

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC. V. THE
AMERICAN COLAITION OF LIFE ACTIVISTS: DISTINGUISHING PROTECTED
SPEECH UNDER THE FIRST AMENDMENT FROM “TRUE THREATS”

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In March 2001, the Ninth Circuit Court of Appeals overturned the District Court of Oregon's ruling in *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, which awarded the plaintiffs a \$107 million in compensatory and punitive damages against anti-abortion activists and issued an injunction against their speech.¹ However, on October 3, 2001, the Ninth Circuit decided that an en banc court would rehear this case² and on December 12, 2001, the en banc panel heard arguments in Pasadena, Ca.³

The Ninth Circuit's decision in *Planned Parenthood* raises an important question about the scope of free speech that is protected under the First Amendment. The plaintiffs in *Planned Parenthood* filed a claim against the defendants after their names appeared on both “wanted” style posters and a web site, which subsequently caused the FBI to offer the plaintiffs twenty-four hour a day protection.⁴ This Note examines whether the defendants' statements in *Planned Parenthood*, which do not explicitly mention violence, taken in context, violate the First Amendment because they are “true threats.” Part I of this Note will discuss the *Planned Parenthood* litigation. Next, part II will describe the “wanted” style posters and the web site that led to this litigation. Part III will analyze the Ninth Circuit's decision in *Planned Parenthood* and argue that the en banc panel should overrule that decision. Part IV will then discuss whether the defendants' statements in *Planned Parenthood* create incitement to produce imminent

¹ 244 F.3d 1007, 1012 (9th Cir. 2001).

² *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 268 F.3d 908 (9th Cir. 2001).

³ Ashbel S. Green, *Court will Reconsider Case of Anti-Abortion Web Site*, THE OREGONIAN, December 10, 2001 at A1.

⁴ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1012-13.

lawless action which is also unprotected under the First Amendment. Finally, part V will discuss how women have been affected by the abortion violence and whether the violence has lessened since Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (FACE).⁵

I. THE LITIGATION

In 1995, Planned Parenthood of the Columbia/Willamette, Inc. (Planned Parenthood), Portland Feminist Women's Health Center (Portland Feminist), and several doctors who perform abortions as part of their medical practices, filed a claim for damages and injunctive relief in a federal district court in Portland, Oregon against the American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), and several defendants who have been involved with the ACLA and other anti-abortion organizations.⁶ Planned Parenthood and Portland Feminist are both not-for-profit corporations that provide abortion services and other reproductive health care services.⁷ The plaintiffs alleged that the defendants' "Deadly Dozen" poster, which lists personal information about physicians who perform abortions, a "wanted" poster of Dr. Robert Crist, and a web site known as the "Nuremberg Files," taken in context, were true threats, which violated state and federal law, including the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. § 248.⁸

FACE creates a civil right of action whenever an individual is harmed by another who "by force or threat of force . . . intentionally . . . intimidates . . . or attempts to . . . intimidate . . . any person because that person is or has been . . . providing reproductive health services."⁹ A

⁵ 18 U.S.C. § 248.

⁶ Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 945 F. Supp. 1355, 136 n.1 (D. Or. 1996).

⁷ Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1185 (D. Or. 1998).

⁸ Planned Parenthood of the Columbia/Willamette, Inc., 244 F.3d at 1013.

⁹ 18 U.S.C. § 248(a)(1) (2001).

court may award injunctive relief as well as compensatory and punitive damages.¹⁰ Intimidation is defined as “plac[ing] a person in reasonable apprehension of bodily harm to him- or herself or to another.”¹¹ The legislative history reveals that the purpose of FACE “is to prevent the use of blockades, violence and other forceful or threatening tactics against medical facilities and health care personnel who provide abortion-related services, and provide appropriate criminal penalties and civil remedies for such conduct when it occurs.”¹²

To prevail under FACE, the plaintiffs must prove that the defendants’ posters and the “Nuremberg Files” constitute “threats of force,” which intentionally intimidated the plaintiffs from providing reproductive health services.¹³ The First Amendment requires a court applying FACE’s prohibition on using “threats of force,” to differentiate between “true threats,” which fall outside First Amendment protection, and protected speech.¹⁴ Therefore, the viability of the plaintiffs’ claim under FACE depends on whether the defendants’ statements are protected speech under the First Amendment or unprotected “true threats.”¹⁵

In 1999, the District Court of Oregon held that the *Planned Parenthood* defendants violated FACE because it found the posters and the “Nuremberg Files” web site were “true threats” and therefore unprotected under the First Amendment.¹⁶ The jury awarded the plaintiffs \$107 million in actual and punitive damages and the district court enjoined the defendants from making or distributing the posters, web page or anything similar.¹⁷ The defendants appealed to the Ninth Circuit Court of Appeals claiming that their statements were protected under the First

¹⁰ 18 U.S.C. § 248(c)(B).

¹¹ 18 U.S.C. § 248(e)(3).

¹² S. REP. NO. 103-117, at 4 (1993).

¹³ *Planned Parenthood of the Columbia/Willamette, Inc.* 23 F. Supp. 2d at 1188.

¹⁴ *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996).

¹⁵ *Planned Parenthood of the Columbia/Willamette, Inc.* 23 F. Supp. 2d at 1188-89.

¹⁶ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1013.

¹⁷ *Id.*

Amendment.¹⁸ The Ninth Circuit reversed the district court’s ruling, holding that the posters and the “Nuremberg Files” web site are protected speech under the First Amendment.¹⁹

II. THE POSTERS AND THE WEB SITE

The facts of *Planned Parenthood* focus around the activities of the ACLA. The ACLA was formed in 1994 and is an unincorporated organization based in Portland, Oregon, with members throughout the United States.²⁰ The ACLA has made it clear that they will use violence to support their cause against abortion providers.²¹ The ACLA co-founder and regional director stated, “if someone was to condemn any violence against abortion, they probably would [not] feel comfortable working with us.”²² In 1995, the ACLA, marking the anniversary of *Roe v. Wade*, unveiled what has become known as the “Deadly Dozen” poster.²³ The poster lists the names and addresses of thirteen doctors who perform abortions.²⁴ Three of the doctors listed on the poster are plaintiffs in the *Planned Parenthood* litigation.²⁵ The poster declares these doctors guilty of “crimes against humanity” and offers \$5,000 for information leading to the “arrest, conviction and revocation of [their] license to practice medicine.”²⁶ The poster was also published in *Life Advocate*, an affiliated magazine, and was distributed at ACLA events.²⁷ When the “Deadly Dozen” poster was released, the FBI and the United States Department of Justice contacted the doctors named on the list and offered them twenty-four hour a day protection.²⁸

¹⁸ *Id.*

¹⁹ *Id.* at 1020.

²⁰ *Planned Parenthood of the Columbia/Willamette, Inc.*, 23 F. Supp. 2d at 1185.

