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Speech as a Weapon: Planned Parenthood v. American Coalition of Life Activists and the Need for a Reasonable Listener Standard

Cover Page Footnote

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**SPEECH AS A WEAPON: *PLANNED PARENTHOOD V.*
AMERICAN COALITION OF LIFE ACTIVISTS AND THE NEED
FOR A REASONABLE LISTENER STANDARD**

Alex J. Berkman * **

I. INTRODUCTION

On May 31, 2009, Dr. George Tiller was shot and killed at his church in Kansas.¹ Prior to his death, Dr. Tiller, one of the nation's only late-term abortion providers, was regularly targeted by anti-abortion extremist groups.² Along with other physicians, Dr. Tiller had been the target of violence and the subject of "Wanted" and "Unwanted" posters on anti-abortion websites.³ In addition to offers of rewards for personal information on abortion providers, the websites published, and continue to publish, the so-called "Nuremberg Files."⁴ The Nuremberg Files consist of a list of names displayed using different typefaces to signify whether the doctors, clinic workers, or judges remained alive—normal lettering signified the doctor was alive, grey signified he or she had been injured, and a line through the

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** Please note some of the following footnotes may contain Internet sources depicting explicit content.

¹ Robin Abcarian & Nicholas Riccardi, *Abortion Doctor Fatally Shot; George Tiller Had Long Been Targeted Over Late-Term Procedures*, CHI. TRIB., June 1, 2009, at C10.

² *Id.*

³ *Id.*; see also *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1063-67 (9th Cir. 2002) (en banc) (listing physicians who had been murdered pursuant to "Wanted" posters describing each as an abortionist); *Alleged Abortionists and Their Accomplices: Tiller the Killer Aborted!*, THE CHRISTIAN GALLERY NEWS SERV., <http://christiangallery.com/atrocity/aborts.html> (last visited Jan. 24, 2013) (naming abortionists who were either wounded or murdered).

⁴ See *Alleged Abortionists and Their Accomplices*, *supra* note 3 (displaying the information contained in the Nuremberg Files).

name meant that he or she was dead.⁵

Four Oregon physicians and two clinics sought judicial intervention against the American Coalition of Life Activists (“ACLA”), the anti-abortion extremist group that began the use of “Wanted” posters and the Nuremberg Files while advocating the use of violence in pursuing its cause.⁶ In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*,⁷ the Ninth Circuit affirmed a permanent injunction and an award of compensatory damages against the ACLA.⁸ In reaching its decision, the court looked to the history of violence in the anti-abortion movement and the nature of the statements in question.⁹ The court emphasized that the violent history of the movement, specifically targeting physicians and clinics, converted otherwise innocuous statements into intentional threats and intimidation under the Freedom of Access to Clinic Entrances Act (“the FACE Act”).¹⁰

Context, thus, plays a role in the determination of whether a statement targeting an individual or group of individuals is protected by the First Amendment, but such classification largely depends on the standard of review applied.¹¹ In *Planned Parenthood*, the Ninth Circuit applied a reasonable speaker standard, an objective test relying on whether a reasonable person in the speaker’s position would consider the statement to be threatening.¹² Although the reasonable speaker standard led the Ninth Circuit to render the correct decision in *Planned Parenthood*, it is inherently flawed. Opinions regarding abortion, one of the most divisive issues in America, can vary widely based on geography.¹³ This lack of uniformity in opinion leads to a

⁵ *Id.*

⁶ *Planned Parenthood*, 290 F.3d at 1062.

⁷ 290 F.3d 1058 (9th Cir. 2002).

⁸ *Id.* at 1088.

⁹ *Id.* at 1083.

¹⁰ *Id.*; 18 U.S.C. § 248 (2006).

¹¹ *E.g.*, *United States v. Landham*, 251 F.3d 1072 (6th Cir. 2001); *Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001); *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000); *Metz v. Dep’t of the Treasury*, 780 F.2d 1001 (Fed. Cir. 1986).

¹² *Planned Parenthood*, 290 F.3d at 1074, 1076.

¹³ See Lydia Saad, *Republicans’, Dems’ Abortion Views Grow More Polarized: Republicans Have Grown More Conservative on Abortion Since 1975; Democrats, More Liberal*, GALLUP (Mar. 8, 2010), <http://www.gallup.com/poll/126374/Republicans-Dems-Abortion-Views-Grow-Polarized.aspx> (illustrating “Americans’ views on the extent to which abortion should be legal” by comparing the outlook of Democrats and Republicans from the years

legitimate concern that one who believes abortion is wrong in all circumstances may consider one's effort to end a physician's practice through threats justified. That risk based on one's opinion of abortion shows the need for a more concrete, static standard of review.¹⁴

This Comment will propose the adoption of a reasonable listener standard, rather than the oft-applied reasonable speaker standard, through an analysis of Supreme Court decisions, the Ninth Circuit's reasoning in *Planned Parenthood*, and an overview of the violent history stemming from the anti-abortion extremist movement. The reasonable listener standard would focus on whether a reasonable person in the target's place would consider the statements made by anti-abortion extremist groups to be intentionally threatening. Section II will discuss the anti-abortion movement's history of violence, including the murder of abortion providers and terrorist acts targeting women's health clinics, and the continued use of violent rhetoric by groups similar to the ACLA. Section III will focus on the history of free speech limitations and the importance of a historical context in determining whether arguably threatening speech may be prohibited. Section IV will examine the importance and impact of the Ninth Circuit's opinion in *Planned Parenthood*. Section V will argue for the adoption of a reasonable listener standard by courts which decide cases involving the use of targeted, threatening rhetoric. Section VI will discuss the shortcomings of the FACE Act as well as suggest changes to increase accountability for the use of threatening rhetoric.

