

Anti-Choice Clinic Protests and Violence— First Amendment Considerations

History of Clinic Violence and Harassment

Since the Supreme Court recognized the constitutional right to abortion in *Roe v. Wade*,¹ extremists have used violence against women's health care providers to demonstrate their opposition to abortion.² Clinic protesters were initially peaceful, but they were soon replaced by aggressive protestors that blockaded clinic entrances and harassed clinic staff and patients.³ For example:⁴

- The first reported clinic arson occurred in **1976** and set a tone of violence for many years.⁵ In **1978**, a series of clinics was bombed.⁶ Since the **mid-1990s**, some types of clinic violence, like bombing and arson incidents, have declined; vandalism, trespassing, assault, and burglary, however, remain widespread.⁷ In **May, 2009**, Dr. George Tiller was the first abortion doctor to be murdered in over a decade, prompting fears of a resurgence in extreme forms of clinic violence.⁸
- In **1992**, anti-choice extremists adopted the tactic of spraying butyric acid at abortion clinics as a way to disrupt services.⁹ Butyric acid is an extremely noxious industrial chemical whose odor causes severe nausea and respiratory problems.¹⁰ Cleanup from butyric acid attacks often requires the clinic to close for weeks, while hazardous materials specialists clean or replace surfaces exposed to the acid.¹¹ Approximately one hundred butyric acid attacks in the United States and Canada have caused over \$1 million worth of damage.¹² Extremist abortion opponents have murdered eight providers since the first murder in **1993** and have attempted to murder many more clinic workers and doctors.¹³
- In **2009**, abortion clinics received an unprecedented number of hate letters and harassing phone calls.¹⁴
- Anti-choice activists have begun promoting the use of “new media” as a method to reach a larger and younger audience.¹⁵ One activist, Lila Rose, created a group called Live Action that uses viral videos and other media outlets.¹⁶ Live Action has sent members to infiltrate clinics and has created several videos depicting Planned Parenthood staff giving erroneous information to members posing undercover.¹⁷
- In addition to the above mentioned types of violence and harassment, anti-choice protesters have engaged in invasion, stalking, kidnapping, picketing, and clinic blockading.¹⁸ They have called in bomb threats, sent hoax devices and suspicious packages, and created anthrax scares.¹⁹
- In response, many clinics have had to implement costly security measures, like installing bullet-proof glass and security cameras.²⁰

Freedom of Access to Clinic Entrances (FACE) Act of 1994

The Freedom of Access to Clinic Entrances (FACE) Act²¹ makes it a federal crime to use force, the threat of force, or physical obstruction to prevent individuals from obtaining or providing reproductive healthcare services.²²

- Violators may be fined or imprisoned.²³
- FACE also allows reproductive health care providers, people who access reproductive services, the Attorney General of the United States, and state attorneys general to bring civil lawsuits against violators.²⁴ Plaintiffs may obtain temporary or permanent injunctive relief, compensatory and punitive damages, and the costs of suit; in an action by an attorney general, civil fines may also be assessed.²⁵
- Many pro-choice advocates credit the FACE Act with the decrease in some forms of clinic violence in the mid-1990s.²⁶
- Twelve states, and the District of Columbia, have their own FACE laws.²⁷ This affords clinics an additional layer of protection, and allows for the prosecution of violators under both state and federal law.²⁸

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Local Buffer or Bubble Zone Ordinances

On the local level, some cities have enacted “bubble zone” or “buffer” ordinances that dictate how far from a clinic entrance protestors must stand and how far from a patient the protestor must stand.²⁹ For example:

- Cities around the country have bubble ordinances.³⁰
- Colorado, Massachusetts, and Montana have state buffer zone statutes.³¹
- There have been two recent and high-profile bubble zone enactments:
 - In **2008**, the Oakland City Council unanimously passed a bubble zone ordinance.³² Under the ordinance, anti-choice protestors within a hundred feet of a clinic entrance must stay at least eight feet away from people entering or leaving the clinic.³³ A violation can result in a \$2,000 fine, imprisonment for one year, and civil liability.³⁴ In **2009**, a federal judge upheld the law, ruling that because it was facially neutral and narrowly tailored, it was a reasonable restriction of protected speech.³⁵ The case is currently pending in front of the Ninth Circuit Court of Appeals.
 - Under a **2009** Chicago bubble zone ordinance, anti-choice protestors within fifty feet of a clinic entrance must stay at least eight feet away from people entering or leaving the clinic.³⁶ A violation can result in a \$500 fine.³⁷

Supreme Court Cases on Clinic Violence

Clinic patients and anti-choice protestors both have important constitutional concerns. The First Amendment clearly protects the right to protest; however, the state is authorized to protect the health and safety of its citizens pursuant to its police power. This may justify a special focus on access to healthcare facilities and abortion clinics.