²¹ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1136 (D. Or. 1999).

²² *Id.*

²³ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1012.

²⁴ *Id.*

²⁵ *Planned Parenthood of the Columbia/Willamette, Inc.*, 41 F. Supp. 2d at 1132.

²⁶ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1012.

²⁷ *Id.*

²⁸ *Planned Parenthood of the Columbia/Willamette, Inc.*, 945 F. Supp. at 1362.

Later that year, the ACLA issued a second poster, targeting specifically Dr. Robert Crist. The poster lists Crist's home and work addresses and also displays his photograph.²⁹ In addition, the poster offers \$500 to “any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines.”³⁰ The poster also accuses Crist of crimes against humanity and various acts of medical malpractice, including a botched abortion that caused the death of a woman.³¹ After the Crist poster was released, the St. Louis police warned Crist that he should take additional security precautions. Crist followed that advice by requesting and receiving additional protection from both state and federal law enforcement authorities.³²

The ACLA was aware of similar “wanted” style posters, and that several doctors were murdered shortly after the release of such posters. On March 10, 1993, Dr. David Gunn was shot and killed outside of his clinic.³³ Prior to his murder, Dr. Gunn's name, photograph, and other personal information appeared on a “wanted” poster similar to the ones at issue in *Planned Parenthood*.³⁴ In addition, several of the defendants in *Planned Parenthood* signed a petition “declaring the murder of Dr. Gunn justifiable.”³⁵ On August 21, 1993, Dr. George Patterson was shot and killed.³⁶ Prior to his murder, his name, physical description and address were published on a “wanted” poster.³⁷ Finally, on July 29, 1994, Dr. John Bayard Britton was shot and killed along with his volunteer escort, while entering a clinic.³⁸ Prior to Dr. Britton's murder, his name, photograph and physical description appeared on “unWANTED” posters, which listed the

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Planned Parenthood of the Columbia/Willamette, Inc.*, 41 F. Supp. 2d at 1133.

³³ *Id.* at 1134.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1135.

phrase “Crimes Against Humanity” found on the Deadly Dozen poster and the poster of Dr. Crist.³⁹

In January 1996, marking another anniversary of *Roe v. Wade*, the ACLA disclosed a number of dossiers it had collected on doctors, clinic employees, politicians, judges, and other abortion rights supporters.⁴⁰ The ACLA named this information the Nuremberg Files, and stated that it had collected this information so that “Nuremberg-like war crimes trials could be conducted in ‘perfectly legal courts once the tide on this nation’s opinions turns against the wanton slaughter of God’s children.’”⁴¹ The ACLA sent this information to Neal Horsley,⁴² an anti-abortion activist, who published this information on a web site, which was named the “Nuremberg Files.”⁴³

The “Nuremberg Files” web site home page is titled “Alleged Abortions and their Accomplices Visualize Abortionists on Trial.”⁴⁴ The site then shows a courtroom, where a doctor appears to be on trial, followed by dripping blood and fetuses’ body parts.⁴⁵ The web site explains:

One of the great tragedies of the Nuremberg trials of Nazis after World War II was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation’s opinion turns against the wanton slaughter of God’s children (as it surely will).⁴⁶

³⁹ *Id.*

⁴⁰ Planned Parenthood of the Columbia/Willamette, Inc., 244 F.3d at 1012.

⁴¹ *Id.* at 1012-13.

⁴² Neal Horsley was not a defendant in this case, but the district court found that Horsley was an agent of the ACLA and other defendants as well as a co-conspirator. Planned Parenthood of the Columbia/Willamette, Inc., 244 F.3d at 1013 n. 1 (citing Planned Parenthood of the Columbia/Willamette, Inc. 41 F. Supp. 2d at 1152).

⁴³ Planned Parenthood of the Columbia/Willamette, Inc., 244 F.3d at 1013.

⁴⁴ The Nuremberg Files, at <http://www.christiangallery.com/atrocity/aborts.html> (n.d.).

⁴⁵ *Id.*

⁴⁶ *Id.*

Next, there are links that show grotesque graphic images of aborted fetuses.⁴⁷ There is also a link to the so-called “hit list,” which is at issue in this case. This list contains the names of doctors who perform abortions and women who have died from having an abortion, which is labeled “the baby butchers and butchered.”⁴⁸ The web site also lists the names of clinic owners and workers labeled as “their weapons providers and bearers,” judges labeled as “their shysters,” politicians labeled as “their mouthpieces,” law enforcement labeled as “their bloodhounds,” and miscellaneous spouses and other blood flunkies.⁴⁹ Before the listed names, there is a legend, which states that the names listed in black font are currently working, those with grayed-out names are wounded, and those with a strikethrough their name have been murdered.⁵⁰

The doctors in *Planned Parenthood* responded defensively to the publication of the posters and the “Nuremberg Files” web site that specifically referred to them. They began wearing bulletproof vests, drawing the curtains on the windows of their homes, and accepting the protection of U.S. Marshals.⁵¹

III. THE NUREMBERG FILES AND THE DEADLY DOZEN POSTERS ANALYZED UNDER FACE AND THE FIRST AMENDMENT

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . prohibiting the free exercise thereof, or abridging the freedom of speech.”⁵² In 1969, the United States Supreme Court held in two different cases that neither “true threats” nor speech that creates incitement for imminent lawless action fall under the protection of the First

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1013.

⁵² U.S. CONST. amend. I.

Amendment.⁵³ Because “true threats” are unprotected under the First Amendment, a court applying FACE’s prohibition on using “threats of force” must differentiate between “true threats” and protected speech.⁵⁴

The first section examines the Ninth Circuit’s definition of what constitutes a “true threat” and how the Ninth Circuit used that definition in its 2001 decision in *Planned Parenthood*. This section also compares the Ninth Circuit’s holding with previous cases that have interpreted “threats of force” under FACE to determine if the Ninth Circuit’s analysis is sound. The second section analyzes whether the defendants’ statements create incitement to produce imminent lawless action and discusses whether statements on the internet fall under the imminent requirement. Finally, the third section analyzes how women have been affected by the abortion controversy and discusses whether the violence has improved since FACE was enacted.

A. True Threats

In *Watts v. United States*, the Supreme Court held that a “true threat” is not protected under the First Amendment.⁵⁵ The Court stated, “a threat must be distinguished from what is constitutionally protected speech.”⁵⁶ With that in mind, the Court held that the defendant’s statement “[i]f they ever make me carry a rifle the first man I wants to get in my sights is L.B.J.,” made during a political rally was political hyperbole and did not rise to the level of a “true threat.”⁵⁷ The Court, however, did not provide any guidelines for later courts to distinguish between what is a “true threat” and what is constitutionally protected speech.