1975 to 2009); Lydia Saad, *Common State Abortion Restrictions Spark Mixed Reviews*, GALLUP (July 25, 2011), <http://www.gallup.com/poll/148631/common-state-abortion-restrictions-spark-mixed-reviews.aspx> (showing how some Americans favor specific types of abortion restriction laws, but oppose others—"[m]ost Americans favor abortion consent laws; oppose clinic funding bans, late-term abortions"); *RealClearPolitics Electoral College*, REAL CLEAR POL., http://www.realclearpolitics.com/epolls/maps/obama_vs_mccain/ (last visited Jan. 24, 2013) (demonstrating the 2008 presidential election results by state). One's opinion of abortion in relation to an identified political affiliation along with election results establish a correlation between a state and the population's assumed perspective on abortion. *Id.*

¹⁴ See *Planned Parenthood*, 290 F.3d at 1088 (finding that the "Wanted" posters naming the abortionists posed a true threat). The court noted that "ACLA and physicians knew of this, and both understood the significance of the particular posters specifically identifying each of them. ACLA realized that 'wanted' or 'guilty' posters had a threatening meaning that physicians would take seriously." *Id.*

II. THE RECENT HISTORY OF VIOLENT ACTS AND ASSOCIATED INTERNET THREATS AGAINST ABORTION PROVIDERS

Since 1993, the anti-abortion movement has been closely connected with extreme acts of violence, including abortion clinic bombings, shootings, and murder.¹⁵ On March 10, 1993, Dr. David Gunn was shot and killed from behind by Michael Frederick Griffin outside of an abortion clinic in Pensacola, Florida.¹⁶ In August of that same year, Dr. George Patterson was shot and killed after his name and personal information had been circulated on “Wanted” posters.¹⁷

In July 1994, Paul Hill, a member of Defensive Action, an anti-abortion extremist group, shot three people at a Florida abortion clinic.¹⁸ Hill killed Dr. John Bayard Britton and his bodyguard, James Herman Barrett, and injured Barrett’s wife.¹⁹ When police arrested Hill, who was later found guilty and sentenced to death, he told police, “I know one thing, no innocent babies are going to be killed in that clinic today.”²⁰ At his sentencing hearing, a woman in the courtroom gallery shouted, “This man is innocent and his blood will be on your hands and the hands of the jury!”²¹ Hill would go on, while awaiting execution and even following his death, to become a celebrity in the anti-abortion movement.²²

¹⁵ See *id.* at 1063-66 (examining the murders of several physicians as a result of “Wanted” posters by anti-abortionists); Richard Fausset, *A History of Violence on the Fringe; Tiller’s Slaying Continues a Decades-long Campaign by Extremists Among Abortion Opponents*, L.A. TIMES, June 1, 2009, at A11 (“Bombings. Butyric acid attacks. Sniper shootings. Letters filled with fake anthrax. These are some of the tactics used over the years by antiabortion extremists.”); Abcarian & Riccardi, *supra* note 1 (recounting violent acts performed by those in the anti-abortion movement).

¹⁶ Eric Harrison & David G. Savage, *Doctor’s Killing Raises Fears for Abortion Groups*, L.A. TIMES, Mar. 12, 1993, at A1.

¹⁷ *Planned Parenthood*, 290 F.3d at 1064.

¹⁸ William Claiborne, *Two Killed at Clinic in Florida: Radical Abortion Foe Charged in Shootings*, WASH. POST, July 30, 1994, at A1.

¹⁹ *Id.*; Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175, 1192 (2000).

²⁰ Claiborne, *supra* note 18 (internal quotation marks omitted); William Booth, *Abortion Clinic Slayer Is Sentenced to Death*, WASH. POST, Dec. 7, 1994, at A1.

²¹ Booth, *supra* note 20 (internal quotation marks omitted).

²² See, e.g., *The Paul Hill*, CHRISTIAN GALLERY NEWS SERV., <http://www.christiangallery.com/PaulHillWarningLinks.html> (last visited Jan. 27, 2013) (memorializing Hill as a hero for his violent acts in the name of the unborn).

One month later, Dr. George Tiller was shot in both arms by Rachelle Shannon outside the Women's Health Care Services Clinic in Wichita, Kansas, where he worked as one of the few late-term abortion providers in the United States.²³ Dr. Tiller returned to work the next day.²⁴ At trial, Shannon stated that she shot Dr. Tiller because she was "concerned about innocent, helpless babies being killed by other people who won't stop unless somebody stops them," and that though she did not intend to kill him, "it would have been right either way to try to stop what he's doing."²⁵ In December 1994, two receptionists and five other people were injured when John Salvi fired a rifle at two clinics in the Boston, Massachusetts, area.²⁶

Towards the end of January 1998, several people were injured and a police officer was killed when a bomb exploded outside of a Birmingham, Alabama, clinic.²⁷ Eric Rudolph later confessed to the clinic bombing as well as the Atlanta Olympic Bombing of 1996.²⁸ On October 23, 1998, James Kopp fired a high-powered assault rifle into the Buffalo, New York, home of Dr. Barnett Slepian.²⁹ During a jailhouse interview, Kopp claimed that he intended to wound Dr. Slepian with the sniper attack, but inadvertently killed him when "the bullet took a crazy ricochet."³⁰ Kopp also stated that he did not regret shooting Dr. Slepian, but that he regretted the doctor's death.³¹ "To pick up a gun and aim it at another human being and to fire, it's not a human thing to do The only thing that would be worse, to me, would be to do nothing, and to allow abortions to continue."³²

²³ *Abortion Foe Who Shot a Doctor Is Convicted of Attempted Murder*, N.Y. TIMES, Mar. 26, 1994, § 1, at 7; Abcarian & Riccardi, *supra* note 1.

²⁴ Lianne Hart & J. Michael Kennedy, *Woman Charged After Abortion Doctor Is Shot; Violence: Oregon Activist Is Arrested in Oklahoma After the Wichita Attack. Physician Returns to Clinic*, L.A. TIMES, Aug. 21, 1993, at A1. The shooting occurred less than one week after a local pastor attempted to publish an advertisement stating that killing of abortion providers was "justifiable homicide." *Id.*

²⁵ *Abortion Foe Who Shot a Doctor Is Convicted of Attempted Murder*, *supra* note 23 (internal quotation marks omitted).

²⁶ Abcarian & Riccardi, *supra* note 1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Militant Confesses to '98 Sniper Killing of Abortion Doctor*, CHI. TRIB., Nov. 21, 2002, at N21.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (internal quotation marks omitted).

