.[128] Third, pro-choice activists must prove section 1964's requisite injury by showing injury to the clinic's property or business.[129] Fourth, pro-choice activists must prove a violation of section 1962(d)[130] by showing that demonstrators conspired to commit extortionate acts.[131] Pro-choice activists can use Congress' findings, that

---

122. Town of West Hartford v. Operation Rescue, 792 F. Supp. 161 (D. Conn. 1992), Libertad v. Welch, 854 F. Supp. 19 (D.P.R. 1993), Northeast Women's Ctr, Inc. v. McMonagle, 868 F.2d 1342 (E.D. Pa. 1989).

123. *See* Town of Brookline v. Operation Rescue, 762 F. Supp. 1521, 1523 (D. Mass. 1991) (holding that a plaintiff town could not establish the pattern of underlying racketeering acts of extortion, or the required showing that the town had been "injured in its business or property by reason of a violation of section 1962", as required of a civil RICO plaintiff) and Libertad v. Welch, 854 F. Supp. 19 (D. P.R. 1993) (determining that class action plaintiffs, representing women who have or will seek family planning services, failed to show likelihood of success on the merits of their RICO claims to be entitled to a preliminary injunction).

124. Northeast Women's Ctr, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989). The court found that damage sustained by a clinic's medical equipment during forcible entry, which was part of a pattern of extortionate acts by antiabortion activists, was sufficient to meet the injury requirement of a civil RICO claim. *Id.* at 1349.

125. *See supra* note 38, for the text of RICO.

126. *See supra* note 120, at 15.

127. For purposes of RICO, each act of criminal activity is counted as an act of racketeering activity even if numerous acts arise out of the same episode. *See* United States v. Witherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978).

128. Northeast Women's Ctr, Inc. v. McMonagle, 670 F. Supp. 1300, 1308 (E.D. Pa. 1987). The court held that the plaintiffs must prove more than the offensive or coercive nature of the defendant's protest activities. Only non-peaceful activity, falling outside the parameters of protected conduct, can form the basis of a claim for extortion. Unauthorized entries by anti-abortion protestors were held to be sufficient in sustaining this burden. *Id.* at 1309.

129. 18 U.S.C. § 1964(c) (1988). The language of the statute makes no requirement that the plaintiff be the victim of the predicate acts so long as the plaintiff is injured as a result of the acts. *McMonagle*, 689 F. Supp. at 472. The court found that the plaintiff alleged and presented evidence of two distinct injuries–physical injury to its property and injury to its business because it was forced to spend more money to maintain its operations in the face of the defendant's extortionate acts. *Id.* at 474-75.

130. 18 U.S.C. § 1962(d) (1988). *See supra* note 38, for the full text of section 1962(d).

131. Proof of an agreement in a RICO proceeding may be established by circumstantial evidence to the same extent permitted in traditional conspiracy cases. It is well established that one conspirator need not

pro-life conspiracies cross state lines and are a continuing problem,[132] in establishing their RICO claim.[133]

Pro-choice activists should be able to prove the required elements necessary to utilize RICO as a prosecutorial tool against violent protestors.[134] In addition, RICO remains an attractive civil remedy against destructive protestors because it provides for treble damages and attorney's fees.[135] Besides the KKKA and RICO, abortion activists can utilize a newly created federal law[136] to stop the violence that surrounds the abortion debate.

The Freedom of Access to Clinic Entrances Act

The newly created federal law that grants protection to abortion activists is the Freedom of Access to Clinic Entrances Act (FACE). Since its enactment in May of 1994, there have been numerous constitutional challenges to FACE.[137] The plaintiffs in each case are anti-abortion protestors who are opposed to abortion on moral, religious, or other grounds. These challenges encompass a large section of modern American constitutional law.

First, a common argument used in these cases is that Congress lacks the authority under the Commerce Clause[138] to pass FACE and therefore enacted FACE in violation of the Tenth Amendment.[139] When considering whether Congressional action is valid under the Commerce Clause,[140] the Court must determine:

1) Whether Congress had a basis for finding that the regulated activity affects interstate commerce, and

---

know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it. *McMonagle*, 689 F. Supp. at 475.