⁵³ See *Watts v. United States*, 394 U.S. 705, 707 (1969) (“What is a threat must be distinguished from what is constitutionally protected speech.”) See also *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that advocacy directed to incite or produce imminent lawless action is not protected under the First Amendment).

⁵⁴ *Dinwiddie*, 76 F.3d at 925. See also S. Rep. No. 103-117, at 44.

⁵⁵ 394 U.S. at 707

⁵⁶ *Id.*

⁵⁷ *Id.* at 706-08.

Since *Watts*, the Ninth Circuit Court of Appeals has decided a number of cases that provide some guidance on how to distinguish a “true threat” from other constitutionally protected speech. The Ninth Circuit has defined a threat as an “expression of an intention to inflict evil, injury, or damage on another.”⁵⁸ In *United States v. Orozco-Santillan*, the Ninth Circuit held that an objective test is used to determine whether a statement is a “true threat.”⁵⁹ Under this objective test, the plaintiff must prove that a “reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”⁶⁰ The defendant’s intent to carry out the threat is irrelevant.⁶¹ In addition, the Ninth Circuit has held that a threat should be considered in context by looking at the surrounding events as well as the reactions of the listeners.⁶² The court noted, “the fact that a threat is subtle does not make it less of a threat.”⁶³

The Ninth Circuit has not ruled on whether this objective test for determining whether a statement is a “true threat” should be applied to the determination of “threats of force” under FACE. However, the legislative history of FACE indicates that Congress intended for the courts to apply an objective test. The Senate Labor and Human Resources Committee Report provides,

Prohibited ‘threats of force’ would include genuine threats of harm intended to injure, intimidate, or interfere with someone because that person is obtaining or providing abortion-related services. Threats are covered by the Act where it is reasonably foreseeable that the threat would be interpreted as a serious expression of an intention to inflict bodily harm.⁶⁴

⁵⁸ *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1987) (quoting Webster’s Third International Dictionary).

⁵⁹ 903 F.2d 1262, 1265 (9th Cir. 1990).

⁶⁰ *Id.* (citing *United States v. Mitchell*, 812 F.2d 1250 (9th Cir. 1987). *See also* *Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969) (a true threat occurs if “the defendant intentionally make[s] a statement . . . in a context . . . wherein a reasonable person would foresee that the statement would be interpreted . . . as a[n] . . . intention to inflict bodily harm upon or to take the life of [another], and that the statement not be the result of mistake, duress, or coercion.”)

⁶¹ *Roy v. United States*, 416 F.2d 874, 878 (9th Cir. 1969).

⁶² *Gilbert*, 884 F.2d at 457 (citing *Mitchell*, 812 F.2d at 1255).

⁶³ *Id.*

⁶⁴ S. REP. NO. 103-117, at 44.

In *Planned Parenthood*, the Ninth Circuit appeared to follow the objective test defined above. The court found that the district court’s jury instructions, which provided that “‘a statement is a ‘true threat’ when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault,’” was consistent with the court’s previous “true threat” cases.⁶⁵ However, the court distinguished the previous cases from *Planned Parenthood* by finding that the speaker who made the threats was clear that he or she would be the one to carry out the threat.⁶⁶ The court viewed this distinction as constitutionally relevant. In *Planned Parenthood*, the Ninth Circuit found the district court’s jury instruction ambiguous because it did not emphasize to the jury that the defendants’ themselves must be the ones to carry out the threats.⁶⁷ The Ninth Circuit found that the *Planned Parenthood* jury could have impermissibly based its finding that the defendants were liable because the defendants’ statements made it more likely that some third party unrelated to the defendants would harm the plaintiffs.⁶⁸ According to the court, if this were what the jury did, it would be unconstitutional because it punished protected First Amendment speech.⁶⁹

The Ninth Circuit found that even though the jury instruction was ambiguous, it was not going to determine whether the ambiguity was great enough to set aside the verdict.⁷⁰ The court noted that instead it must conduct a de novo review of both the law and the relevant facts

⁶⁵ *Planned Parenthood of the Columbia/Willamette Inc.*, 244 F.3d at 1016.

⁶⁶ *Id.* See *Lovell v. Poway Unified School District*, 90 F.3d 367 (9th Cir. 1996) (“true threat” found when defendant told administrator “If you don’t give me this schedule change, I’m going to shoot you!”); *Orozco-Santillan*, 903 F.2d at 1264 (defendant threatened INS agent during arrest and made threatening telephone calls); *Gilbert*, 884 F.2d at 455-56 (defendant mailed a letter and several posters to the founder of an adoption agency condemning her occupation and threatening violence against inter racial couples); and *Roy*, 416 F.2d at 875 (defendant threatened president when telephoned operator and said “‘Tell the President that he should not come aboard the base or he would be killed.’”)

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1017

because the district court rejected the defendant's First Amendment claim.⁷¹ The court started its review by noting that neither the posters nor the web site explicitly mention violence, but acknowledged, "a threat may be inferred from the context in which the statements are made."⁷² Viewing the context in which the statements were made, the Ninth Circuit found that the defendants' statements not only failed to mention violence, but that in this case context could not supply a violent meaning to the defendants' statements.⁷³

In reaching its holding that context could not supply a violent meaning to the defendants' nonviolent statements, the court found that the violence committed after similar "wanted" style posters were released, was not "committed by the defendants or anyone connected with them," and that the defendants' statements were made in the public discourse, specifically the Internet, rather than in personal communications.⁷⁴ The court also found it significant that the statements were made at public rallies away from the doctors.⁷⁵ In addition, the court gave two reasons for distinguishing between threats communicated directly to the victim and threats made at public rallies. First, if a threat is communicated directly to the victim, the speaker leaves no doubt that he or she is sending the recipient a message, whereas statements made at public rallies are more diffuse in their focus and are generally intended to shore up political support for the speaker's position.⁷⁶ Second, the court found that speech made through "the normal channels of group

⁷¹ *Id.* (citing *Lovell*, 90 F.3d at 370). In *Lovell*, the Ninth Circuit noted that when a district court rejects a First Amendment claim, the court must conduct a de novo review of the facts. 90 F.3d at 370 (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988)).

⁷² *Id.*

⁷³ *Id.* at 1018.

⁷⁴ *Id.* Because the court held that the violence surrounding the abortion controversy was not committed by the defendants or anyone connected with them, the court did not rule on the defendants' objection to the admission of this past violence. *Id.* at 1018 n. 15.

⁷⁵ *Id.* at 1019 n. 16.