On May 31, 2009, almost fifteen years after Dr. Tiller was shot in both arms at his clinic and after continued efforts to stop his practice, Scott Roeder killed Dr. Tiller by shooting him in the head at point-blank range in the Wichita, Kansas, church that the doctor attended.³³ At his trial for the murder of Dr. Tiller, Roeder explained that in 1993 he realized that murdering Dr. Tiller, or other physicians who performed abortions, was a means to stop abortions, a practice he viewed as murder.³⁴ Roeder was sentenced to life in prison.³⁵ As he was escorted out of the courtroom following his sentencing hearing, Roeder shouted at the presiding judge that “[t]he blood of babies is on your hands!”³⁶ From his jail cell, before his conviction, Roeder told a reporter, “I know there are many other similar events planned around the country as long as abortion remains legal,” but refused to elaborate on what he meant by the statement.³⁷

Besides their profession, the murdered physicians had one thing in common: in each case, the murder victim had been displayed in the Nuremberg Files, or on “Wanted” posters distributed by anti-abortion extremist groups offering rewards for information about the doctors and stating that they were guilty of mass murder and must be stopped.³⁸ In 1998, within hours after Dr. Slepian was shot and killed in his home, the Christian Gallery News Service, the website that publishes the Nuremberg Files, put a line through the doctor’s name.³⁹

³³ *Abortion Foe Who Shot a Doctor Is Convicted*, *supra* note 23; Robin Abcarian, *Abortion Doctor’s Killer Sentenced to Life in Prison; Activist Defiant As Judge Rules No Parole for 50 Years in Slaying at Kansas Church*, CHI. TRIB., Apr. 2, 2010, at C12.

³⁴ Robin Abcarian, *Killer Says Church Was Only Option: That Was the One Place He Could Get to Abortion Provider George Tiller, He Tells Jurors at His Trial*, L.A. TIMES, Jan. 29, 2010, at A20.

³⁵ Abcarian, *Abortion Doctor’s Killer Sentenced*, *supra* note 33.

³⁶ *Id.* (internal quotation marks omitted) (“If I were allowed to display pictures of aborted babies as you allowed (pictures of) George Tiller lying in a pool of blood, some of the jury might have been persuaded to find me innocent of murder.”).

³⁷ Roxana Hegeman, *Roeder Says More Violence Planned; Abortion Shooting Suspect Contacts AP from Jail Cell*, THE BOSTON GLOBE, June 8, 2009, at 7 (internal quotation marks omitted).

³⁸ *See Planned Parenthood*, 290 F.3d at 1064-65 (showing the murders resulting from “Wanted” posters); *Alleged Abortionists and Their Accomplices*, *supra* note 3 (noting that the lists often include politicians, police officers, and judges, in addition to abortion providers).

³⁹ Vitiello, *supra* note 19, at 1199; *Planned Parenthood*, 290 F.3d at 1065 (stating that the Nuremberg Files website opened in January, 1997).

The Army of God, another anti-abortion extremist group that espouses the use of violence, which has been characterized as a “network of domestic terrorists” by the National Abortion Foundation and Terrorism Research & Analysis Consortium, published a manual that called for homicide as the only plausible means of ending abortion, and also included a “how to” guide for acts of violence against physicians who provide abortions, including arson, making explosives, and butyric acid attacks.⁴⁰ Michael Bray, the Chaplain of the Army of God, who along with two other members served time in prison for bombing the offices of the National Abortion Foundation and the American Civil Liberties Union in 1984, is credited as author of the manual.⁴¹ Additionally, the Army of God hosted “White Rose Banquets,” an annual event organized by the ACLA in which “Wanted” posters were often debuted.⁴² Throughout the Army of God website, those convicted of murdering physicians are referred to

⁴⁰ See *Cell Strategy and Terrorist Groups: Army of God*, TERRORISM RES. & ANALYSIS CONSORTIUM, <http://www.trackingterrorism.org/article/cell-strategy-and-terrorist-groups/army-god> (last visited Jan. 6, 2013) (“The Army of God is a terror organization located in the United States and is committed to stopping abortion.”); *Anti-Abortion Extremists: The Army of God and Justifiable Homicide*, NAT’L ABORTION FED’N, http://www.prochoice.org/about_abortion/violence/army_god.html (last visited Jan. 24, 2013) (showing that in 1984, the Army of God sent a death threat to Supreme Court Justice Harry Blackmun). Law enforcement first discovered the manual in 1993 at the home of Shelly Shannon after she shot Dr. George Tiller in both arms. *Id.* Furthermore, a foreword to the manual states the following:

All of the options have expired. Our Most Dread Sovereign Lord God requires that whosoever sheds man’s blood, by man shall his blood be shed. Not out of hatred of you, but out of love for the persons you exterminate, *we are forced to take arms against you*. Our life for yours—a simple equation. Dreadful. Sad. Reality, nonetheless. You shall not be tortured at our hands. *Vengeance belongs to God only. However, execution is rarely gentile* [sic].

Id. (emphasis added) (internal quotation mark omitted) (quoting The Army of God Manual, available at <http://www.armyofgod.com/AOGsell.html>). Butyric acid is an odiferous, often-nauseating liquid that has been referred to as “vomit-like” and is often used in attacks on women’s health clinics to interfere with services and harass those within. *History of Violence: Butyric Acid Attacks*, NAT’L ABORTION FED’N, http://www.prochoice.org/about_abortion/violence/butyric_acid.asp (last visited Jan. 24, 2013). Between January 1991 and July 1998, butyric acid was used in attacks on clinics more than sixty times. *Id.*

⁴¹ *Army of God and Justifiable Homicide*, *supra* note 40.

⁴² See *Planned Parenthood*, 290 F.3d at 1065 (noting that many doctors felt apprehensive after “Wanted” posters were released at the White Rose Banquets); *Army of God and Justifiable Homicide*, *supra* note 40 (naming Michael Bray from the Army of God as the “host of the annual White Rose Banquets”).

as “heroes who stood up for the unborn,” and the murders they committed are characterized as justified and appropriate.⁴³ On June 19, 2009, Bray published a biblically themed diatribe discussing who was to blame for Tiller’s murder, which clearly showed the intent of the Army of God’s actions.⁴⁴ Bray stated the following:

Consider the man George Tiller when he saw his fate played out in the shooting of abortionists David Gunn, John Barrett, and [Barnett] Slepian. . . . Rather than reaffirm that these men received the *due punishment of their murderous deeds*, Tiller heard those who were ostensibly enlightened[,] the putative teachers of Truth and the Law of God by which he would one day be judged

. . . .