132. H.R. REP. NO. 103-259, 103d Congress, 1st Sess. (1994), at 703-704.

133. 18 U.S.C. § 1961-1968 (1988).

134. *See supra* notes 131-133.

135. *See supra* note 71, for examples of RICO cases.

136. *See supra* note 39, for the text of FACE.

137. *See* Reily v. Reno, 860 F. Supp. 693 (D. Ariz. 1994) (explaining that FACE was passed in furtherance of a compelling government interest in proscribing conduct that harms individuals, damages property, and burdens interstate commerce); Harnsberger v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994) (using the prohibitions in FACE are a reasonable and appropriate means to address the problem of violence at reproductive health service facilities); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994) (holding that FACE is a valid exercise of legislative power designed to curb violence without stifling the freedom of speech); American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994) (determining that FACE avoids infringing on legitimate First Amendment rights).

138. "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8 cl.3.

139. *See, e.g.*, Harnsberger v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994). There is a sufficient nexus between the activities that are the subject of FACE and interstate commerce to support Congressional authority to enact FACE pursuant to the commerce clause. *Id.* at 1431.

140. U.S. CONST. art I, § 8, cl. 3.

2) Whether the means it selected to eliminate the problem are reasonable and appropriate.[141]

In considering these questions, the Court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.[142]

When enacting FACE, Congress made findings that the conduct prohibited under FACE affected interstate commerce.[143] Congress concluded that "[c]linics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other states."[144] In addition, Congress found that many of the patients who seek services from these facilities engage in interstate commerce by traveling from one state to another to obtain these services.[145] Clinic employees and physicians also travel across state lines to provide reproductive health care. Furthermore, Congress concluded that the activities proscribed by FACE have a negative impact on interstate commerce, reducing the availability of abortion services and the interstate movement of goods and people.[146]

Congress had ample evidence of the impact upon interstate commerce of myriad threats, bombings, stalkings, blockades, and assaults inflicted on reproductive health providers and patients to justify the use of the Commerce Clause. The prohibitions in FACE are a reasonable and appropriate means to address the problem of violence at reproductive health service facilities.[147] Therefore, the enactment of FACE is a valid exercise of Congress' power under the Commerce Clause and courts should defer to Congress' policymaking.

The second constitutional challenge is that FACE violates the overbreadth doctrine of the First Amendment.[148] Overbreadth refers to a statute's being written so as to include protected First Amendment activities along with unprotected activities.[149] Contrary to the pro-life

141. Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 276 (1981).

142. *Id.*

143. *See* Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 724 (1994).

144. H.R. REP. NO. 103-488, 103d Congress, 1st Sess. 1994, at 724.

145. *Id.*

146. *Id.*

147. *See supra* note 137, for cases discussing the constitutionality of FACE.

148. U.S. CONST. amend. I.

149. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). To invalidate a statute on overbreadth grounds, "particularly where conduct and not merely speech is involved, [the overbreadth] must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

movement's argument, FACE actually avoids infringing upon legitimate First Amendment rights. In fact, FACE only criminalizes conduct: the use of force, threat of force, and physical obstruction.[150] These acts have long been outside the scope of the First Amendment's protection.[151] It is inconceivable 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.'"[152] The Supreme Court explained that when a statute regulates "speech" and "nonspeech" elements "combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[153]

The First Amendment protects the right to hold and express beliefs opposing abortions; it does not give unfettered license to express those beliefs through violent or disruptive conduct. Similarly, threats to use force are not protected by the First Amendment and Congress may criminalize threats made to a particular victim if doing so furthers an important governmental interest.[154] Congress' purpose for enacting FACE was to protect medical personnel and clients from physical threats and harm. Therefore, Congress identified a sufficiently important governmental interest in regulating the nonspeech component of activity prohibited by FACE to justify the incidental limitations FACE may impose on the speech component of such activity.[155]

A third challenge is that FACE is unconstitutionally vague on its face. A statute is unconstitutionally vague if persons of common intelligence necessarily guess at its meaning and differ as to its application.[156] Not only does FACE include specific definitions for key terms, but also

---

150. *See supra* note 39, for the text of FACE.

151. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). The Court unanimously held that a penalty enhancement for criminal conduct motivated by racial bias did not violate the First Amendment. The Court explained that conduct does not become "speech" entitled to the protection of the First Amendment whenever the actor intends to express an idea through his conduct. *Id.* at 2199.

152. *Id.* at 2199 (quoting U.S. v. O'Brien, 391 U.S. 367, 376 (1968)).

153. Texas v. Johnson, 491 U.S. 397 (1989). The Court found that Congress had identified a sufficiently important governmental interest in regulating the nonspeech component of activity prohibited by FACE to justify the incidental limitations FACE may impose on the speech component of such activity. *Id.* at 407. *See also* Reily v. Reno, 860 F. Supp. 693 (D. Ariz. 1994).

154. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). Such laws do not violate the First Amendment, even though a defendant may be expressing a message while engaged in the proscribed conduct, because the "government [has] not target[ed] conduct on the basis of its expressive content." *Id.* at 2546-47. Persons who interfere with access to reproductive health services are not shielded from regulation merely because they express an idea or philosophy. *Id.*

155. *See, e.g.*, Reily v. Reno, 860 F. Supp. 693 (D. Ariz. 1994).

156. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

most of the operative words come from other statutes which the U.S. Supreme Court has found to withstand constitutional challenge.[157]

Fourth, recent plaintiffs have argued that FACE violates the First Amendment because it is not viewpoint neutral since it affects only anti-abortion protestors. However, nothing in the language of the statute supports this argument. FACE applies to whomever engages in the prohibited conduct of injuring, intimidating, or interfering with those who enter reproductive clinics to receive or supply services.[158] Additionally, "reproductive health services" include all counseling services relating to the human reproductive system.[159] This definition encompasses more than just abortion clinics. Thus, although the statute is subject-specific, it is viewpoint neutral.[160]

Those seeking reproductive health services to promote fertilization are protected by FACE with the same vigor as those seeking reproductive health services to terminate pregnancy. Additionally, the law is applicable to both men and women alike.[161] FACE is not aimed at a particular side of the abortion controversy, but applies to anyone obtaining or providing reproductive health services, regardless of moral, social, or religious beliefs.[162]

The final constitutional challenge stems from the First Amendment's freedom of religion clauses. Protestors argue that FACE violates the Religious Freedom Restoration Act[163] and thus violates their freedom of religion. However, none of the plaintiffs who has challenged FACE has been able to prove that their religions advocate the use of force, threats of force, or the use of physical obstruction to make passage to a facility unreasonably difficult or hazardous, acts which are expressly prohibited

157. *See* Cameron v. Johnson, 390 U.S. 611, 616 (1968). The Court held that a state statute prohibiting "picketing or mass demonstrations in such a manner to obstruct or unreasonably interfere with free ingress or egress" was not unconstitutionally vague.

158. *See* Harnsberger v. Reno, 856 F. Supp. 1422, 1427 (S.D. Cal. 1994). The court rejected plaintiffs' argument that FACE is unconstitutional because it singles out for special punishment, acts committed in the course of anti-abortion protests. *Id.* Nothing in the plain words of the statute supported their argument.

159. *Id.*

160. *Id.*

161. *See* Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994). Contrary to plaintiffs' contention that FACE is a content-based restriction applicable only to anti-abortion activists, the statute is completely neutral in all respects. *Id.*

162. *Id.* at 1010.