⁷⁶ *Id.* at 1019.

communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment.”⁷⁷

Finally, in reaching its holding that the defendants’ statements were not “true threats,” the Ninth Circuit relied on *NAACP v. Claiborne Hardware Co.*⁷⁸ In *Claiborne Hardware*, the United States Supreme Court held that while the defendant’s statements expressly threatened violence, they were protected under the First Amendment because they “were quintessentially political statements made at a public rally, rather than directly to [the] targets.”⁷⁹ Therefore, taking the above factors into account, the Ninth Circuit held that the posters and the “Nuremberg Files” web site were protected speech under the First Amendment, and reversed the district court’s ruling.⁸⁰

1. Analyzing “True Threats” under FACE

The United States Supreme Court has not provided the courts with guidance on how to analyze FACE’s “threats of force” requirement under the First Amendment. Because there is no guidance, each circuit is free to develop its own analysis and ignore the other circuits’ analysis. The Eighth Circuit has developed a useful test that would assist to other courts in analyzing whether a statement that is not explicitly threatening, taken in context, constitutes a “threat of force” under FACE.⁸¹ Like the Ninth Circuit, the Eighth Circuit has held that conduct constitutes a “threat of force” under FACE only if it constitutes a “true threat,” which is unprotected under the First Amendment.⁸² Using that standard, the Eighth Circuit in *United States v. Hart*, considered a number of factors developed in its decision in *United States v.*

⁷⁷ *Id.*

⁷⁸ *Id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

⁷⁹ *Id.* (citing *Claiborne Hardware*, 458 U.S. at 902).

⁸⁰ *Id.*

⁸¹ The Eighth Circuit is the only circuit that has addressed the “threat of force” requirement under FACE.

⁸² *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) (citing *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)).

Dinwiddie to determine whether a statement constitutes a “true threat.”⁸³ These factors include: (1) the reaction of the recipient of the threat and of other listeners; (2) whether the threat was conditional; (3) whether the maker of the threat had made similar statements to the victim in the past; (4) whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence, and (5) whether the threat was communicated directly to its victim.⁸⁴

Using these factors, the Eighth Circuit in *Hart* held that the defendant’s act of parking Ryder trucks in the parking lots of two abortion clinics constituted a “threat of force” under FACE.⁸⁵ The court found it relevant that the defendant was a regular protestor outside the two clinics where he parked the trucks, he parked the trucks in the driveways rather than in the parking lot, the trucks blocked the entrance to the clinics, and the placement of the trucks at the clinics preceded a visit from President Clinton, which heightened concerns about potential violence.⁸⁶ In addition, the court found that the defendant did not provide a legitimate reason for leaving the trucks in the driveways and that this act was similar to the Oklahoma City bombing, which reasonably was interpreted by the clinic staff and police officers as a threat of force.⁸⁷

Similarly, in *Dinwiddie*, the Eighth Circuit Court of Appeals used the factors listed above to determine whether the defendant’s statements violated FACE.⁸⁸ Using those factors, the court held that the defendant’s comments to Dr. Robert Crist, which included: ““Robert, remember Dr. Gunn This could happen to you He is not in the world anymore Whoever sheds man’s blood, by man his blood shall be shed,”” were threats of force that violated FACE.⁸⁹ The court also held that the statements were intimidating, because the statements placed Dr. Crist in

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1072.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 76 F.3d 913, 925 (8th Cir. 1996).

⁸⁹ *Id.*

“reasonable apprehension of bodily harm.”⁹⁰ The Eighth Circuit found it relevant that the defendant made these statements to Dr. Crist approximately fifty times, the defendant communicated these threats directly to Dr. Crist, and Dr. Crist reacted by wearing a bulletproof vest.⁹¹ In addition, the court noted that Dr. Crist was aware that the defendant was a well-known advocate of the view

That it is justifiable to use lethal force against doctors who perform abortions, had used force against a maintenance supervisor at Planned Parenthood, physically obstructed patients trying to enter Planned Parenthood, and told an Executive Director at Planned Parenthood that ‘you have not seen violence yet until you see what we do to you.’⁹²

The court also distinguished *Watts*, where the Supreme Court noted that the audience responded to Watts’s statement with laughter. In *Dinwiddie*, Dr. Crist did not laugh at the defendants’ statements, but rather reacted by wearing a bulletproof vest.⁹³ Finally, the court noted that in *Watts*, the defendant did not communicate his comment directly to President Johnson, whereas the defendant in *Dinwiddie*, spoke directly to Dr. Crist.⁹⁴

Finally, in *Lucero v. Trosch*, the District Court of the Southern District of Alabama used the *Dinwiddie* factors to hold that the defendant’s statements to the plaintiff on a national talk show did not violate FACE because the statements were not “true threats.”⁹⁵ In 1994, the defendant who was an “outspoken advocate of what is known as the ‘doctrine of justifiable homicide,’” appeared as a guest on Geraldo with plaintiff Dr. Bruce Lucero who was a physician who performs abortion services.⁹⁶ During the show, the defendant made the following statements in response to questions by Geraldo: “I would not murder [an abortion doctor], but I

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 926.

⁹⁴ *Id.*

⁹⁵ 928 F. Supp. 1124, 1130 (S.D. Al. 1996).

⁹⁶ *Id.* at 1125-26.

would kill him . . . [Dr. Lucero] is a mass murderer and he should be dead.”⁹⁷ Using the *Dinwiddie* factors, the district court of the Southern District of Alabama found that the defendant’s statements were made during a daytime talk show that “explores and exploits controversial subjects and guests in order to boost its ratings,” the defendant had been prodded in an effort to express his views in a volatile manner, and that the defendant was not permitted to explain himself in any detail.⁹⁸ In addition, the court found that Dr. Lucero was fully aware of the defendant’s beliefs before agreeing to appear on the show.⁹⁹ By taking into account the context in which the statements were made, the district court held that the defendant’s statements were not of a nature that a reasonable person “would construe them as a serious expression of an intention to inflict bodily harm upon or to take [Dr. Lucero’s] life.”¹⁰⁰ Therefore, the court held that the defendant’s statements did not violate FACE because they were not “true threats.”¹⁰¹

The Eighth Circuit appeared to primarily focus on the defendant’s propensity to engage in violence, whether the defendant had made similar statements to the plaintiff in the past, and the reaction of the recipient of the threat in finding that a statement was a “threat of force” under FACE. In *Hart*, the Eighth Circuit focused its findings on the fact that the defendant was a regular protestor outside of the two clinics and that placing the Ryder Trucks outside the clinics was reasonably interpreted by clinic workers as a threat of force.¹⁰² Similarly, in *Dinwiddie*, the Eighth Circuit emphasized that the defendant had made similar statements to the plaintiff approximately fifty times, the defendant was known for his view that it was justifiable to use

⁹⁷ *Id.* at 1127.

⁹⁸ *Id.* at 1129.