. . . Of all the places where the blood of Tiller ought to be shed, it was most appropriate that it spill in full view of his “brothers” and “sisters” who allowed him to continue in his sin-filled, blind life. May his death serve as a wake-up call so that others may repent and mend their ways.⁴⁵

The Army of God did not limit themselves to mere acts of rhetoric; among the known-members of the “underground network” are multiple individuals convicted of murdering physicians or terrorist acts targeting clinics.⁴⁶

⁴³ ARMY OF GOD, <http://www.armyofgod.com> (last visited Jan. 24, 2013); see also Michael Bray, *Who Will You Blame?*, ARMY OF GOD (June 10, 2009), <http://www.armyofgod.com/MikeBrayWhoWillYouBlame.html> (“[T]he leaders of the ‘pro-life movement’ . . . have refused to consistently call abortion murder by affirming the legitimacy of justifiable homicide; i.e., the necessary force required to prevent what is called murder.”).

⁴⁴ See Bray, *supra* note 43 (stating that although the pro-life movement regarded the murder of physicians to be wrong, the killing of those who provide abortion is justified).

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Army of God and Justifiable Homicide*, *supra* note 40. Known Army of God members included: James Kopp, known as “Atomic Dog” within the Army of God, convicted for the murder of Dr. Barnett Slepian and suspected in connection with shootings of multiple other physicians; Eric Robert Rudolph, convicted in 2003 for bombing a clinic in Alabama; Shelley Shannon, known as “Shaggy West” within the Army of God, convicted for shooting Dr. George Tiller in both arms at his clinic in Kansas; Clayton Waagner, convicted in 2003 for mailing more than 500 anthrax threats to clinics throughout the United States. *Id.*

Prior to the murders of Doctors Tiller, Gunn, Britton, and Patterson, each was featured on a “Wanted” poster at least once.⁴⁷ These and other “Wanted” posters frequently featured personal information such as their home address; their car’s make, model, and sometimes license plate number; and even similar information for their family members.⁴⁸

III. THE LIMITS OF FREE SPEECH

Since the early 1900s, the Supreme Court of the United States has repeatedly addressed the issue of what types of statements, if any, are unprotected by the First Amendment’s right to free speech.⁴⁹ Beginning in 1919, the Supreme Court established the clear and present danger doctrine in *Schenck v. United States*,⁵⁰ which stated that speech having the potential to incite acts of hysteria, panic, violent action (or other acts that Congress has the right to prohibit) is not protected by the First Amendment.⁵¹

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.⁵²

In *Schenck*, appellants were convicted under the Espionage Act of 1917⁵³ for distributing literature that called for people to defy military

⁴⁷ Michelle Miller, *Abortion Docs Decry “Wanted” Posters As Bait*, CBS NEWS (Nov. 9, 2010), http://www.cbsnews.com/2100-18563_162-6994245.html.

⁴⁸ *Anti-Abortion Extremists Distribute “Wanted” Posters for Abortion Providers*, ALTERNET (Oct. 21, 2010), <http://www.alternet.org/speakeasy/2010/10/21/anti-abortion-extremists-distribute-wanted-posters-for-abortion-providers/>.

⁴⁹ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

⁵⁰ 249 U.S. 47 (1919).

⁵¹ *Id.* at 52.

⁵² *Id.* (citation omitted).

⁵³ 40 Stat. 217 (1917).

conscription orders.⁵⁴ In holding that such speech was not protected, the Court stated that because the literature obviously “had been intended to have some effect, and [the Court did] not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out,” which Congress had the power to prevent, it opened the defendants to prosecution.⁵⁵

In April and June of 1969, the Supreme Court decided *Watts v. United States*⁵⁶ and *Brandenburg v. Ohio*,⁵⁷ respectively, in which the Court refined the clear and present danger doctrine and established two new doctrines that work better hand-in-hand as a well defined limitation on free speech.⁵⁸ In *Watts*, the petitioner, an eighteen-year-old African-American who had recently been classified “1-A”⁵⁹ for the draft, was convicted for making threats against the President while discussing the draft with other young people at a rally in Washington, D.C.⁶⁰ In that setting, petitioner stated that he refused to report to a military physical examination the following week, and that “[i]f they ever make me carry a rifle[,] the first man I want to get in my sights is [President Lyndon Baines Johnson].”⁶¹ The Court held that although a statement is vitriolic and violent in nature, it is not the basis for prosecution unless the statement is a “true threat.”⁶² Though the Court did not explicitly define what a true threat is, the Court did hold that the First Amendment protected petitioner’s assertion that he refused to honor his draft selection and wanted to shoot the President in response.⁶³ The Court explained that when taken in

⁵⁴ *Schenck*, 249 U.S. at 49.

⁵⁵ *Id.* at 51.

⁵⁶ 394 U.S. 705 (1969).

⁵⁷ 395 U.S. 444 (1969).

⁵⁸ *Watts*, 394 U.S. at 707-08 (“What is a threat must be distinguished from what is constitutionally protected speech. . . . The language of the political arena . . . is often vituperative, abusive, and inexact.” (citation omitted)); *Brandenburg*, 395 U.S. at 448-49 n.4 (“Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . .”).

⁵⁹ See SELECTIVE SERV. SYS., <http://www.sss.gov/classif.htm> (last visited Jan. 24, 2013) (defining “1-A” as “available immediately for military service”).

⁶⁰ *Watts*, 394 U.S. at 705-06.

⁶¹ *Id.* at 706. Others attending the rally that heard petitioner’s statement responded with laughter. *Id.* at 707.

⁶² *Id.* at 708 (holding that the government did not prove that the petitioner’s statement that he would shoot the president was an actual or “true threat”).