1994: In *Madsen v. Women’s Health Center*, the Court upheld a permanent injunction that prevented anti-choice protestors from impeding clients’ access to an abortion clinic.³⁸

- The Court held that although the injunction restricted the speech of anti-choice protestors, it was nevertheless not content-based and thus not subject to heightened scrutiny.³⁹ Therefore, the Court held, the 36-foot buffer zone around the clinic entrance did not violate the protestors’ First Amendment rights, because it did not burden speech any more than was necessary to serve significant government interests.⁴⁰ The state, the Court reasoned, had a “strong interest in protecting women’s constitutional rights to seek lawful medical or counseling services in connection with pregnancy . . . [and] in ensuring public safety and order, in promoting free flow of traffic on public streets and sidewalks, [and] in protecting property rights of all citizens.”⁴¹

1997: In *Schenck v. Pro-Choice Network of Western New York*, the Supreme Court upheld a preliminary injunction against anti-choice protestors who engaged in large-scale blockades and who provided “sidewalk counselors” that crowded, jostled, yelled, and spit at people entering the clinic.⁴²

- Although the Court struck down “floating buffer zones” as overly burdensome on free speech, it upheld the “fixed buffer zone” of fifteen feet surrounding the clinic’s entrances and exits.⁴³

2000: In *Hill v. Colorado*, the Supreme Court extended the ruling in *Schenck* to a Colorado law that required clinic protestors to request permission before knowingly coming within eight feet of people entering the clinic.⁴⁴



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- The Court held that given the government’s interest in protecting the health and safety of patients, the Colorado statute was a valid “time, place, and manner” regulation that would not adversely affect the protesters’ First Amendment rights.⁴⁵

2005: In *Planned Parenthood v. American Coalition of Life Activists*, the Ninth Circuit Court of Appeals affirmed the District Court’s determination that the publishing of abortion providers’ photos, names, and addresses on posters and on their “Nuremberg Files” website was not protected by the First Amendment, because it created true threats of harm.⁴⁶ The Supreme Court has denied appeal multiple times.⁴⁷

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *History of Abortion*, NATIONAL ABORTION FEDERATION (NAF), http://www.prochoice.org/about_abortion/history_abortion.html (last visited June 20, 2011).

³ *Id.*

⁴ The latest available compilation of clinic violence statistics is from 2009. See *NAF Violence and Disruption Statistics*, NAF, http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/stats_table2009.pdf (last visited June 20, 2011) [hereinafter *NAF Violence Statistics*]. Violence and harassment has continued, however, in 2010 and 2011. See, e.g., *Anti-Choice Actions and Abortion Clinic Violence*, PLANNED PARENTHOOD ACTION CTR., <http://www.plannedparenthoodaction.org/positions/anti-choice-actions-clinic-violence-787.htm> (last visited June 20, 2011) (documenting incidents of clinic violence and harassment against Planned Parenthood facilities in 2010); Rebekah Dryden, *Extremists Target Abortion Clinic Staff*, THE MADDOW BLOG (Tue Apr 12, 2011 3:29 PM EDT), http://maddowblog.msnbc.msn.com/_news/2011/04/12/6458488-extremists-target-abortion-clinic-staff (reporting that a Kansas doctor who intends to provide abortions has been threatened and harassed).

⁵ *History of Violence: Arson and Bombings*, NAF, http://www.prochoice.org/about_abortion/violence/arsons.asp (last visited June 20, 2011).

⁶ *Id.*

⁷ *NAF Violence Statistics*, *supra* note 4.

⁸ See *id.*; John Hanna, *Tiller Death Re-Ignites Clinics’ Security Concerns*, WASH. POST, June 3, 2009, available at <http://inform.com/special-interests/tiller-death-reignites-clinics-security-concerns-548740a>.

⁹ *History of Violence: Butyric Acid Attacks*, NAF, http://www.prochoice.org/about_abortion/violence/butyric_acid.asp (last visited June 20, 2011).