⁹⁹ *Id.* at 1130.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Hart*, 212 F.3d at 1072.

violence against abortion doctors, and that the plaintiffs reacted to the defendants' statements by wearing bullet proof vests.¹⁰³

2. *Critique of Planned Parenthood*

In *Planned Parenthood*, the Ninth Circuit did not analyze the case under FACE. The court conducted a de novo review and held that the district court's jury instruction was ambiguous because the instructions did not make it clear that the defendants themselves must be the ones to carry out the threats.¹⁰⁴ In addition, the court held that the defendants' statements were not "true threats" because the statements did not explicitly mention violence and context could not supply a violent meaning to the defendant's nonviolent statements because the past violence surrounding the abortion controversy was not "committed by the defendants or anyone connected with them" and the statements were made in the context of public discourse, rather than directly to the defendants.¹⁰⁵

The Ninth Circuit is the first circuit to require that a defendant's statement is not a "true threat" if it is unclear that the defendant will be the one to carry out the threat. Because the Supreme Court has not ruled on whether a "true threat" requires the defendant making the threat to be the one to carry out the threat, it is unclear whether the en banc panel will follow the panel or apply a different test.

In reaching its holding that the defendants' statements taken in context do not have a violent meaning because the past violence surrounding the abortion controversy was not "committed by the defendants or anyone connected with them,"¹⁰⁶ the Ninth Circuit did not recognize the connection between the past violence surrounding the abortion controversy and the

¹⁰³ Dinwiddie, 76 F.3d at 925

¹⁰⁴ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1016.

¹⁰⁵ *Id.* at 1018.

¹⁰⁶ *Id.*

formation of the ACLA. The plaintiffs supplied the district court with evidence that members of Operation Rescue had engaged in violence after similar “wanted” style posters were released.¹⁰⁷ The ACLA emerged after the 1994 organizational decomposition of Operation Rescue.¹⁰⁸ There was a split in the pro-life movement over the use of force and those members of Operation Rescue that advocated the use of “force” and justifiable homicide were no longer allowed to be members of Operation Rescue.¹⁰⁹ As a result, those members that advocated violence created the ACLA.¹¹⁰ On July 29, 1994, three months after the formation of the ACLA,¹¹¹ Paul Hill, a former member of Operation Rescue,¹¹² shot and killed Dr. John Bayard Britton and wounded his wife.¹¹³ Prior to Dr. Britton’s murder, his name, photograph, and physical description appeared on “unWANTED” posters.¹¹⁴ These posters contained the phrase “Crimes Against Humanity,” which is also found on the “Deadly Dozen” poster, the poster of Dr. Crist, and the “Nuremberg Files” web site.¹¹⁵ Three of the defendants signed a petition calling for the acquittal of Paul Hill.¹¹⁶ Similarly, in August 1993, Shannon Shelley, another former member of Operation Rescue,¹¹⁷ shot Dr. George Tiller in both arms.¹¹⁸ At the time Shelley shot Dr. Tiller, she had in her possession copies of *Life Advocate* magazine, which published information about Dr. Tiller.¹¹⁹ Shelley Shannon is a close friend and associate of the defendants.¹²⁰ Dr. Tiller is

¹⁰⁷ Planned Parenthood of the Columbia/Willamette, Inc., 41 F. Supp. 2d at 1132, 1135.

¹⁰⁸ Will Offley, *The Mainstreaming of Terror: Anti-Choice Politics and Clinic Violence in the Age of Spin*, at <http://af.antifa.net/archive/afarchive/re/right/will%20offley/terror.html> (Oct. 14, 1998).

¹⁰⁹ Planned Parenthood of the Columbia/Willamette, Inc. 41 F. Supp. 2d at 1136.

¹¹⁰ *Id.*

¹¹¹ In April 1994, the ACLA was created. *Id.*

¹¹² Kim Gandy, *NOW Breaks Class Action Barrier in Scheidler Case*, at <http://www.now.org/nnt105-97/scheid.html> (n.d.).

¹¹³ Planned Parenthood of the Columbia/Willamette, Inc., 41 F. Supp. 2d at 1135.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Who is Shelley Shannon?*, at <http://www.armyofgod.com/ShelleyWhois.html> (n.d.).

¹¹⁸ Planned Parenthood of the Columbia/Willamette, Inc., 41 F. Supp. 2d at 1132.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1135.

also listed on the “Deadly Dozen” poster.¹²¹ Because Hill and Shelley committed the murders around the time of the formation of the ACLA, today they would more likely be members of the ACLA rather than Operation Rescue because they advocate the use of force against abortion providers. Many ACLA members were previous members of Operation Rescue.¹²² The Ninth Circuit did not address this connection between this past violence and the ACLA. Had the court taken this into account, it is clear that the past violence surrounding the abortion controversy was associated with ACLA members.

Using the *Dinwiddie* factors to determine whether the ACLA’s statements constituted a “true threat,” the ACLA’s statements meet four out of the five *Dinwiddie* factors, which include the following: the reaction of the recipient, whether the threat was conditional, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. The first factor is clearly met because the plaintiffs reacted to the “Deadly Dozen” poster, the Crist poster, and the “Nuremberg Files” web site by purchasing bulletproof vests, drawing the curtains on the windows of their homes, and by accepting twenty-four hour surveillance.¹²³ The FBI and the United States Department of Justice also reacted to the defendants’ statements by offering the plaintiffs twenty-four hour a day protection.¹²⁴ Next, the threats appear to be unconditional because the ACLA has made it clear that the posters and the web site will continue to be published until the day that abortion becomes illegal.¹²⁵ The third factor is met because the defendants have made similar statements to the plaintiffs in the past. Finally, the fourth factor is

¹²¹ *Id* at 1132.

¹²² Frederick Clarkson, *Intelligence Project: Two Decades of Arson, Bombs and Murder*, at <http://www.splcenter.org/cgi-bin/goframe.pl?refname=/intelligenceproject/ip-4g2.html> (n.d.).

¹²³ Planned Parenthood of the Columbia/Willamette, Inc., 244 F.3d at 1013.

¹²⁴ Planned Parenthood of the Columbia/Willamette, Inc., 245 F. Supp. at 1362.