163. 42 U.S.C. § 2000bb-1(b) (1988, Supp. V. 1993). This act provides that the Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

1) is in furtherance of a compelling governmental interest; and

2) is the least restrictive means of furthering that compelling governmental interest.

by the statute.[164] In addition, the Supreme Court has held that a law that is neutral toward religion and is generally applicable does not offend the free exercise clause, even if it has an incidental effect on religious practice.[165] FACE is neutral regarding religion; it prohibits specific conduct regardless of the actor's motivation.[166]

Even assuming that FACE substantially burdens free exercise of religion, that burden is in furtherance of a compelling governmental interest in proscribing conduct that harms individuals, damages property, and burdens interstate commerce, and is the least restrictive means of furthering that interest.[167]

Every constitutional challenge brought against FACE has been denied.[168] Congress has the authority to enact FACE based on the Commerce Clause.[169] FACE is not overbroad or vague and thus does not violate the First Amendment.[170] Instead, FACE regulates only unprotected speech and conduct. FACE is viewpoint neutral because it applies to everyone, regardless of moral, social, or religious beliefs. FACE does not violate the Religious Freedom Restoration Act[171] because its enforcement does not depend on religious grounds. Based on current federal judicial decisions, FACE is a constitutionally sound statute that protects both the right to abortion and the freedom of speech. Therefore, FACE will be a powerful and useful tool in the prosecution of violent abortion activists.

THE FUTURE OF ABORTION RIGHTS

The controversy over whether abortion should be a protected right still continues. Some groups have tried to abolish abortion at the state level while others petition the U.S. Supreme Court to ban abortions at the federal level. The following sections discuss the future of abortion in Wyoming, a state that recently considered limiting the right to abortion, and the future of abortion rights in the United States.

---

164. *See supra* note 137, for cases that discuss FACE's impact on religion.

165. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217, 2226 (1993).

166. Harnsberger v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994). FACE "prohibits certain conduct regardless of whether religious conviction motivated the actor, and it neither favors certain religions over others nor favors no religion over religion." *Id.* at 1430.

167. *See supra* note 163, for the text of the Religious Freedom Restoration Act.

168. *See* Harnsberger v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994) and Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) and accompanying text.

169. U.S. CONST. art I, § 8, cl. 3.

170. U.S. CONST. amend. I.

171. 42 U.S.C. § 2000bb-1(b) (1988, Supp. V. 1993).

Abortion in Wyoming

In response to FACE,[172] a statute enacted to curtail the violence at abortion clinics, various states have attempted to criminalize abortion. One such state that recently attempted to ban abortion is Wyoming.[173]

Prior to 1973, abortion was illegal in Wyoming.[174] Shortly after the U.S. Supreme Court decided *Roe v. Wade*,[175] the Wyoming Supreme Court decided *Doe v. Burk*.[176] Similar to the facts in *Roe*, the plaintiff in *Doe* attempted to get a therapeutic abortion.[177] Her physician refused to perform the abortion for fear of prosecution under Wyoming laws.[178] The plaintiff sought an injunction against the officials who might prosecute her physician and a declaratory judgment that the Wyoming laws prohibiting abortion were illegal.[179]

The Wyoming Supreme Court ruled that regulation of abortions was beyond the power of the courts and was a matter solely for the legislature.[180] In light of the U.S. Supreme Court's decision in *Roe v. Wade*,[181] the Wyoming Supreme Court found that the Wyoming laws were unconstitutional and could not be upheld.[182] The case was remanded with instructions to enter a declaratory judgment declaring the applicable Wyoming statutes unconstitutional, void, and of no force and effect.[183] As in other states, the pro-choice and pro-life movements of Wyoming have remained active. Recently, a pro-life faction presented an anti-abortion initiative for vote in Wyoming's 1994 general election.[184]

---

172. *See supra* note 39, for the text of FACE.

173. *See infra* note 184, for a description of Initiative One.

174. *See* Wyo. Stat. §§ 6-77, 6-78, 6-105 (1957). Section 6-77 provided:

> Criminal abortion—Whoever prescribes or administers to any pregnant woman, or to any woman he supposes to be pregnant, any drug, medicine, or substance whatever, with intent, thereby to procure the miscarriage of such woman; or with intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall . . . be imprisoned in the penitentiary not more than 14 years.

