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Advocating the Use of California’s Stalking Statutes to Prosecute Radical Anti-Abortion Protestors

Olga Rodriguez*

“Terrorism in our society . . . . We are concerned that as it continues, the right to choose will be a right in name only.”

“A country dedicated to freedom of speech does not easily censor political rhetoric, however inflammatory it becomes. But it can—and should—punish criminal activity. That means, among other things, that leaders need to take responsibility for what they say, to respect the power of words just as they respect the law. When they indulge in inflammatory rhetoric, can they feign surprise and innocence when some unbalanced person follows their reasoning to its logical conclusion?”

I. Introduction

Although the paragon of free speech can be characterized as peaceful and informative demonstrations or protests, a free market place of ideas, this has not been the case with recent abortion protests. Not all anti-abortion protestors want to hold signs and make speeches to sway people’s decisions; the extremists of the movement want change, and they want it by any means necessary—even if that means using what they consider “justifiable force.” In the past, most activities by anti-abortion protestors

* The author is a 1996 graduate of University of California, Hastings College of the Law.
2. Sara Engram, Deadlier than Sticks and Stones, THE SUN (Baltimore), Aug. 7, 1994, at 3E.
4. Id.
were non-violent. Protests consisted of praying, picketing and "sidewalk" counseling in lawful attempts to discourage women from obtaining abortions. For the past twelve years, however, protest violence has escalated. Many groups and individuals have abandoned peaceful protest in favor of violence. The political climate has disenfranchised many who see their way of life and thinking threatened. Doctors have been shot outside of their clinics as they arrived to work or while at work. Most of these doctors were stalked for months before they were eventually murdered. Unfortunately, the law provided these victims no protection from the stalking.

California was the first state to enact a penal stalking statute in 1990. This legislation was enacted soon after incidents of celebrity stalkings by fans. The statute was also designed to combat the behavior of spurned ex-boyfriends or ex-husbands who follow and harass their girlfriends or wives. Notably, the law is not gender-specific and therefore covers lesbian and gay victims, as well. The statute attempts to

8. See Goodstein & Thomas, supra note 7.
10. See Johnson, supra note 3.
deal with the domestic violence problem in this country resulting from the inadequacy of temporary restraining orders.16

Prior to the enactment of this statute, it was not considered a crime to follow someone and harass them repeatedly. The law was unable to deal with such an inchoate offense—an offense that appears to have, at least initially, mostly psychological effects on the victim. A remedy was provided only after something tangible happened or the person made actual contact with the victim. In general, society did not view what we consider harassment today as “harassment.”

The enactment of stalking statutes furnished a viable solution to the problem. This Note begins by exploring the current anti-abortion climate. It then examines the theory that there exists a nationwide conspiracy to deprive women of the ability to exercise their right to an abortion. Additionally, both federal and state legislation that attempts to deal with the increasingly aggressive and violent actions of anti-abortion demonstrators is discussed. Specifically, this Note advocates the use of California Penal Code Section 646.9 (“penal stalking statute”) and California Civil Code Section 1708.7 (“civil stalking statute”) to stop radical abortion protestors who choose to engage in methods of expression which go beyond the protection of the First Amendment. This Note only discusses the application of the stalking statutes to this particular class of activities and actions.17 Radical anti-abortion protestors who stalk doctors, clinic employees, and patients should not be permitted to terrorize them in the name of their cause.18 The recent amendments to the California stalking statutes facilitate the effort to stop the threats and violence.19

II. Anti-Abortion Protestors—The Current Climate

Anti-abortion extremists have increasingly resorted to aggressive and violent actions in an attempt to achieve their objectives.20 Over the past twelve years, violence against abortion clinics, doctors, and employees includes more than 1,500 cases of stalking, assault, sabotage, and burglary nationwide.21 In the last three years alone, abortion clinics reported thirty-seven bombings, 123 incidents of arson and 115 stalking, sabotage, or

17. The First Amendment implications involved in prosecuting these individuals are beyond the purview of this Note. For a detailed discussion of this issue, see Dana S. Gershon, Note, Stalking Statutes: A New Vehicle to Curb the New Violence of the Radical Anti-Abortion Movement, 26 COLUM. HUM. RTS. L. REV. 215 (1994).
18. Radical abortion protestors should not be allowed to hide behind the First Amend- ment. See Bernstein, supra note 6.
19. See id.
20. Goodstein & Thomas, supra note 7 (citing statistics from the Bureau of Alcohol, Tobacco & Firearms and abortion clinics).
21. Id.
burglary cases. After the first fatal attack on an abortion clinic in 1993, there have been seven murders, about 350 incidents of arson, bombing, assault, and vandalism, and more than 400 death threats in 1994 alone. Anti-abortion activists are “expanding their use of terror tactics against abortion clinics to include targeting not only physicians but also clinic escorts.” According to various surveys, overall “more than 50% of all responding clinics have experienced some form of violence . . . in the first seven months of 1994 . . . .” Specifically relevant to this Note, in 1994 the National Abortion Federation recorded about fifty incidents of stalking and fifty-five threats to abortion providers around the country. Sylvia Stengle, the executive director of the National Abortion Federation, observed that “[i]f you look at the statistics on stalkings, you can see there have been many missed opportunities” for prosecution.

The National Abortion Federation reported a significant increase in the number of physicians being stalked and receiving death threats. Some anti-abortion individuals believe physician harassment is now one of their most effective anti-abortion tactics. Protestors are of the opinion that if they “work” on doctors long enough, they can actually stop abortions altogether. Although doctors and clinic employees are the main targets of abortion protestors, patients are also targeted.