¹²⁵ See The Nuremberg Files, at <http://www.christiangallery.com/atrocity/aborts.html> (n.d.) (stating that the goal is to “record the name of every person working in the baby slaughter business across the United States of America, so as in the Nuremberg Trials in Nazi Germany, we can punish these people for slaughtering God’s children.”)

met because the plaintiffs had reason to believe the defendants had a propensity to engage in violence. The ACLA broke off from Operation Rescue because its members advocated the use of force and found homicide justifiable against doctors that perform abortions.¹²⁶ In addition, many of the defendants had signed a petition approving the murder of Dr. Gunn and refused to commit to nonviolence.¹²⁷

The one factor that is not met, and that the Ninth Circuit Court of Appeals focused on in determining that the defendants' statements were not true threats, is that the threats were not communicated directly to the victims. The Ninth Circuit stated, "In considering whether context could import a violent meaning to ACLA's nonviolent statements, we deem it highly significant that all the statements were made in the context of public discourse, not in direct personal communications."¹²⁸ The court also held that it must "defer to the well-recognized principle that political statements are inherently prone to exaggeration and hyperbole."¹²⁹

However, in *Dinwiddie*, the Eighth Circuit held that the presence or absence of any one of the five factors is not dispositive.¹³⁰ The Ninth Circuit is correct that the defendants did not communicate their threats directly to the plaintiffs, but the court failed to recognize that the plaintiffs clearly interpreted these statements as a threat and not as political hyperbole. These statements are more than political hyperbole because the statements were not just said once at a rally. Rather the posters and the Internet represent a continuing threat. Anyone can log on and look at the Internet site night or day. In addition, political hyperbole does not leave individuals fearing for their lives. If the statements were merely political hyperbole, federal marshals would not offer and provide these plaintiffs twenty-four hour protection. The Ninth Circuit did not

¹²⁶ *Panned Parenthood of the Columbia/Willamette, Inc.*, 41 F. Supp. 2d at 1136.

¹²⁷ *Id.*

¹²⁸ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1018

¹²⁹ *Id.* at 1019.

¹³⁰ *Dinwiddie*, 76 F.3d at 925.

consider the reaction of the plaintiffs in reaching its conclusion that the defendants' statements were not "true threats." When this is taken into account it becomes clear that the court erred in holding that the statements was merely political hyperbole.

3. *Claiborne Hardware Distinguished from Planned Parenthood*

Finally, in *Planned Parenthood*, the Ninth Circuit in reaching its holding that the defendants' statements are not "true threats," relied on the United States Supreme Court decision in *Claiborne Hardware*.¹³¹ In *Claiborne Hardware*, the United States Supreme Court held that the Field Secretary of the NAACP in Mississippi, Charles Evers' statements to boycott violators, which included: "[I]f we catch any of you going in any of them racist stores we're gonna break your . . . neck," and the sheriff cannot protect you at night were protected speech under the First Amendment.¹³² In 1966, the NAACP launched a boycott against white merchants in Claiborne County, Miss.¹³³ The NAACP practices used to encourage support for the boycott were generally peaceful and orderly.¹³⁴ However, one NAACP method of disciplining African Americans who violated the boycott included having their names read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times."¹³⁵ Those individuals that traded with white merchants were labeled as traitors, called demeaning names, and socially ostracized.¹³⁶ There was also evidence that because these individuals were ignoring the boycott, in two instances shots were fired in one of their homes.¹³⁷ Furthermore, a brick was thrown through a windshield, and a flower garden was damaged.¹³⁸

¹³¹ *Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1019.

¹³² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¹³³ *Id.* at 889.

¹³⁴ *Id.* at 903.

¹³⁵ *Id.* at 903-04.

¹³⁶ *Id.* at 904.

¹³⁷ *Id.*

¹³⁸ *Id.*

Claiborne Hardware can be distinguished from *Planned Parenthood*. In *Claiborne Hardware*, the defendant's statements were not directed toward anyone in particular; rather they were addressed toward a vague and general class of persons who failed to abide by the boycott. In contrast, in *Planned Parenthood*, the defendants' statements were targeted at particular doctors who perform abortion services. In addition, the defendant's statements in *Claiborne Hardware* were made to its own members, the references to violence were isolated statements in an otherwise nonviolent speech, and the isolated statements were not found to trigger any violence.¹³⁹ In *Planned Parenthood*, the defendants' statements taken in context contain a serious threat of violence, the ACLA is known for advocating violence against abortion doctors, and the plaintiffs' were obviously intimidated because they reacted to the defendants' statements by hiring twenty-four hour protective security and by wearing bulletproof vests. Therefore, in *Planned Parenthood* the Ninth Circuit erred in relying on *Claiborne Hardware*, to determine that the defendants' statements are not "true threats."

4. Summary

In *Planned Parenthood*, the Ninth Circuit is correct that the defendants' statements do not explicitly mention violence. However, the Ninth Circuit erred in holding that the defendants' statements taken in context could not supply a violent meaning to the defendants' nonviolent statements. The past violence that has occurred after similar "wanted" style posters were released was associated with ACLA members. In addition, the posters and the "Nuremberg Files" web site is more than political hyperbole. Political hyperbole does not create an environment where the plaintiffs fear for their lives and where others fear for the plaintiffs' lives as well. Finally, *Claiborne Hardware* is distinguishable from *Planned Parenthood*. *Claiborne Hardware* resulted in a few incidences of violence in a generally nonviolent boycott. In *Planned*

¹³⁹ *Claiborne Hardware Co.*, 458 U.S. at 928.

Parenthood, the ACLA have made it clear that they refuse to limit themselves to nonviolence in their mission to stop abortion. Taking these factors into account, it becomes clear that, taken in context, the defendants' statements are "true threats," and the En Banc panel should reverse the Ninth Circuit's holding.

IV. INCITEMENT

Because FACE only prohibits "threats of force," the Ninth Circuit did not rule on whether the defendants' statements amount to incitement to produce imminent lawless action. FACE currently does not provide a remedy for incitement. This section will analyze whether the defendants' statements in *Planned Parenthood* created incitement in others to produce imminent lawless action and whether FACE should be expanded to provide a remedy for statements that amount to incitement.

The test for whether speech falls into the incitement category was defined in *Brandenburg v. Ohio*.¹⁴⁰ In *Brandenburg*, the defendant, a leader of the Ku Klux Klan group invited a television reporter to a Ku Klux Klan rally.¹⁴¹ The prosecutor relied on films taken by the newsmen who attended the meeting.¹⁴² One film showed twelve hooded figures burning a large wooden cross.¹⁴³ The film captured the defendant's speech, which included the following remarks:

We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank You.¹⁴⁴

¹⁴⁰ 395 U.S. 444 (1969).

¹⁴¹ *Id.* at 445.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 446.

The second film showed six hooded figures, where the defendant made a similar speech to the one recorded on the first film.¹⁴⁵ The Supreme Court held that the statute under which the defendant was convicted did not draw a proper line between speech that promotes mere advocacy which is protected under the First Amendment, and speech that is likely to produce incitement to engage in imminent lawless action.¹⁴⁶ The Court concluded that “the constitutional guarantees of free speech . . . do not permit States to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁴⁷ Under the Court’s test, three conditions must be met.¹⁴⁸ These conditions include: (1) the speaker must promote imminent lawless action; (2) the imminent lawless action must be likely to occur; and (3) the speaker must intend to produce imminent lawless action.¹⁴⁹

Since *Brandenburg*, the Supreme Court has addressed incitement in two cases, *Hess v. Indiana*¹⁵⁰ and *Claiborne Hardware*.¹⁵¹ In *Hess*, the defendant was involved in an antiwar demonstration.¹⁵² During the demonstration the local sheriff and his deputies were clearing the streets of protestors that were blocking traffic, and according to a stipulation, as the sheriff passed the defendant he stated “[w]e’ll take the f . . . street later, or [w]e’ll take the f . . . street again.”¹⁵³ Two witnesses testified that the defendant

¹⁴⁵ *Id* at 447.