⁶³ *Id.*

context petitioner's statement clearly did not qualify as a true threat.⁶⁴ The Court stated:

We agree with petitioner that his only offense here was "a kind of crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.⁶⁵

Brandenburg reached the Supreme Court on appeal from the conviction of a Ku Klux Klan leader in Ohio for statements made at a rally that were later broadcast on television.⁶⁶ The Court reasoned that any statute infringing upon one's freedom of speech could not stand unless that statute makes a clear "distinction[] between mere advocacy and incitement to imminent lawless action."⁶⁷ Citing cases decided after *Schenck*,⁶⁸ the Court stated that the clear and present danger rule was largely discredited in favor of more protective holdings, favoring the rights of individuals or groups advocating the use of violence as a choice in reaching their goals, while not inciting such violence.⁶⁹

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. . . .

. . . .

. . . [A] prosecution can be launched for the overt acts usually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.⁷⁰

The Court further refined the clear and present danger doctrine, re-

⁶⁴ *Watts*, 394 U.S. at 708.

⁶⁵ *Id.*

⁶⁶ *Brandenburg*, 395 U.S. at 444-45.

⁶⁷ *Id.* at 449 n.4.

⁶⁸ *E.g.*, *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

⁶⁹ *Brandenburg*, 395 U.S. at 447 (The clear and present danger doctrine has never been expressly overruled.).

⁷⁰ *Id.* at 456-57 (Douglas, J., concurring).

placing it with the imminent lawless action doctrine, a test that both protects one's right to make vitriolic political statements while limiting one's right to make statements with the intent to incite violent acts.⁷¹ The Court held that advocacy must be "distinguished from incitement."⁷² The Court specified that:

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State 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.*⁷³

The *Brandenburg* test remains good law, but the Court has continued to clarify what types of rhetoric and advocacy may be designated as non-protected speech.⁷⁴ In 2003, the Court, in *Virginia v. Black*,⁷⁵ held a Virginia statute criminalizing the burning of a cross for intimidation purposes unconstitutional because the statute allowed for the act itself to constitute prima facie evidence of intent to intimidate.⁷⁶

In *Black*, three men were convicted under the cross-burning statute.⁷⁷ Barry Black was arrested while leading a Ku Klux Klan rally.⁷⁸ Jonathan O'Mara and Richard Elliot, neither of whom was a member of the Ku Klux Klan, were arrested under the same statute for attempting to burn a cross on the front lawn of Elliott's neighbor's home, an African-American man.⁷⁹ At the trials leading to appellees' convictions, the juries were instructed that they could infer that the burning of the cross was prima facie evidence of intent to intimidate and that no further mens rea was required.⁸⁰ On appeal, the Supreme

⁷¹ *Id.* at 449 & n.4 (per curiam).

⁷² *Id.* at 448-49.

⁷³ *Id.* at 447 (emphasis added).

⁷⁴ *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

⁷⁵ 538 U.S. 343 (2003).

⁷⁶ *Id.* at 364, 367; VA. CODE ANN. § 18.2-423 (1996).

⁷⁷ *Black*, 538 U.S. at 348.

⁷⁸ *Id.* at 348-49.

⁷⁹ *Id.* at 350.

⁸⁰ *Id.* at 349-51.

Court of Virginia found the statute “unconstitutional on its face” and reversed appellees’ convictions, stating that the statute had a chilling effect and was discriminatory in its focus on cross burning.⁸¹

The Supreme Court of the United States agreed that the statute was unconstitutional, but declined to follow the lower court’s reasoning on whether Virginia could prohibit and criminalize the burning of crosses.⁸² Noting the long, and often violent, history of the Ku Klux Klan, Justice Sandra Day O’Connor, writing for the majority, stated that the burning of a cross is often directly associated with intimidation tactics and therefore may be the basis of a “true threat,” removing any protections afforded by the First Amendment.⁸³ This history of violence associated with cross burning moved the act from a mere political statement to a statement of intimidation or imminent violent action, which the Court characterized as an example of a “true threat” rendering it unprotected speech.⁸⁴ Citing *Watts* and *Brandenburg*, the Court did not explicitly define what a true threat was, but did state that it included:

[T]hose statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with *the intent of placing the victim in fear of bodily harm or death*.⁸⁵

Furthermore, the Court held that the language used by Black did not constitute a true threat because the burning of a cross at a rally was not intended to threaten another or incite violence, rendering it a mere “political hyperbole.”⁸⁶ In contrast, appellees O’Mara and Elliot used the cross burning with the clear intent to intimidate an Afri-

⁸¹ *Id.* at 351.

⁸² *Black*, 538 U.S. at 362.

⁸³ *Id.* at 352-57 (“From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. . . . Often, the Klan used cross burning as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches.”).

⁸⁴ *Id.* at 359-60.

⁸⁵ *Id.* (emphasis added) (citations omitted).

⁸⁶ *Id.* (“[P]olitical hyperbole’ is not a true threat.” (quoting *Watts*, 394 U.S. at 708)).

can-American neighbor.⁸⁷ The difference between the appellees' actions clearly distinguishes political hyperbole from a true threat.⁸⁸ Appellee Black was arrested and convicted under the Virginia anti-cross burning statute while partaking in a peaceful, though vitriolic rally, which expounded anti-African-American and anti-Semitic rhetoric.⁸⁹ On the other hand, appellees O'Mara and Elliott burned a cross on an African-American man's property in retaliation.⁹⁰

The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. . . .

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity.⁹¹

For this reason, the Court affirmed the Supreme Court of Virginia's decision to vacate Black's conviction, but reversed and remanded with regard to O'Mara and Elliot.⁹²

The scenario presented in *Black* parallels the circumstances leading to the Ninth Circuit's decision in *Planned Parenthood* in 2002.⁹³ The Ku Klux Klan has a history of grotesque violent acts, as well as violently-toned hyperbolic rhetoric.⁹⁴ Similarly, the anti-abortion movement, dating back to *Roe v. Wade*,⁹⁵ has a history of violence and hyperbolic rhetoric.⁹⁶ When the line between rhetoric

⁸⁷ *Black*, 538 U.S. at 350 ("Their apparent motive was to 'get back' at [the African-American neighbor] for complaining about the shooting in the backyard.").

⁸⁸ *See id.* at 367-68 ("The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.").

⁸⁹ *Id.* at 348-49.

⁹⁰ *Id.* at 350.

⁹¹ *Id.* at 365-66.