175. 410 U.S. 113 (1973).

176. 513 P.2d 643 (Wyo. 1973).

177. *Id.* at 644. The plaintiff was in her fourteenth week of pregnancy and applied for a therapeutic abortion. Her physician refused to preform the procedure. *Id.*

178. *Id.*

179. *Id.* The action was brought to overturn Wyoming's anti-abortion laws and to stop the prosecution of doctors who perform abortions. *Id.*

180. *Id.* at 645. The court did not want to change existing statutes, but also noted that the decision had already been made for them in *Roe v. Wade*. *Id.*

181. 410 U.S. 113 (1973).

182. *Doe*, 513 P.2d at 645. The court recognized that the United States Constitution is the supreme law of the land and the states must conform with it. *Id.*

183. *Id.*

184. OFFICE OF THE WYOMING SECRETARY OF STATE, 1994 Voter's Guide and Proposed

The Wyoming National Abortion Rights Action League[185] brought suit to stop the initiative from being placed on the general ballot.[186] The Action League's concern was that the initiative would be unconstitutional if enacted and therefore should not be put to a vote.[187]

The Wyoming Supreme Court ruled that the initiative could be included on the general ballot[188] even though parts of the initiative are unconstitutional.[189] The court found these parts of the initiative unconstitutional because they violate the holdings in *Roe*[190] and *Casey*.[191] After considering other state courts' applications[192] of the initiative review process, the Wyoming Supreme Court held that Initiative One must be totally unconstitutional before the court could stop its inclusion on the general election ballot.[193]

Amendments to the Wyoming Constitution and Initiatives. The "Unseen Hands Prayer Circle" Initiative Number One would:

> prohibit any person from intentionally performing an abortion upon a pregnant woman unless her attending physician reasonably determines that the pregnancy endangers the mother's life, or the pregnancy is the result of a sexual assault or incest reported to a law enforcement agency before the abortion. Pregnancy is defined as beginning with conception. A physician or other person performing an abortion under any other circumstance would be subject to the existing felony penalty for illegal abortions. The woman procuring the abortion would not be subject to prosecution. *Id.*

185. The Action League is one of the proponents of the "No on #1 Campaign". *See Campaign NEWS No. 1*, (Wyoming No on #1 Campaign, Casper, Wyo.), July 1994, at 1.

186. Wyoming Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281 (Wyo. 1994).

187. *Id.* at 243. The "No on #1" Campaign contends that if Initiative One were passed, it would:

a. Outlaw all abortions unless a woman's life was in danger, or in cases of previously reported rape or incest.

b. Overrule family and doctors by disregarding serious health risks or the certainty of crippling birth defects as grounds for legal abortion.

c. Impose up to 14 year prison sentences on convicted doctors, making it difficult to recruit new doctors to Wyoming.

d. Be clearly unconstitutional - costing Wyoming taxpayers millions of dollars in unnecessary court battles and legal appeals.

e. Perhaps be interpreted by judges as outlawing most forms of birth control.

f. Make rape and incest reports and miscarriages suspect and bring back illegal, unsafe back-alley abortions.

g. Take this decision out of the hands of the woman, her family, and her doctor and turn it over to the government and the politicians.

Its's Not the Government's Business Newsletter, (Wyoming's No on #1 Campaign, Casper, Wyo.), July 1994, at 1.

188. *Wyoming Nat'l Abortion Rights Action League*, 881 P.2d at 289. The court concluded that the initiative was not unconstitutional in toto and therefore could be placed on Wyoming's general ballot. *Id.*

189. *Id.* Even though portions of the initiative would be judged clearly unconstitutional, such as the criminal penalty to the doctor preforming the abortion, the constitutional provisions would still stand. *Id.*

190. Roe v. Wade, 410 U.S. 113 (1973).

191. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

192. The Wyoming Supreme Court considered Florida's review process in Dade County v. Dade County League of Municipalities, 104 So. 2d 512 (Fla. 1958) and South Carolina's initiative review process in Town of Hilton Head Island v. Coalition of Expressway Opponents, 415 S.E. 2d 801 (S.C. 1992).