¹⁴⁶ *Id* at 449.

¹⁴⁷ *Id* at 447.

¹⁴⁸ Cass R. Sunstein, Constitutional Caution, 1996 U. CHI. LEGAL F. 361 (1996) (citing *Brandenburg*, 395 U.S. at 447)

¹⁴⁹ *Id.* In *Brandenburg*, the intent requirement stems from the court stating that the speech must be “directed to inciting or producing imminent lawless action.” 395 U.S. at 447.

¹⁵⁰ 414 U.S. 105 (1973).

¹⁵¹ 459 U.S. 898 (1982).

¹⁵² *Hess*, 414 U.S. at 106.

¹⁵³ *Id* at 106-107.

[D]id not appear to be exhorting the crowd to go back into the street, that he was facing the crowd . . . when he uttered the statement, that his statement did not appear to be addressed to any particular person . . . , and that his tone . . . was no louder than that of the other people in the area.¹⁵⁴

The Supreme Court rejected the argument that the defendant's statement was intended to incite further lawless action and was likely to produce such action.¹⁵⁵ In reaching its conclusion, the Court noted that because the defendant's statement was not directed to a particular person, he was not advocating any action.¹⁵⁶ In addition, the Court noted that there was no evidence that the defendant's words were intended and likely to produce imminent disorder.¹⁵⁷ The Court noted that "at worst, [the defendant's statement] amounted to nothing more than advocacy of illegal action at some indefinite future time."¹⁵⁸

Finally, in *Claiborne Hardware*, the Supreme Court held that "Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*."¹⁵⁹ The Court noted that most of the violence occurred weeks or months after one of Evers' speeches.¹⁶⁰ However, the Court noted that had Evers speeches been followed by acts of violence, "a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct."¹⁶¹ In addition, the Court found that "[i]f there were other evidence of [Evers'] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence."¹⁶² It is unclear

¹⁵⁴ *Id.* at 107.

¹⁵⁵ *Id.* at 108.

¹⁵⁶ *Id.* at 109.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 108.

¹⁵⁹ *Claiborne Hardware Co.*, 458 U.S. at 928.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 929.

whether Evers would have been liable if his speeches had been followed by acts of violence.

I. Whether the “Wanted” Style Posters Create Incitement

In *Planned Parenthood*, the Ninth Circuit suggested that the plaintiffs’ would not have prevailed if they could have brought a claim that the defendants’ statements created incitement to produce imminent lawless action.¹⁶³ The court noted:

[T]he statements were made at public rallies, far away from the doctors, and before an audience that included members of the press. ACLA offered rewards to those who stopped the doctors at ‘some indefinite future time,’ . . . and the ambiguous message was hardly what one would say to incite others to immediately break the law. Finally, the statements were not in fact followed by acts of violence.¹⁶⁴

The Ninth Circuit is incorrect in concluding that the defendants’ statements are unlikely to “incite others to immediately break the law.”¹⁶⁵ In *Planned Parenthood*, the District Court noted several incidents of harm that occurred to doctors after their names appeared on similar “wanted” style posters. Shortly before Dr. Britton, Dr. Gunn, and Dr. Patterson were murdered, their names appeared on “wanted” style posters similar to the ones in *Planned Parenthood*.¹⁶⁶ The defendants in *Planned Parenthood* were aware of the murders and the posters that preceded them.¹⁶⁷ In addition, some of the defendants signed petitions declaring the murder of Dr. Gunn “justifiable.”¹⁶⁸ This evidence appears to establish that the defendants intended to produce imminent lawless action and they promoted imminent lawless action. In addition, because the harm to the doctors occurred

¹⁶³ *Planned Parenthood of the Columbia/Willamette, Inc.* 244 F.3d at 1019 n. 16.

¹⁶⁴ *Id.* (citations omitted).

¹⁶⁵ *Id.*

¹⁶⁶ *Planned Parenthood of the Columbia/Willamette, Inc.* 41 F. Supp. 2d at 1134-35.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1134.

after similar “wanted” style posters were released it is not unlikely that the “wanted” style posters could incite others to immediately break the law.

2. *Whether the “Nuremberg Files” Web Site Creates Incitement*

The Supreme Court has not ruled on whether speech published on the Internet can create incitement to produce imminent lawless action. In *Planned Parenthood*, the plaintiffs would probably be able to prove that the ACLA had the intent and promoted imminent lawless action when they published the “Nuremberg Files” web site. The ACLA has made their position clear that they support violence against abortion providers. However, it is not clear whether the “Nuremberg Files” web site can meet the imminent and likelihood requirement set forth in *Brandenburg*.

The Internet enables an individual to publish information that is instantaneously available to individuals around the world.¹⁶⁹ Unlike other mass media, an individual has greater control over what sites he or she accesses on the Internet, which makes it unpredictable when an individual will actually locate a particular site.¹⁷⁰ Because of this lapse of time between when an individual publishes information on the Internet and when an individual might actually locate the site, the imminent requirement needs to be measured from the time an individual actually locates the site, rather than the time the site is published.

3. *Summary*

¹⁶⁹ Kathleen M. Sullivan, *Symposium: Voices of the People: Essays on Constitutional Democracy in Memory of Professor Julian N. Eule: First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1668 (1998).

¹⁷⁰ *Id.* at 1668-69.

If the En Banc panel decides that a “true threat” requires the defendant to be the one to carry out the threat then it is important for the plaintiffs to be able to bring a claim under the incitement doctrine. It appears that the posters could rise to incitement to produce imminent lawless action, but it remains uncertain how the Supreme Court would rule on information published on the Internet.

V. HOW WOMEN ARE AFFECTED BY THIS VIOLENCE

Abortion violence has caused a severe shortage of the number of physicians who are willing to provide abortion services. Thus, it creates an environment where many American women are at risk of losing access to safe and legal abortions.¹⁷¹ Eighty-six percent of the counties in the United States currently have no abortion provider.¹⁷² This section examines the violence surrounding the abortion controversy before FACE was enacted in 1994 and then examines whether the violence has improved in the years after FACE was enacted.

In 1993, a year before FACE was enacted, a survey of 281 clinics, representing forty-two states, the District of Columbia, and Puerto Rico revealed that 50.2% experienced severe anti-abortion violence in the first seven months of 1993.¹⁷³ The violence has caused health care workers and patients to fear for their lives.¹⁷⁴ The survey also revealed that anti-abortion violence is not only aimed at abortion providers and women seeking abortions, it is also aimed at children of clinic staff, volunteer escorts,

¹⁷¹ *Clinic Violence, Intimidation and Terrorism*, at <http://www.prochoicevoice-org/get-informed/factsheets/terrorism.asp> (2000).