⁹² *Black*, 538 U.S. at 367-68.

⁹³ *Compare id.* (calling for the consideration of context in each determination of a true threat), with *Planned Parenthood*, 290 F.3d at 1063-66 (considering actions that when taken out of context may constitute political hyperbole, but when in context are clearly true threats).

⁹⁴ *See Black*, 538 U.S. at 352-57 ("From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology.").

⁹⁵ 410 U.S. 113 (1973).

⁹⁶ *See Planned Parenthood*, 290 F.3d at 1063-66 (describing the murders and crimes re-

and violence began to blur, as the publication of “Wanted” posters were frequently followed by the murder of the physician being targeted, the intent to intimidate and inherent potential for violence following the publication of such statements, similar to the statements made when one burns a cross on another’s property, became clear.⁹⁷

IV. *PLANNED PARENTHOOD V. AMERICAN COALITION OF LIFE ACTIVISTS*

A mere three years before Dr. Tiller was murdered in his church, the United States Court of Appeals for the Ninth Circuit affirmed a permanent injunction against the ACLA and many other anti-abortion groups, prohibiting the publication of the Nuremberg Files and “Wanted” posters.⁹⁸ The suit was brought by four physicians and two clinics under the FACE Act, which provides “aggrieved persons a right of action against whoever by ‘threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services.’”⁹⁹ At issue before the Ninth Circuit was whether the ACLA’s actions constituted a true threat and therefore were not protected by the First Amendment.¹⁰⁰

The ACLA argued that the trial court erred when it allowed the jury to consider the statements in question in a historical context because the statements were protected regardless of context.¹⁰¹ “[The ACLA] suggests that the key question for us to consider is whether these posters can be considered ‘true threats’ when, in fact, the posters on their face contain no explicitly threatening language.”¹⁰² Due to the lack of a clear intent to threaten through the language of the

sulting from the anti-abortion movement); Vitiello, *supra* note 19, at 1184 (“[B]ecause *Roe v. Wade* was lawless, and because at some future date, some natural disaster ‘might cause the normal order of government to break down,’ the creators of the [Nuremberg] files began collecting information about abortion providers and their supporters to preserve evidence for when they are put on trial for mass murder” (citations omitted)).

⁹⁷ *Planned Parenthood*, 290 F.3d at 1063-66.

⁹⁸ *Id.* at 1088.

⁹⁹ *Planned Parenthood*, 290 F.3d at 1062 (alterations in original) (quoting 18 U.S.C. § 248 (2006)); *see also Hart*, 212 F.3d at 1071 (“Congress enacted the FACE Act in 1994 in an effort to combat the continuing violence against, and forcible interference with, abortion clinics, those providing or receiving abortion-related services, and their families. . . . To this end, the FACE Act provides criminal and civil penalties . . .”).

¹⁰⁰ *Planned Parenthood*, 290 F.3d at 1070.

¹⁰¹ *Id.* at 1072.

¹⁰² *Id.* at 1070-71.

“Wanted” posters and Nuremberg Files, the ACLA maintained that the First Amendment precluded a judgment against them because the challenged language was a mere exercise of political speech.¹⁰³ In response, the physicians argued that the statements must be considered in a historical context and that the district court did not commit error because it limited the amount of historical content submitted to the trier of fact.¹⁰⁴

A. Origins of the Reasonable Speaker Standard in the Ninth Circuit

Due to the Supreme Court’s failure to explicitly define what constitutes a true threat in *Watts*, the Ninth Circuit looked to related precedents and to the FACE Act to determine what qualifies as a true threat.¹⁰⁵ The FACE Act does not explicitly state what constitutes a threat, but instead defines “intimidate” as an act “to place a person in reasonable apprehension of bodily harm to him- or herself or to another.”¹⁰⁶ The Ninth Circuit noted that in *Brandenburg*, although the Court did not clearly describe the line that separates advocacy from threatening speech, the Supreme Court did hold that speech advocating the use of violence is protected, “so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action.”¹⁰⁷

To determine whether historical context should bear on the analysis, the court looked to *Watts* and *Roy v. United States*,¹⁰⁸ the first speech case the Ninth Circuit decided after the Supreme Court decided *Watts*.¹⁰⁹ Based on the Supreme Court’s consideration of context in *Watts*, the Ninth Circuit summarily rejected the ACLA’s plea to have its statements considered without context.¹¹⁰ “ACLA’s

¹⁰³ *Id.* at 1072.

¹⁰⁴ *Id.* at 1071.

¹⁰⁵ See *Planned Parenthood*, 290 F.3d at 1071-74 (examining Supreme Court precedent); see, e.g., *Claiborne*, 458 U.S. 886; *Brandenburg*, 395 U.S. 444; *Watts*, 394 U.S. 705; *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990).

¹⁰⁶ 18 U.S.C. § 248(e)(3) (2006).

¹⁰⁷ *Planned Parenthood*, 290 F.3d at 1071.

¹⁰⁸ 416 F.2d 874 (9th Cir. 1969).

¹⁰⁹ *Planned Parenthood*, 290 F.3d at 1074.

¹¹⁰ *Id.* at 1074-75.

position is that the posters, including the Nuremberg Files, are protected political speech under *Watts*, and cannot lose this character by context. But this is not correct. The Court itself considered context and determined that Watts's statement was political hyperbole instead of a true threat because of context."¹¹¹ Although the Ninth Circuit took context into account to determine whether the ACLA's conduct constituted a true threat or political hyperbole, an objective standard of review was still needed.¹¹²

In *Roy*, the Ninth Circuit considered whether a statement by a marine at Camp Pendleton to a phone operator that he was "going to get" the President during a visit the following day was a true threat.¹¹³ Roy maintained that the statement was innocuous and did not qualify as a threat under 18 U.S.C. § 871,¹¹⁴ the statute prohibiting threats against the President of the United States.¹¹⁵ To determine if Roy's statement constituted a true threat removing it from the protections of the First Amendment, the Ninth Circuit adopted a reasonable speaker standard.¹¹⁶ The court stated:

This [c]ourt therefore construes the willfulness requirement of the statute to require only that the defendant intentionally make a statement, written or oral, *in a context or under such circumstances wherein 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 an intention to inflict bodily harm upon or to take the life of the President¹¹⁷

In reaching its decision, the court took into account that Roy was a marine stationed at Camp Pendleton, that he had ready access to a large cache of weapons, and that the President would be arriving at the base within a few hours.¹¹⁸ Ultimately, the court affirmed the

¹¹¹ *Id.* at 1072.