193. *Wyoming Nat'l Abortion Rights League*, 881 P.2d at 289.

Initiative One prohibited abortion and criminalized the act of performing an abortion. The court found that these portions of the initiative were in direct contravention of the holdings in *Roe*[194] and *Casey*,[195] which represent the current federal law on abortion.[196] The court also found that the initiative made no allowance for a woman's pre-viability choice with respect to abortion.[197]

On November 8, 1994, the Wyoming voters considered the initiative and voted it down.[198] Its opponents "felt that if people knew of the ramifications to Wyoming women they would defeat it."[199] The proponents, on the other hand, were "disappointed, but did not feel that the effort was in vain."[200]

If the measure had been adopted by Wyoming voters, it could not withstand the rulings of *Roe* and *Casey*, as it would be unconstitutional under those standards.[201] As written, Initiative One, would have essentially eliminated the right to legal abortions in Wyoming.[202] As a result, women seeking abortions in Wyoming would have been forced to travel to another state. The controversy over whether the First Amendment rights of the pro-life movement and the right of a woman to choose an abortion in Wyoming would have been moot. The pro-life movement would have been able to continue to express their views on abortion, but

194. Roe v. Wade, 410 U.S. 113 (1973).

195. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

196. *Wyoming Nat'l Abortion Rights League*, 881 P.2d at 288. The portions of the initiative that prohibit abortion and criminalize the practice directly contravene the rule in *Roe* and *Casey*. *Id.*

197. *Id.* at 287. In *Casey*, the United States Supreme Court upheld the rule of *Roe* in which a state may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability of the fetus. *Id.*

198. Joan Barron, *Abortion Initiative Defeated; 'Privacy' Victorious, Opponent Says*, CASPER STAR TRIBUNE, November 9, 1994, at A1. With a majority of the precincts reporting, sixty-one percent of the ballots were against the initiative. *Id.*

199. *Id.* The opponents of the initiative said it was "too extreme and would mean a return to unsafe, back alley abortions that were common before the U.S. Supreme Court legalized first trimester abortions in 1973." *Id.* at A8.

200. *Id.* The proponents of the Human Rights Protection Act indicated that they were able to educate the people of Wyoming and to clear up some misinformation about abortion by sponsoring the initiative. *Id.*

201. The Wyoming Supreme Court stated that because the initiative was contrary to the rulings of *Roe* and *Casey*, a justiciable controversy was present in the same way that one would be present if the language of the Constitution were challenged directly. *Wyoming Nat'l Abortion Rights Action League*, 881 P.2d at 289.

202. Initiative One's proposed bill for the Wyoming legislature amends sections 35-6-101, 102, 106, and 107(a)(v) of the Wyoming Statutes. The bill names the Act the "Wyoming Human Life Protection Act" and removes the term "fetus" from the statutes, replacing it with the term "unborn child." The bill allows for an abortion only in cases on incest and sexual assault. It also imposes criminal liability on the doctor for preforming an unauthorized abortion. Wyoming Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, at Exhibit A (Wyo. 1994).

women would no longer have the right to choose an abortion in Wyoming.[203] The future of abortion in Wyoming and all other states is dependent upon the rulings of the U.S. Supreme Court. The only way that Wyoming could have banned abortions would have been for the U.S. Supreme Court to overrule its previous decisions.[204]

Abortion in the United States

Although some states have attempted to ban all abortions, the U.S. Supreme Court has continued to protect a woman's right to seek an abortion. However, this right may eventually be abolished at the federal level. In *Casey*,[205] the Supreme Court held that states may not impose restrictions that place an undue burden[206] on a woman's right to abortion. However, the Supreme Court has since maintained that states may constitutionally refuse to fund abortions.[207] This refusal is tantamount to a complete denial of legal abortions to impoverished women.[208] Based on these decisions, although the