23. Vulliamy, supra note 1.
26. Id.
30. Id.
31. For example, Carolyn Izard, a nurse and clinic director in Arkansas, arrived home one day to find her neighborhood distributed with fliers calling her a “death camp worker.” Goodstein & Thomas, supra note 7. See also James Risen, As Anti-Abortion Violence Grows, Clinics Seek Federal Shield, L.A. TIMES, Nov. 23, 1993, at A5.
32. Sharon Bond, Speak Out Against the Violence, ST. PETERSBURG TIMES, Jan. 8, 1995, at 4D.
In 1992, Randall Terry, founder of the radical pro-life group Operation Rescue, proclaimed doctors the “weak link” in abortion services. Terry declared that Operation Rescue’s mission was to expose all the doctors and to humiliate them. When a doctor is targeted by a “No Place to Hide” campaign, their faces appear on “Wanted” posters placed around their residential neighborhoods. Dr. David Keulen of Garden Grove, California was targeted by the “No Place to Hide” campaign. With regard to this campaign, he stated: “What they are doing is casting a net out. It’s like they are trying to find a crazy person and then pointing him in my direction.”

Doctors are constantly aware of the changing moods in the protestors. They do not want a routine that will expose them to the unprotected danger of anti-abortion extremists. They face pickets outside their homes and their children are followed to school. To avoid unwanted exposure and heckling, hiding from protestors becomes a way of life for abortion providers. One doctor in Columbus was forced to drive rental cars from his home to the clinic. He also varied his driving schedule and parking location. Even with these precautions, the doctor has been followed twice by a van and was picketed at his home. Likewise, a group of three Houston abortion doctors devised a strategy in which they used a different entrance every time they arrived to work at their clinic.

A number of anti-abortion tactics have proven fatal. In March of 1993, Michael Griffin shot and killed Dr. David Gunn in front of an abortion clinic in Pensacola, Florida. A few months later, on July 29, 1993, Paul J. Hill murdered Dr. James Britton and the doctor’s bodyguard in front of a Florida clinic. Likewise, Rochelle Shannon shot and wounded George Tiller, an abortion doctor in Wichita, Kansas. Additionally, on December 30, 1994, in the City of Hampton, New Hampshire, two abortion providers were shot.

37. Id.
38. Lenhart, supra note 22.
39. Id.
41. Lenhart, supra note 22.
42. Whitford, supra note 33.
43. Id.
44. Id.
45. Lenhart, supra note 22.
46. Shootings at Abortion Clinics, supra note 11.
47. Id.
clinics were the target of what can only be characterized as a "political terrorist attack." In that attack, John Salvi shot and killed two women who worked at the clinics and wounded five others.

The recent massacre of doctors and staff has resulted in mixed reactions by anti-abortion group leaders. These reactions range anywhere from caution to stifled celebration. Some anti-abortion leaders are now discouraging confrontational clinic blockades and advising protestors to "tone down the rhetoric," e.g., to abstain from referring to doctors and staff members as "baby killers" and "murderers." Cardinal Bernard Law, Archbishop of Boston, asked for a moratorium on protests of abortion facilities after the John Salvi murders. This plea, however, was rejected by other renowned leaders in the anti-abortion movement.

One member of a group of anti-abortion individuals who were praying at the hospital where John Salvi was arrested declared: "[John Salvi] is not a murderer. He was slaying the servants of Satan who would make profit from the killing of God's innocent children. John Salvi was doing the Lord's work." The individual making this statement held a sign that proclaimed his and (presumably Salvi's) inspiration—a passage from the Bible. Similarly, upon learning of Dr. Gunn's murder, Don Treshman, an anti-abortion extremist proclaimed: "While Gunn's death is unfortunate, it's also true that quite a number of babies' lives will be saved."

California doctors have, so far, avoided fatal attacks by anti-abortion extremists. However, the tragedy that occurred in Florida may be repeated in California as anti-abortion protestors have turned their focus to the West Coast. This fact is not surprising since California leads the nation in the number of abortions performed, 304,000 in 1992, followed by New York (195,000), Texas (97,000), Florida (85,000), and Illinois (68,000).

Examples of the increasing violence in California include a 1993 incident in which protestors sprayed a foul-smelling chemical, butyric acid, into eight clinics in the counties of Riverside and San Diego. Four

48. Id.
49. Id.
50. Goodstein & Thomas, supra note 7.
51. Id.
52. Id.
53. Vulliamy, supra note 1.
54. Id.
55. Don Treshman is the national director of Rescue America. Klein, supra note 12.
57. Orlov, supra note 29.
health care workers were hospitalized with respiratory problems after the incident.60 Likewise, clinics have been burned to the ground with butyric acid, causing 1.4 million dollars in damage.61

Recently, on February 28, 1995, a fire started outside a building containing two family planning clinics in San Francisco.62 The fire caused little damage to the buildings.63 Investigators were suspicious, however, as the blazes seemed strikingly similar to four other arson attacks on California abortion clinics in the previous three weeks.64

Significantly, in February, 1995, a “No Place to Hide” campaign was started in California by Operation Rescue.65 Operation Rescue chose to target between ten and fifteen doctors and clinics in an escalation of West Coast protests.66 Eleanor Smeal, president of the Feminist Majority Foundation, warned that this “list [of ten to fifteen doctors] could become the doctors’ death warrant.”67 She also stated, “This is a campaign of terrorism. Free speech doesn’t mean hit lists.”68 Smeal observed that before the murders of Drs. David Gunn and John Britton, their pictures had been placed on “Wanted Posters” and circulated in public areas.69 These lists, just like the posters, could also be called “death warrants.”70