¹¹² *Id.* at 1074-75.

¹¹³ *Roy*, 416 F.2d at 875.

¹¹⁴ 18 U.S.C. § 871 (2006).

¹¹⁵ *Roy*, 416 F.2d at 876 n.6 (arguing the word "get" did not necessarily imply intent to commit a violent act).

¹¹⁶ *Id.* at 877-78.

¹¹⁷ *Id.* at 877 (emphasis added).

¹¹⁸ *Id.* at 878.

conviction.¹¹⁹

B. Comparing Circuits and Affirming the Reasonable Speaker Standard

Although the Ninth Circuit had an established standard of review for determining if speech constituted a true threat in *Roy*, it had never applied the standard to a case involving the FACE Act or anti-abortion activism.¹²⁰ The Ninth Circuit looked to other circuits' decisions in similar cases.¹²¹ Noting a split among the circuits on the applicable standard, the court considered the differences between a reasonable speaker and reasonable listener standard inconsequential.¹²² "Although all now apply an objective standard, several circuits have a 'reasonable listener' test while others have a 'reasonable speaker' test as we do. The difference does not appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener."¹²³

Of the cases cited by the Ninth Circuit, but largely glossed over in the decision, *United States v. Hart*¹²⁴ is particularly noteworthy. In *Hart*, appellant J. Fred Hart Jr., "a self-declared anti-abortion activist," was convicted under the FACE Act for parking two Ryder cargo trucks in the entrance driveway of two abortion clinics in Little Rock, Arkansas, "rather than an ordinary parking area."¹²⁵ Hart, like the *ACLA* in *Planned Parenthood*, argued that his actions were protected under the First Amendment and that parking a cargo truck in

¹¹⁹ *Id.* at 879.

¹²⁰ *Planned Parenthood*, 290 F.3d at 1074.

¹²¹ *Id.* at 1074-75 n.7.

¹²² *Id.* at 1075 n.7 (noting that seven circuits apply a reasonable listener standard); *see, e.g.,* *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001); *United States v. Landham*, 251 F.3d 1072 (6th Cir. 2001); *Hart*, 212 F.3d 1067; *United States v. Sovie*, 122 F.3d 122 (2d Cir. 1997); *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994); *Metz*, 780 F.2d 1001; *United States v. Callahan*, 702 F.2d 964 (11th Cir. 1983). The remaining five circuits, including the Ninth Circuit, apply a reasonable speaker standard. *See, e.g.,* *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001); *United States v. Hartbarger*, 148 F.3d 777 (7th Cir. 1998); *United States v. Whiffen*, 121 F.3d 18 (1st Cir. 1997); *United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991).

¹²³ *Planned Parenthood*, 290 F.3d at 1075 n.7.

¹²⁴ 212 F.3d 1067 (8th Cir. 2000).

¹²⁵ *Id.* at 1069-70 ("[E]mployees arriving at the clinics were alarmed by the presence of the trucks. . . . [E]mployees of the clinics feared that the trucks contained bombs.").

the driveway of an abortion clinic was not a true threat nor a violation under the FACE Act.¹²⁶ The Eighth Circuit, unlike the Ninth, employed a reasonable listener standard, taking into account multiple factors cited by the Supreme Court in *Watts* to decide if a statement constituted a true threat.¹²⁷ In addition to looking at the statement or action in context, the court also considered:

[H]ow the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether it was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim on other occasions, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.¹²⁸

By taking these factors into account, the Eighth Circuit examined the totality of the circumstances in context, as well as how that statement affected its recipient.¹²⁹

Similarly, in *Metz v. Dep't of Treasury*,¹³⁰ the United States Court of Appeals for the Federal Circuit explicitly outlined the factors to be considered when applying the reasonable listener standard.¹³¹ These factors include: “(1) [t]he listener’s reactions; (2) [t]he listener’s apprehension of harm; (3) [t]he speaker’s intent; (4) [a]ny conditional nature of the statements; and (5) [t]he attendant circum-

¹²⁶ *Id.* at 1069.

¹²⁷ *Id.* at 1071; *see also* *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (applying the reasonable listener standard to an in-person threat made by an anti-abortion activist to a physician).

¹²⁸ *Hart*, 212 F.3d at 1071.

¹²⁹ *Id.* at 1072.

[O]ur inquiry focuses on whether the jury reasonably could have believed that parking the Ryder trucks in the clinic driveways, in light of the surrounding circumstances, constituted a “true threat” of force. Given the context and manner in which Hart placed the Ryder trucks and the reaction of clinic staff and patients and others, we conclude that it was reasonable for the jury to find that Hart’s conduct constituted a “true threat” of force.

Id.

¹³⁰ 780 F.2d 1001 (Fed. Cir. 1986).

¹³¹ *Metz*, 780 F.2d at 1002 (citing *Watts* as a source of factors).

tances.”¹³² Without considering these factors in a determination of whether a statement constitutes a true threat, the decision fails to account for the divided opinion on abortion based on geography and political affiliation in the United States.¹³³ Dr. Warren Hern, a plaintiff in *Planned Parenthood* who appeared on the Nuremberg Files, was quoted by the court as having said that “[h]e was terrified. . . . [He] felt that [it] was . . . a list of doctors to be killed.”¹³⁴ If a case such as *Planned Parenthood* were tried in a state where the majority of the population’s perspective of abortion is even minimally in line with that of the ACLA, the reasonable speaker standard is dangerously malleable.