---

203. At least five other states have restrictions on abortions. The initiative considered in In re Initiative No. 349, 838 P.2d 1 (Ok. 1992) is very similar to Wyoming's Initiative One. When the initiative was confronted in the legal system, the Oklahoma Supreme Court held that the initiative was unconstitutional. *Id.* at 7. The court found that the initiative would violate the undue burden test explained in *Casey*. *Id.* at 6. Likewise, in Guam, the Ninth Circuit Court of Appeals ruled that Guam's virtual abortion ban was facially unconstitutional. Guam Society of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366 (9th Cir. 1992). In addition, the Fifth Circuit affirmed the district court's finding that Louisiana's abortion law was facially invalid because it was a virtual ban on abortion. Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992). Finally, in Pennsylvania, the district court judge that originally heard *Casey*, reopened the case to reconsider the issues using the undue burden test of constitutionality. However, the Fifth Circuit determined that Mississippi's abortion law did not place an undue burden on women seeking abortion. Barnes v. Mississippi, 992 F.2d 1335 (5th Cir. 1993). Mississippi's abortion law requires a two-parent consent with a judicial by-pass for minors. *Id.* at 1344. The dissent argued that a girl would be unduly burdened if there was a conflict between her best interest to have an abortion and her parents' refusal to consent. *Id.* at 1344.

204. Wyoming Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 187 (Wyo. 1994).

205. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). In *Casey*, a majority of the Court declined to overrule *Roe v. Wade* explicitly. However, abortion's status as a "fundamental right" was overturned. As a result, a state may restrict abortion as long as they do not place an "undue burden" on a woman's right to choose. *Id.*

206. In *Casey*, the Court stated, "Only where state regulation imposes an undue burden on a woman's ability to make [the decision to abort] does the power of the State reach into the heart of liberty protected by the Due Process Clause." 112 S. Ct. at 2819. The Court defined an "undue burden" as having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus." *Id.*

The *Roe* court defined viability as having the "capability of meaningful life outside the mother's womb." Roe v. Wade, 410 U.S. 113, 160 (1972). The Court found this typically occurs at the beginning of the third trimester. *Id.*

207. Robin Toner, *Clinton Would End Ban on Aid to Poor Seeking Abortions*, N.Y. TIMES, March 30, 1993, at A6.

208. Stephanie Mencimer, *Our Bodies Our Selfishness; Who's Really to Blame for Hyde*, WASH. POST, July 4, 1993, at C1 (the Hyde Amendment prohibits the use of federal Medicaid funds for abortions).

right to abortion is not absolute nor strongly endorsed by the Court,[209] it probably will not be overturned in the immediate future.[210]

CONCLUSION

The First Amendment rights of anti-abortion protestors and a woman's right to an abortion are not mutually exclusive concepts. To successfully stop the needless violence surrounding abortion clinics, courts can utilize the Ku Klux Klan Act, the Racketeer Influenced and Corrupt Organizations Act, and the Freedom of Access to Clinic Entrances Act. The application of these statutes allows pro-life activists to exercise their freedom of speech, which does not include the right to commit violent acts, and protects a woman's right to abortion.

JOY HOLLINGSWORTH MCMURTRY & PATTI S. PENNOCK

209. *See Casey*, 112 S. Ct. 2791. There were three voting blocs in *Casey*. The first, comprised of Stevens and Blackmun, voted to reaffirm *Roe* completely. The second, with Rehnquist, White, Scalia, and Thomas, voted to overturn *Roe* completely. The third, consisting of O'Connor, Souter, and Kennedy, voted to reaffirm the essential holding of *Roe*, but to allow more state regulation. Therefore, the Court decided by a 5-4 vote to maintain *Roe* as precedent, but voted 7-2 to allow states to regulate abortions more strictly. *Id.*

210. *C.f.* Jeffrey Rosen, *Courting Mediocrity*, SAN FRAN. CHRON., April 25, 1993, at A12.