Other abortion rights activists agree with the sentiments expressed by Smeal.71 Attempts at identity exposure and harassment tactics instigate violence.72 All of the doctors murdered by anti-abortion extremists experienced this type of activity prior to their deaths.73 They may not have been the subject of a “No place to Hide” campaign, but the tactics used were the same.74 Equivalent tactics are already under way in Southern California against Dr. Michael Morris in the Riverside-San Bernardino area.75

60. Id.
61. Goodstein & Thomas, supra note 7.
63. Id.
64. Id.
65. Orlov, supra note 12.
66. Id.
68. Id.
70. Id.
71. Orlov, supra note 12.
72. Id.
73. Id.
74. Id.
75. Risen, supra note 9.
Abortion-rights groups note that violence and pressure on clinics has become so great that fewer and fewer doctors are willing to perform abortions. Frank Snydle, a doctor at a Melbourne, Florida abortion clinic, quit his job for these reasons. Dr. Snydle claimed that abortion opponents followed him and sent him threatening mail for two years. A few days after Dr. David Gunn was killed, a stranger approached Snydle in a parking lot and "made his hand like a gun and pulled the trigger." Such tactics may be successful, as a study indicates that between 1988 and 1992, the number of abortion providers dropped eight percent, from 2,582 to 2,380. Only one abortion clinic is scheduled to be built in the United States in 1995, in Jackson, Mississippi. Thus, not only are these extremists instigating increasingly violent acts against our nations' abortion doctors and clinic personnel, but as a consequence of the success of these terrorist tactics, women's choices are being reduced.

Actions of violence by anti-abortion extremists are creating an atmosphere in which doctors will be unwilling to perform abortions. In this way, anti-abortion groups will achieve indirectly what they have been unable to do directly, a de facto ban on abortions. A women's right to choose, as guaranteed by Roe v. Wade, will be effectively reduced to a hollow right.

III. Possibility of a Nationwide Conspiracy to Impede Access to Abortion

The Department of Justice and Attorney General Janet Reno created a task force to investigate the possibility of a nationwide conspiracy to impede access to abortion. This action was taken in response to the rising number of abortion clinic killings and the discovery of manuals and other publications encouraging violent anti-abortion tactics.

76. Risen, supra note 5.
77. Maria Puente, Clinic Protesters Under Pressure From Stalking Laws. USA TODAY, May 10, 1993, at 2A.
78. Id.
79. Id.
80. Sauer, supra note 58.
81. Id.
82. See Risen, supra note 5; Snieison, supra note 14, at 646.
83. Roe v. Wade, 410 U.S. 113 (1973). Unfortunately, the symbol that Jane Roe epitomized has slightly tarnished as Norma Jean McCorvey switched sides to join the anti-abortion forces. Norma Jean McCorvey was Jane Roe in the case for class action purposes. Debbie Nathan, The Death of Jane Roe, VILLAGE VOICE, Apr. 30, 1996, at 31.
84. Risen, supra note 9.
85. See Risen, supra note 9; Risen, supra note 31; Vulliamy, supra note 1.
One of these manuals was found buried in the yard of Rochelle (Shelley) Shannon, an Oregon activist convicted of the attempted murder of a Kansas abortion doctor, George Tiller, in Wichita, Kansas.\textsuperscript{86} A letter recently released by Shannon provided evidence that she and other anti-abortion extremists were engaged in a "nationwide conspiracy of anti-abortion terrorists whose aim is to kill physicians and shut down abortion clinics."\textsuperscript{87}

The Federal Bureau of Investigation has discovered another handbook now circulating entitled \textit{When Life Hurts We Can Help} (published by a group called the Army of God).\textsuperscript{88} This handbook is described as a "how-to manual of means to disrupt and ultimately destroy Satan’s power to kill our children."\textsuperscript{89}

The handbook states that "[e]very pro-life person should commit to destroying at least one death camp or disarming at least one baby-killer."\textsuperscript{90} The handbook includes a section for the beginner who has not engaged in violent protest before and would like to start.\textsuperscript{91} This section states that "[t]he preferred method for the novice would be gasoline and matches, straight and easy. No traces."\textsuperscript{92}

For the more experienced extremist the handbook discusses the benefits of "several methods: pellet guns on thin glass, .22 calibre on heavy glass. Pellet guns work almost all the time, BB guns are usually not powerful enough."\textsuperscript{93} Additionally, the manual teaches how to make explosives for the extremist possessing limited funds.\textsuperscript{94}

Clearly, the fringe of the anti-abortion movement has given up on nonviolent civil disobedience, which has been the trademark of anti-abortion groups like Operation Rescue.\textsuperscript{95} Some fringe groups, like Advocates for Life and Defensive Action, are now openly encouraging violence.\textsuperscript{96}

Andrew Burnett walked away from a divisive meeting of anti-abortion leaders in Chicago to start one of these splinter groups.\textsuperscript{97} He was convinced that the time had come to create a new organization run by


\textsuperscript{87.} \textit{Special Hearing on Violence}, supra note 25.

\textsuperscript{88.} Vulliamy, supra note 25.

\textsuperscript{89.} \textit{Id.}

\textsuperscript{90.} \textit{Id.}

\textsuperscript{91.} \textit{Id.}

\textsuperscript{92.} \textit{Id.}

\textsuperscript{93.} \textit{Id.}

\textsuperscript{94.} \textit{Id.}

\textsuperscript{95.} See Risen, supra note 31.

\textsuperscript{96.} See id.

\textsuperscript{97.} Risen, supra note 9.
activists who no longer believed in moderation. Burnett wanted to bring together those persons willing to initiate more aggressive action than civil disobedience.