¹⁷² *Id.* This number increases to 95% in non-metropolitan counties. *Id.*

¹⁷³ *1993 Clinic Violence Survey Report: Methodology & Results*, at <http://www.feminist.org/research/cvsurveys/93meth.html> (2000). The violent acts included “death threats, . . . , chemical attacks, arson, bomb threats, invasions, and blockades.” *Id.*

¹⁷⁴ *Id.*

vendors, landlords, and fellow tenants where the clinics are located.¹⁷⁵ In Florida, a landlord broke a lease with a clinic after the landlord's family had received threats from anti-abortion groups.¹⁷⁶ Many clinics have been severely damaged from this violence, which has resulted in reducing the patient load and the services provided at these clinics.¹⁷⁷ Other clinics have completely closed down after their facilities have been destroyed.¹⁷⁸

Anti-abortion violence has also affected employment at these clinics. Sixty-four clinics reported that a staff member had resigned as a result of the violence.¹⁷⁹ In one-third of these clinics that staff member was a physician.¹⁸⁰ Fifty percent of the clinics where staff members have resigned reported having problems finding a replacement.¹⁸¹

As a result of this violence, thousands of women, particularly low-income women and their families are left without adequate health care services.¹⁸² The lack of abortion providers is becoming prevalent in Eugene, OR, where only five physicians currently provide abortions in their own clinics and fewer physicians are being trained to provide abortion services.¹⁸³ The lack of physicians willing to provide abortions in Eugene has resulted in physicians having to come from Portland, OR to provide abortions at All

¹⁷⁵ *1993 Clinic Violence Survey Report: Anti-Abortion Violence is Pervasive*, at <http://www.feminist.org/research/cvsurveys/93violence.html> (2000).

¹⁷⁶ *Methodology & Results*, *supra* note 173.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *1993 Clinic Violence Survey Report: How Clinics are Affected*, at <http://www.feminist.org/research/cvsurveys/93clinics.html> (2000).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* In Eugene, OR it is becoming more difficult to replace abortion providers, because fewer new physicians are being trained to provide abortion services. Interview with Kitty Piercy, Planned Parenthood, in Eugene, OR (Apr. 2, 2002).

¹⁸² *Methodology & Results*, *supra* note 173.

¹⁸³ Interview with Kitty Piercy, *supra* note 181.

Women's Health Services.¹⁸⁴ All Women's Health Services is a nonprofit clinic that provides abortion services primarily to lower income women.¹⁸⁵

As access to abortions becomes less accessible there is also a high risk that many women, particularly low income women will use the black market to obtain an abortion.¹⁸⁶ One woman stated that if her town did not have an abortion provider she would try to perform an abortion by herself.¹⁸⁷ One way to perform an abortion by oneself is to have a medical abortion, which can be done by purchasing pills on the black market. These pills can increase the risk of medical complications and deaths.¹⁸⁸

In 1994, Congress enacted FACE to respond to the anti-abortion violence that has been endangering the lives of health care providers and the patients who seek their services. In 1998, 351 clinics were surveyed which represents forty-seven states and the District of Columbia.¹⁸⁹ The survey revealed that 63% of the clinics reported that they were free from violence, harassment or intimidation in 1998.¹⁹⁰ However, one-fourth of the clinics experienced severe-anti abortion violence in 1998.¹⁹¹ The survey also revealed that in 1998 fewer clinics reported violations of FACE than ever before.¹⁹² In addition, 45% of the clinics that reported FACE violations in 1998 indicated that they were given clear direction from federal officials on how to initiate a FACE complaint.¹⁹³

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* All Women's Health Services has experienced anti-abortion violence. For example, in the early 1990s, a local right to life organization in Eugene, OR attempted to fire bomb the clinic. Interview with Sarah Hendrickson, M.D., Public Health Officer, Dept. of Public Health & Human Services, in Eugene, Or. (Apr. 11, 2002).

¹⁸⁶ Interview with Sarah Hendrickson, M.D., *supra* note 185.

¹⁸⁷ 1993 *Clinic Violence Survey Report: Conclusion: Abortion Denied Threatens Women's Lives*, at <http://www.feminist.org/research/cvsurveys/93end.html> (2000).

¹⁸⁸ Interview with Sarah Hendrickson, M.D., *supra* note 185.

¹⁸⁹ Jennifer Jackman Ph.D. et al., 1998 *National Clinic Violence Survey Report*, at <http://www.feminist.org/research/cvsurveys/1998/finaldraft.html> (Jan. 21, 1999).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

In 1998, 25% of clinics reporting FACE violations reported that an investigation had been opened as a result of their FACE violation, compared to 20.9% in 1997.¹⁹⁴ However, only 15% of clinics that reported FACE violations said that federal officials interviewed involved parties, compared to 41.9% in 1997.¹⁹⁵ The survey also found a decrease in the percentage of federal officers who told clinics they would not prosecute reported FACE violations.¹⁹⁶ Finally, the survey revealed that 43.9% of the clinics believe that FACE has improved local law enforcement's response to anti-abortion violence, compared to only 14.8% who feel that FACE did not have any effect, 32.8% of the clinics felt state law enforcement had improved and only 15.4% disagreed, and 42.5% of the clinics felt federal law enforcement had improved with only 11.7% finding no difference.¹⁹⁷

While law enforcement response to clinic violence has improved, the survey reveals that the judicial response to anti-abortion violence is less optimistic. Fewer clinics are seeking legal remedies in court and fewer clinics win remedies.¹⁹⁸ In 1997, 44.4% of clinics seeking legal remedies were successful; compared to only 26.1% in 1998.¹⁹⁹ It is unclear what has caused the decline in courts providing legal remedies, but it raises an issue for concern.

VI. CONCLUSION

According to the surveys, FACE does appear to have had an effect on decreasing the abortion violence. However, one-fourth of the clinics in 1998 facing severe abortion

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

violence and the defendants' statements in *Planned Parenthood* indicate that the violence surrounding the abortion controversy is still very much alive. The defendants in *Planned Parenthood* have successfully used the First Amendment to create an environment where many physicians fear for their lives. Sustaining the Ninth Circuit's opinion will likely result in many physicians named on the posters and the web site to stop performing abortion services, which will create an environment where many women are left without access to safe and legal abortions. If the En Banc panel recognizes the ACLA's propensity to engage in violence, the reaction of the plaintiffs after receiving these threats, and the connection between the formation of the ACLA and members of Operation Rescue that have committed violence against abortion providers after similar "wanted" style posters were released, it becomes clear that the defendants' statements are "threats of force" under FACE and unprotected under the First Amendment. Therefore, the Ninth Circuit's decision in *Planned Parenthood* should be reversed.