¹⁰ Melissa Healy, *FBI Probing Acid Attacks at Abortion Clinics*, L.A. TIMES, July 19, 1998, available at <http://articles.latimes.com/1998/jul/19/news/mn-5293>.

¹¹ NAF, *History of Violence: Butyric Acid Attacks*, *supra* note 9.

¹² *Id.*

¹³ *NAF Violence Statistics*, *supra* note 4.

¹⁴ *Id.*

¹⁵ See, e.g., Luis Zaffirini, *Using the New Media to Increase your Pro-life Effectiveness*, NAT’L RIGHT TO LIFE NEWS TODAY (Apr. 29, 2011), <http://www.nationalrighttolifenews.org/news/2011/04/using-the-new-media-to-increase-your-pro-life-effectiveness> (explaining to anti-choice activists how to use new media).

¹⁶ *Lila Rose, President*, LIVE ACTION: A NEW MEDIA MOVEMENT FOR LIFE, <http://liveaction.org/index.php/about/47> (last visited June 20, 2011).

¹⁷ *Id.*

¹⁸ *NAF Violence Statistics*, *supra* note 4.

¹⁹ *Id.*

²⁰ *Clinic Violence*, NAF, http://www.prochoice.org/about_abortion/violence (last visited June 20, 2011).

²¹ Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (2006).

²² § 248(a)

²³ § 248 (b)

²⁴ § 248(c)

²⁵ *Id.*

²⁶ Rebecca A. Hart & Dana Sussman, *About FACE: Using Legal Tools to Protect Abortion Providers, Clinics, and their Patients*, AM. CONST. SOC’Y BLOG (July 7, 2009), <http://reproductiverights.org/en/press-room/about-face-using-legal-tools-to-protect-abortion-providers-clinics-and-their-patients>.

²⁷ *Abortion Facts*, NAF, http://www.prochoice.org/about_abortion/facts/face_act.html (last visited June 20, 2011). These states are CA, CT, KS, MD, ME, MN, NC, NV, NY, OR, WA, and WI. *Id.*



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²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., PHOENIX, ARIZ., ORD. G-3705 § 1 (1993); NAF, REPRODUCTIVE CHOICE IN THE STATES IN 2005 15 (2005) (noting that West Palm Beach, FL, and Pittsburgh, PA have bubble zone ordinances).

³¹ NAF, *Abortion Facts*, *supra* note 28. In addition, Michigan provides some clinic protections. Guttmacher Institute, *Anthrax Threats, Continued Violence Prompt Renewed Attention to Clinic, Client Protection*, THE GUTTMACHER REPORT ON PUB. POLICY (Dec. 2001), available at

<http://www.guttmacher.org/pubs/tgr/04/6/gr040613.html>.

³² Vicki, *Federal Judge Upholds Bubble Zone Ordinance*, NAF BLOG (Aug. 7, 2009, 3:09 PM), <http://www.prochoice.org/blog/labels/buffer%20zone%20laws.html>.

³³ OAKLAND, CAL., ORD. 12860 § 3(B) (2008), available at

<http://library.municode.com/index.aspx?clientId=16308&stateId=5&stateName=California>.

³⁴ OAKLAND, CAL., ORD. 12849 § 4 (2007), available at

<http://library.municode.com/index.aspx?clientId=16308&stateId=5&stateName=California>.

³⁵ *Hoye v. City of Oakland*, 642 F. Supp 2d 1029, 1034, 1042-44 (N.D. Cal. 2009).

³⁶ CHICAGO, IL., MUN. CODE § 8-4-010(k) (2009), available at [http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il).

³⁷ *Id.*

³⁸ *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 757 (1994).

³⁹ *Id.* at 762.

⁴⁰ *Id.* at 770.

⁴¹ *Id.* at 767-68.

⁴² *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 361 (1997).

⁴³ *Id.*

⁴⁴ *Hill v. CO*, 530 U.S. 703, 730 (2000).

⁴⁵ *Id.* at 725.

⁴⁶ *Planned Parenthood v. Am. Coal. of Life Activists*, 422 F.3d 949, 959 (9th Cir. 2005).

⁴⁷ *Assoc. Press, Top Court Again Rejects Abortion Poster Case*, USA TODAY, Oct. 6, 2008, available at http://www.usatoday.com/news/washington/2008-10-06-64842724_x.htm.