Abortion rights activists suggest that organizations like Burnett’s exemplify the closeness of many of the extremist leaders around the country who endorse violence. Intimate associations alone, however, do not comprise evidence of a criminal conspiracy. Indeed, many anti-abortion leaders deny that a conspiracy exists. Yet, there are facts which raise questions about the complicity of radical anti-abortion leaders in encouraging violence: the relationship between the leaders, their sanctioning of violence, and the fact that all of the abortion doctors who were murdered had been targets of organized harassment by anti-abortion groups.

Notably, Burnett and Advocates for Life Ministries are responsible for the publication of one of the most important media sources for the radical wing of the anti-abortion movement. This magazine, Life Advocate, is used to publicize the identities of abortion doctors and clinics. The magazine once identified Dr. James Britton, one of the doctors fatally targeted by anti-abortion extremists. Even Rochelle Shannon, the activist convicted of the attempted murder of Kansas abortion doctor George Tiller, carried “Life Advocate” articles discussing Tiller with her.

Burnett’s alliance with many of the leading radicals within one national organization is seen as providing law enforcement officials “a road map to the anti-abortion fringe” and the chance to discover the terror network within. Prior to Shannon’s conviction for the attempted murder of Dr. Tiller, she was an active member of Advocates for Life, an anti-abortion group run by Andrew Burnett. Her activities led to an indictment on charges resulting from bombing and vandalism attacks on abortion clinics in California and the Pacific Northwest.

98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id.
Similar connections between leading radicals have been discovered elsewhere. When Michael Griffin shot Dr. Gunn during a demonstration organized by Rescue America (run by Anti-Abortion leader Don Treshman), a fellow protestor, extremist Paul Hill, distributed a petition to anti-abortion group members to sign in support of the action. Two of the anti-abortion extremists who signed Hill’s petition also took part in a protest for John Salvi, the man who shot and killed two female clinic employees and wounded five others. Even Michael Bray, the man convicted of bombing the Norfolk Clinic in 1984, signed Hill’s petition. Significantly, the petition Hill had distributed asserted that lethal force was justifiable as a form of anti-abortion protest. Hill was eventually sentenced to death for the murder of Dr. James Britton and his bodyguard in Pensacola, Florida. Burnett and others continue to insist that anti-abortion organizations activities (which include picketing doctors’ homes and following them in caravans) are legal. Interestingly, one member of a small group of radicals stated that his motto, and that of his fellow activists, is merely to: “defend the termination by private citizens of practicing abortionists to defend innocent children.”

IV. Federal Legislation Attempting to Deal with the Increasingly Aggressive and Violent Actions of Anti-Abortion Demonstrators

A. FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT (FACE)

On May 26, 1994, President Clinton signed the Freedom of Access to Clinic Entrances Act (“FACE”) into law. FACE prohibits protest-
tors from impeding the entrance of patients and doctors into reproductive health care clinics.\textsuperscript{119} This federal statute targets individuals who obstruct patients, doctors, and clinic employees from entering and exiting reproductive facilities.\textsuperscript{120} This statute also prohibits persons from intentionally destroying these facilities.\textsuperscript{121} The criminal penalties for violation of the federal statute range from a misdemeanor for a first offense to a felony for violations thereafter.\textsuperscript{122} The civil remedies accorded for violations vary from temporary, preliminary, or permanent injunctive relief to compensatory and punitive damages.

The necessary elements for a violation of FACE are conduct and specific intent.\textsuperscript{123} The statute prohibits three types of conduct: use of force, threat of force, and physical obstruction.\textsuperscript{124} The individual must intend to injure, intimidate, or interfere with a person who is obtaining or has obtained or is providing or has provided, reproductive health services.\textsuperscript{125}

Due to increasing tensions, the Clinton administration has utilized the new federal legislation, FACE, to initiate an in-depth investigation of anti-abortion violence.\textsuperscript{126} Since the enactment of FACE last year, the Department of Justice has initiated four civil suits and three criminal prosecutions against anti-abortion protestors.\textsuperscript{127} As of February, 1995, Paul J. Hill (the man who murdered James Britton and his clinic escort in Pensacola, Florida) was the first person to be successfully convicted under FACE.\textsuperscript{128} Additionally, the Department of Justice has sought civil damages from four anti-abortion protestors accused of blocking the entrance of the only abortion clinic in North Dakota and stalking its employees on January 18, 1995.\textsuperscript{129} This was the government’s fourth civil action under FACE

\begin{quote}
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\item lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of worship; or
\item intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship.
\end{enumerate}
\end{footnotesize}
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\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} 18 U.S.C.A. § 248(b) (West 1994).
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Risen, supra note 5.
\textsuperscript{127} Puga, supra note 27.
\textsuperscript{128} Marie McCullough, Controversy Dogs Year-Old Abortion-Clinic Law, SALT LAKE TRIB., May 21, 1995, at A18.
within two months.\textsuperscript{130} The government also sought a restraining order against the protestors in connection with this suit.\textsuperscript{131}

Despite the government'\textsc{'}s efforts, FACE cannot adequately deal with the stalking behavior of extreme anti-abortion protestors. In analyzing the language of the FACE statute, only the word "intimidation" could be interpreted to include stalking.\textsuperscript{132} Intimidation must specifically involve placing "a person in reasonable apprehension of bodily harm."\textsuperscript{133} Reasonable apprehension of bodily harm is not as clear an expression as it could be.\textsuperscript{134} What places a person in reasonable apprehension of bodily harm? A threat? A look? Is following a doctor, patient, or clinic employee, also included in the term "intimidation?" The word fails to clearly address threatening behaviors such as following doctors, patients, or clinic employees home, following them to work, yelling at their children and family members, and threatening bodily violence.

Likewise, in order to receive protection under FACE, the person who "threatens" the provider or patient must express a specific intent to harm the provider or patient because of his or her involvement with abortion services.\textsuperscript{135} This is difficult to prove unless the protestor either commits an act of violence against the abortion provider or patient at a clinic or combines anti-abortion statements with aggressive conduct.

Further, the statute aims to clear obstructions from the doors of reproductive health clinics; it cannot deal with stalking behavior that occurs away from the clinics.\textsuperscript{136} Nonetheless, it would be worthwhile for clinic doctors, employees, and patients to employ all remedies available to seek justice on both state and federal levels.

B. RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT (RICO)

The Supreme Court held in \textit{National Organization for Women, Inc. v. Scheidler},\textsuperscript{137} that RICO\textsuperscript{138} could be employed to prosecute anti-abortion organizations.\textsuperscript{139} In \textit{Scheidler}, a women's rights group, in conjunction with abortion clinics, brought an action against a coalition of anti-abortion groups alleging that the defendants were members of a nationwide

\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} 18 U.S.C.A. § 248(a) (West 1994).
\textsuperscript{133} Thomas, supra note 12.
\textsuperscript{134} See id.
\textsuperscript{136} See Snieirson, supra note 14, at 648.
\textsuperscript{137} Nat'l Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994).
\textsuperscript{139} 114 S. Ct. at 802-03; Snieirson, supra note 14, at 650.
conspiracy to close down abortion clinics through a pattern of racketeering activity in violation of RICO. The Court held that abortion clinics had standing to bring this cause of action against a coalition that conspired to use force to cause clinic staff to stop working and patients to obtain medical services elsewhere. A plaintiff would need to show that these events harmed the clinics by injuring their business and property interests in violation of RICO. However, the Court held that RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering be motivated by an economic purpose. At this time, there have not been any prosecutions under RICO for radical anti-abortion behavior.

C. **Ku Klux Klan Act**

In *National Abortions Fed'n v. Operation Rescue*, women asserting their constitutional right to abortion brought suit under the civil rights conspiracy statute, the Ku Klux Klan Act, against persons involved in blockade activities at abortion clinics. The Ninth Circuit held that a conspiracy to prevent or hinder state law enforcement officers from securing the constitutional right to abortion for women (a class exclusively seeking to exercise that right) is actionable under the hindrance clause of the Act. The court acknowledged the Supreme Court case of *Bray v. Alexandria Women's Health Clinic*.

In *Bray*, the Court concluded that the deprivation clause of the Act did not provide a federal cause of action against persons obstructing access to abortion clinics. In doing so, the Court rejected the plaintiff’s argument that either women in general or women seeking abortions constituted a protected class under the deprivation clause. The Court, however, left

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140. 114 S. Ct. at 799.
141. Id. at 803.
142. Id. at 805.
143. Id. at 804.
144. Nat'l Abortions Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993).
145. 42 U.S.C.A. § 1985(3) (1996). “The alleged federal cause of action was brought under the first two clauses of §1985(3). These clauses provide a civil cause of action:

[I]f two or more persons . . . conspire . . . 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.

The first clause is commonly termed the ‘deprivation’ clause; the second as the ‘hindrance’ clause.” 8 F.3d at 682.
146. 8 F.3d at 680.
148. 113 S. Ct. at 764.
open the question of whether the hindrance clause might apply.\textsuperscript{149} The Ninth Circuit answered in the affirmative in \textit{National Abortions Fed’n}.\textsuperscript{150}

V. California Legislation—The Application of California’s Anti-Stalking Statutes to Anti-Abortion Protestors

Some of the aggressive and violent behavior of anti-abortion extremists can be characterized as stalking or harassment. Viewed in this way, their behavior would fall within the reach of the anti-stalking statutes and outside the protection of the First Amendment.\textsuperscript{151}

A. CRIMINAL STATUTE

The innovation of California Penal Code Section 646.9\textsuperscript{152} is a significant achievement. Criminal stalking can be either a felony or a misdemeanor punishable by sixteen months, two, or three years in state prison or by up to one year in county jail and/or a fine up to $1,000.

The California stalking statute penalizes:

(a) Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.\textsuperscript{153}

The criminal statute also applies a penalty enhancement when the defendant violates a restraining order, injunction, or any other court order prohibiting the behavior described in subdivision (a).\textsuperscript{154}

A violation of this statute is a felony punishable by imprisonment for two, three, or four years in state prison.\textsuperscript{155} Prior conviction of felony stalking is also punished by two, three, or four years in state prison.\textsuperscript{156}

\textsuperscript{149} “In order to state a cause of action under the deprivation clause, the conspiracy must be for the purpose of depriving the person or class of persons of the ‘equal protection of the laws or equal privileges and immunities under the laws.’” 8 F.3d at 682.

\textsuperscript{150} \textit{Id.} at 687.

\textsuperscript{151} See Bernstein, \textit{supra} note 6.

\textsuperscript{152} This statute excludes constitutionally protected conduct, thereby expressing the inherent value in peaceful picketing and demonstrations. \textit{See CAL. PENAL CODE} § 646.9(d) (West 1995).

\textsuperscript{153} \textit{Id.} § 646.9(a).

\textsuperscript{154} \textit{Id.} § 646.9(b).

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.} § 646.9(c).
The statute clarifies the terms used. "Credible threat" is defined as:

[A] verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.157

The term "harasses" is defined as:

[A] knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose. The course of conduct must be such that as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to that person. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.158

Robert Epple (chairperson of the California Assembly Committee on Public Safety) introduced a bill159 that facilitates the prosecution of radical anti-abortion protestors under this penal stalking statute.160 This bill was later signed by Governor Wilson and amended to the current penal stalking statute.161

Epple's bill facilitates prosecution by not requiring a "credible threat" of violence.162 The prosecution would only have to prove harassment with the intent to place the victim in reasonable fear for the safety of himself or herself or his or her family.163 The creation of this bill reflects California's acknowledgement of the stalking problem and its attempt to resolve it. The statute, if used, would provide prosecutors with an excellent tool against anti-abortion violence. Anti-abortion protestors, however, have not yet been prosecuted under the statute.164

The California Court of Appeals has reviewed only one California case applying the criminal statute.165 In People v. Heilman, the defendant was...
convicted of first-degree murder, violating a court order, and stalking.\textsuperscript{166} The defendant harassed his ex-girlfriend for months before killing her.\textsuperscript{167}

The stalking behavior occurred during the months of June 1992 through September 9, 1992, the day the victim was murdered.\textsuperscript{168} The defendant frequently made unwanted phone calls to the victim’s office.\textsuperscript{169} He also left angry and obscene telephone messages at the victim’s house.\textsuperscript{170} He started showing up at the victim’s car while she was at work and waiting for her.\textsuperscript{171} One of the victim’s co-workers noticed him by the victim’s car several times, and each time he would drive away quickly after being discovered.\textsuperscript{172} He left many threatening notes for the victim. Most of the time, he would leave these notes on the victim’s car, but on one occasion, he scribbled profanity on her car using mustard.\textsuperscript{173} He would show up at the victim’s apartment and pound on the door while yelling and screaming.\textsuperscript{174} Many of the victim’s neighbors witnessed this behavior.\textsuperscript{175} The victim obtained a restraining order against the defendant after the defendant sabotaged the victim’s car by placing super glue on the gasoline cap and in the door locks.\textsuperscript{176} Eventually, the victim moved from her residence.\textsuperscript{177}

This violence culminated in the victim’s murder.\textsuperscript{178} The defendant went to his ex-girlfriend’s place of employment in a rental car and waited for her.\textsuperscript{179} When she arrived, he confronted her with a loaded gun, shot her in the stomach at close range, and tore the public phone from the wall so she could not call for help. He then fled.\textsuperscript{180}

The defendant claimed that his conviction under California Penal Code Section 646.9 should be reversed because the statute was unconstitutionally vague.\textsuperscript{181} Specifically, he claimed that the word “repeatedly,” referring to the section of the statute that states: “Any person who willfully, maliciously, and repeatedly follows or harasses another person,” was

\begin{itemize}
  \item \textsuperscript{166} \textit{Id.} at 393.
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.} at 393-94.
  \item \textsuperscript{169} \textit{Id.} at 394.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.}
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.} at 395.
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.}
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{Id.} at 395, 397.
  \item \textsuperscript{180} \textit{Id.} at 395-96.
  \item \textsuperscript{181} \textit{Id.} at 398.
\end{itemize}
The court found that the statute addressed two different forms of behaviors and only one of these relied upon the interpretation of the word “repeatedly.” The two behaviors the statute penalizes are: (1) willful, malicious, repeated following and (2) willful, malicious harassment.

Furthermore, the court also found that the statute, which defines harassment as a “course of conduct,” subsequently defines “course of conduct” as “a series of acts over a period of time, however short, evidencing a continuity of purpose.” Therefore, the term harassment already includes multiple acts within its definition. If “repeatedly” were construed to modify harassment, it would be redundant. On this basis, the court concluded that repeatedly cannot modify the word “harassment” but only the word “following.” Moreover, a different construction would be inconsistent with the intent of the statute to penalize a single course of conduct of harassment.

The Court also found the term “repeatedly” to be a word of such common understanding that its meaning could not be vague. Further, the court found that “repeatedly” simply meant the alleged stalker must follow the victim more than once, and that the term provides police officers with sufficient guidance.

Additionally the Court noted that the statute provided other constraints which would protect against arbitrary and discriminatory enforcement:

1. the harassment and following must be found to be within the meaning of the statute;
2. the threat must be credible; and
3. the threat must have been made with the specific intent to place the victim in a reasonable fear of death or great bodily harm.

In light of these considerations, the court held that the statute was not unconstitutionally vague. The defendant’s behavior constituted sufficient conduct to support a conviction under the harassment theory of the stalking statute.

182. CAL. PENAL CODE § 646.9(a) (West 1995).
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id. at 400.
190. Id. at 400-01.
191. Id.
192. Id. at 401.
193. Id.
On September 2, 1995, California Penal Code Section 646.9 was amended again.\textsuperscript{194} The Bill, sponsored by Assemblyperson Firestone, made several significant changes to the penal stalking statute as applied in Heilman. These changes bode well for the prosecution of radical anti-abortion protestors.

Significantly, the Bill redefined "credible threat" as:

such a threat made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat.\textsuperscript{195}

According to the comments in the Public Safety Committee report for the Bill, "a first reading of this definition might lead one to conclude that the defendant must actually intend to carry out the substance of their threat, and not merely intend to terrorize their victim."\textsuperscript{196} This Bill intends to clarify this ambiguity, for "the pattern of conduct or combination of written or verbal statements need only be taken as a threat by the victim."\textsuperscript{197} Perhaps most significantly, "this bill declares that it is not necessary to prove that the defendant had the intent to actually carry out their threat."\textsuperscript{198}

B. CIVIL STATUTE

California also enacted a corresponding civil statute. California Civil Code Section 1708.7 states in relevant part:

(a) A person is liable for the tort of stalking when the plaintiff proves all the following elements of the tort:

(1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.

(2) As a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member . . . .

(3)(A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with the intent to place the plaintiff in reasonable fear for his or her

\textsuperscript{194} A.B. 985, 1995 Cal. Legis. Serv. Ch. 438 (West).
\textsuperscript{195} Id.
\textsuperscript{197} Id. (emphasis added).
\textsuperscript{198} Id. (emphasis added).
safety, or the safety of an immediate family member and, on at least one occasion, the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct.\textsuperscript{199}

The civil statute defines "credible threat" to mean:

a verbal or written threat or threat implied by a pattern of conduct, or a combination of verbal or written statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of an immediate family member.\textsuperscript{200}

The civil statute, like the criminal statute, applies when the defendant violates a restraining order.\textsuperscript{201} Moreover, this statute grants the "rights and remedies provided in this [civil] section as cumulative and in addition to any other rights and remedies provided by law."\textsuperscript{202} In other words, a prospective plaintiff/victim may pursue both civil and criminal suits. He or she is entitled to both forms of relief.

The civil statute may have the desired effect of discouraging anti-abortion protestors from participating in violent conduct because of the pressure of court fees and fines. James E. McElroy, a San Diego sole practitioner who represents doctors in suits against anti-abortion groups, believes that "[s]ometimes civil remedies are far more effective" than pressing criminal charges because "[t]hese people have been criminally prosecuted before, and it rolls off their backs. They wear it as a badge of courage. But when it comes out of their pockets, it's a little different."\textsuperscript{203} There is still a question, however, whether these individuals care about these fines. There is no point in charging them court fines if they don't pay them. There is no remedy for the plaintiff in that case. For example, Randall Terry, head of Operation Rescue, has been fined many times.\textsuperscript{204} Even his violation of court orders proscribing Operation Rescue abortion clinic demonstrations resulted in countless fines.\textsuperscript{205} He has refused to pay.\textsuperscript{206} In October 1990, he decided to close down Operation Rescue's

\textsuperscript{199} CAL. CIV. CODE § 1708.7 (West 1996).
\textsuperscript{200} Id. § 1708.7(3)(A).
\textsuperscript{201} Id. § 1708.7(3)(B).
\textsuperscript{202} Id. § 1708.7(e).
\textsuperscript{203} Bernstein, supra note 6.
\textsuperscript{204} Hedges, supra note 116.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
national office to go "underground." The purpose of this closure was to avoid court fines and concentrate on the fight against abortion providers. Randall Terry knew that "[b]eing underground [made] for a very difficult target in these harassing lawsuits." As in the case of the criminal stalking statute, a Bill was also passed to amend the civil stalking statute to facilitate suits against anti-abortion protestors. Assemblyperson Dede Alpert introduced a Bill that allowed the victims who were targets of anti-abortion protestors to file civil suits for monetary damages when the criminal anti-stalking law was violated. Alpert and her supporters viewed the Bill as a deterrent against lawful protests going too far and breaking the anti-stalking law by threatening bodily harm. In a statement Alpert said: "If the harassment and hate of pro-choice human beings, and arson and bombings of medical clinics continue, it is only a matter of time before someone dies at the hands of those who say they are 'pro-life.'" Her prediction came true. An Alpert aide commented that she was not aware of any cases where the anti-stalker law had been used against abortion protestors.

C. OTHER CALIFORNIA LEGISLATION

A new regulation affecting the Department of Motor Vehicles provides an option whereby a person can request to have their registration or driver’s license records suppressed. This suppression is possible if the person submits acceptable verification that he or she has reasonable cause to believe either of the following:

(A) That he or she is the subject of stalking, as specified in Section 1708.7 of the Civil Code or Section 646.9 of the Penal Code [or]

(B) That there exists a threat of death or great bodily injury to his or her person, as defined in subdivision (d) of Section 12022.7 of the Penal Code.

"Verification" is defined as police reports, court documentation, or documentation from other law enforcement agencies.

207. Id.
208. Id.
209. Id.
211. Mendel, supra note 163.
212. Id.
213. Shootings at Abortion Clinics, supra note 11; see supra text accompanying note 46.
214. Shootings at Abortion Clinics, supra note 11.
216. Id.
217. Id. § 1808.21.
Further, the California legislature passed a Bill, now codified, which makes it unlawful to intentionally harass a child because of another person's employment, e.g., when the parent is a doctor or employee of an abortion clinic. 218 A violation of this statute constitutes a misdemeanor punishable by a six-month jail term and/or a $1,000 fine, with mandatory jail time of at least five days for a subsequent offense. 219 Harassment is defined as "knowing and willful conduct directed at a specific child that seriously alarms, annoys, torments or terrorizes the child, and that serves no legitimate purpose. The conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer the distress." 220 Unlike the stalking laws, this statute does not require additional conduct, such as a credible threat, to constitute an offense. 221

This statute could have been used to prosecute the anti-abortion extremists who targeted Dr. Clay Alexander and his family. 222 Besides picketing Dr. Alexander's home with signs saying "repent" and "stop the slaughter," extremists followed the doctor's wife on errands and yelled at his daughter that her father killed little boys and girls. 223 Dr. Alexander eventually quit performing abortions. 224 This particular harassment strategy is taught by Operation Rescue in a twelve-week workshop on how to limit clinic access. 225

At one time, the California legislature considered passing a Bill 226 which would amend the "Street Terrorism Enforcement and Prevention Act." 227 This statute criminalizes conduct associated with gang activity, such as: kidnapping, carjacking, robbery, and murder. 228 The Bill would have amended this statute to include the phrase "domestic political terrorism." 229 The purpose of this language was to facilitate the prosecution of abortion protestors who engage in chemical attacks, felony stalking, felony aggravated vandalism, bombing, and related offenses involving possession and use of explosives and destructive devices. 230 Terrorist threats committed as part of a political agenda would also have

219. Id.
220. Id.
222. Cleeland, supra note 40.
223. Id.
224. Id.
225. Id.
228. Id. § 186.22.
been included as criminal activity. According to the legislative comments, this Bill would have curtailed the torrent of clinic violence by radical pro-life organizations. Unfortunately, this Bill was abandoned and the “Street Terrorism and Prevention Act” was never amended.

D. STATES THAT HAVE ADOPTED STALKING STATUTES

Forty-eight states have followed California’s example and adopted stalking statutes. Three states, Arizona, Maine, and New York, have amended their harassment statutes to prohibit stalking behavior. There are efforts in many states to expand stalking laws to protect abortion clinic employees at work and at home. In Illinois, the State City Attorney stated that he would not hesitate to apply Illinois’ anti-stalking statute against pro-lifers. South Carolina prosecuted a pro-lifer with its anti-stalking law for threatening the director of the Charleston Women’s Medical Clinic by telling her that she would be the next one to

be shot. Likewise, Florida has employed its stalking statute against an anti-abortion protestor. The protestor was convicted, but only received probation. He later violated his probation by protesting at the clinic where his victim worked. Additionally, in Minnesota, prosecutor’s charged a protestor with a violation of the anti-stalking statute for repeatedly following a volunteer guard at an abortion clinic. These efforts have been met with resistance from abortion opponents, prosecutors, and even the American Civil Liberties Union who argue that anti-stalking statutes, as applied to this type of activity, infringe on free speech rights.

VI. Conclusion

In response to the stalking and harassment of doctors, patients, and clinic employees by radical abortion protestors, law enforcement should prosecute under the California penal statutes. Some of the aggressive and violent behavior of anti-abortion extremists should be characterized as stalking and harassment. Viewed in this way, their behavior would fall within the reach of anti-stalking statutes.

Abortion rights supporters feel that it is obvious that stalking laws should apply to clinic workers who are followed and who receive hate mail and death threats. As one abortion rights supporter observed: “We’ve been stalked for ten years, we just didn’t have a name for it. We just called it ‘following.’” But stalking does not require both following and near accomplishment of the threatened action to traumatize the victim. As stated by a prosecutor in Houston: “You can be harassed and relentlessly pursued . . . and still not a single word is said. That’s psychological intimidation.” Doctors and clinic staff have become so accustomed to harassment and death threats that they accept them as part of the job.

Under the criminal stalking statute, an abortion protestor would be subject to criminal prosecution for willfully, maliciously, and repeatedly following or harassing an individual associated with an abortion clinic. The verbal, written, or symbolic conduct by the protestor would qualify for

239. Stalker is Accused of Violating Probation, MIAMI HERALD, Dec. 23, 1993, at 5B.
240. Id.
241. Id.
242. Tatsha Robertson, Abortion Foes Say Stalking Law is Not Constitutional, STAR TRIB. (Minneapolis-St. Paul), Oct. 21, 1993, at 1B.
243. Id.
244. Puente, supra note 77.
245. Id.
246. Rohter, supra at note 29.
247. CAL. PENAL CODE § 646.9(a) (West 1996).
prosecution as long as the victim was reasonably fearful for his or her safety or the safety of his or her immediate family.248

Under the civil stalking statute, victims could also pursue relief.249 A civil judgment against radical anti-abortion protestors would hurt the movement financially. Additionally, the standard of proof is lower in civil suits which would increase the likelihood of success.

The repercussions of not providing some means of stopping the terrorist activities of anti-abortion extremists is obvious. Abortion-rights groups note that violence and pressure on clinics and clinic personnel have become so great that fewer doctors are willing to perform abortions.250 These activities are forcing medical schools, hospitals, clinics, and doctors out of the abortion business and are decreasing the availability of this medical service.251 In 87% of the country’s obstetric and gynecology programs, first trimester abortion training is either now an elective or no longer offered.252 Second trimester abortion training is either an elective or not offered in 93% of the programs.253 Hospitals are reluctant to associate with the abortion procedure, and thus most women must go to clinics.254 In 1988, more than 86% of all abortions were performed in clinics and approximately 4% in doctors’ offices.255 In 1982, there were 2,908 alternative abortion providers.256 Today, there are less than 2,400 medical facilities which regularly perform abortions.257 Additionally, abortions are not available in 83% of all counties in the United States.258

The consequence of these statistics is that although abortion may still remain legal, there will be fewer and fewer doctors willing to perform the procedure. Women will be forced to return to “back alleles” and coat hangers. The right to choose must be protected by protecting those who provide this necessary service. Anti-abortion extremists must not be permitted to terrorize and murder abortion providers.259

248. Id.
249. CAL. CIV. CODE § 1708.7 (West 1996).
252. Id.
253. Id.
255. Id.
257. Id.
258. Id.
259. It should be noted that constitutionally protected conduct, such as peaceful picketing and demonstrations, would not be affected by the use of stalking statutes in this manner. Law enforcement officials can prosecute only action and conduct by stalkers, not their motivations.
The use of California's stalking statutes supplies these victims with a remedy at law. This remedy is a powerful means of protecting a woman's right to choose while deterring anti-abortion extremists from, and punishing them for, the increasingly violent and fatal consequences of their acts.