C. Placing the Merits in Historical Context

In an exhaustive determination of whether the First Amendment protected the ACLA’s vitriolic rhetoric, the court examined closely the movement’s history.¹³⁵ The ACLA and Advocates for Life Ministries, another appellant in the case and a group associated with the ACLA, were unlike other anti-abortion advocacy groups, in that they subscribed to the use of violence to reach their goals.¹³⁶ This acceptance of violence as a viable option led to the formation of the ACLA.¹³⁷ The founders of the ACLA were previously members of Operation Rescue, which denounces the use of violence to reach its goal of ending abortion.¹³⁸ Following the death of Doctors Griffen and Patterson in 1993 and Dr. Britton in 1994, Operation Rescue explicitly denounced these acts of violence.¹³⁹ Operation Rescue,

¹³² *Id.*

¹³³ See Saad, *supra* note 13 (“Large majorities of Americans favor the broad intent of several types of abortion restriction laws that are now common in many states, but have mixed or negative reactions to others.”).

¹³⁴ *Planned Parenthood*, 290 F.3d at 1091-92 (Kozinski, J., dissenting).

¹³⁵ *Id.* at 1063-66 (majority opinion).

¹³⁶ *Id.* at 1064.

¹³⁷ *Id.* (The ACLA split off from Operation Rescue due to a difference in position on the use of violent acts to reach its goal.).

¹³⁸ *Id.*; see also *History*, OPERATION RESCUE, <http://www.operationrescue.org/about-us/history/> (last visited Jan. 27, 2013) (“Operation Rescue led the largest movement involving peaceful civil disobedience in American history. During those early years, thousands of men and women willingly sat in front of abortion mill doors to prevent the killing of innocent children and paid the penalty in arrest and prosecution on trespassing charges.”).

¹³⁹ *Planned Parenthood*, 290 F.3d at 1064.

which expressed interest in moving its headquarters to Dr. George Tiller's clinic three years after he was murdered,¹⁴⁰ described itself as having "led the largest movement involving peaceful civil disobedience in American history."¹⁴¹ The ACLA on the other hand "espoused a 'pro-force' point of view."¹⁴² This, along with the bloody history associated with the anti-abortion movement, created the historical framework on which the Ninth Circuit relied.¹⁴³

In three prior incidents, a "wanted"-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on the poster was killed. . . . [The] ACLA realized that "wanted" or "guilty" posters had a threatening meaning that physicians would take seriously. In conjunction with the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list.¹⁴⁴

The appearance of physicians on "Wanted" posters prior to their murder clearly showed that a reasonable person in the speaker's place would consider such rhetoric threatening because "both the actor and the recipient get the message."¹⁴⁵

V. THE NEED FOR A REASONABLE LISTENER STANDARD

Although the Ninth Circuit reached the correct decision in *Planned Parenthood*—affirming the permanent injunction and compensatory damages—the court failed to consider the partisanship regarding abortion that makes the adoption of a reasonable speaker standard categorically incorrect for cases involving such a divisive

¹⁴⁰ Margery Gibbs, *Anti-Abortion Group Interested in Buying George Tiller's Clinic*, HUFFINGTON POST (June 10, 2009), http://www.huffingtonpost.com/2009/06/10/antiabortion-group-intere_n_213637.html; OPERATION RESCUE, <http://www.operationrescue.org/about-us/history> (last visited Jan. 27, 2013) (saying that the purchase of the building where Dr. Tiller's clinic was located forced the operation to close following his murder).

¹⁴¹ *History*, OPERATION RESCUE, <http://www.operationrescue.org/about-us/history/> (last visited Jan. 27, 2013).

¹⁴² *Planned Parenthood*, 290 F.3d at 1064.

¹⁴³ *Id.* at 1063-66.

¹⁴⁴ *Id.* at 1088 (emphasis added).

¹⁴⁵ *Id.* at 1085.

issue.¹⁴⁶ Abortion remains one of the most divided issues in America as shown in a recent poll finding that more than sixty percent of Americans think abortion should be illegal in most, if not all, circumstances.¹⁴⁷ By placing the focus on the party who made the statement, the standard of reasonableness has the potential to fluctuate based on time, geography, and politics.¹⁴⁸ When dealing with an issue as absolutely fundamental as the right to live without fear of physical harm or death at the hands of another, the courts should adopt a more static standard. Application of a reasonable listener standard provides more certainty and clearer boundaries on what speech is protected. A reasonable person in the shoes of a physician who is targeted by an anti-abortion organization which publishes his or her personal information in a medium with a clear correlation to gruesome murders would undoubtedly be fearful regardless of extraneous factors such as geography or the region's political leanings.

The need to apply a reasonable listener standard in a *Planned Parenthood*-like scenario is somewhat unclear in the abstract, but becomes apparent when taken in the context of the current and ongoing anti-abortion extremist tactics. For example, the Nuremberg Files and "Wanted" posters continue to be published by Neil Horsley, an anti-abortion activist who believes domestic terrorism will be the force that will shape the future of America and who hosts the Christian Gallery News Service, a violently toned weblog.¹⁴⁹ Along with

¹⁴⁶ See *RealClearPolitics Electoral College*, *supra* note 13 (showing the different viewpoints on abortion across party lines); Saad, *Common State Abortion Restrictions*, *supra* note 13 (noting the mixed reviews among Americans regarding different abortion laws); Lydia Saad, *Americans Still Split Along "Pro-Choice," "Pro-Life" Lines: Majorities Believe Abortion Is Morally Wrong, Legal Access to It Should Be Restricted*, GALLUP (May 23, 2011), <http://www.gallup.com/poll/147734/Americans-Split-Along-Pro-Choice-Pro-Life-Lines.aspx> (finding that over the last twenty years, Americans are divided on the abortion issue based on political affiliation, but the majority think that abortion should be illegal in most, if not all circumstances); Frank Newport & Lydia Saad, *Religion, Politics Inform Americans' Views on Abortion: Churchgoing Frequency Is Associated with Strength of Anti-Abortion Views*, GALLUP (Apr. 3, 2006), <http://www.gallup.com/poll/22222/Religion-Politics-Inform-Americans-Views-Abortion.aspx> ("While Republicans as a whole are more likely than Democrats to have anti-abortion views, identifiers with both parties who frequently attend church have stronger anti-abortion views than those who attend less frequently.")

¹⁴⁷ Saad, *Americans Still Split Along "Pro-Choice," "Pro-Life" Lines*, *supra* note 146.

¹⁴⁸ See *RealClearPolitics Electoral College*, *supra* note 13 (illustrating the different views on abortion based on location and party affiliation).

¹⁴⁹ Neal Horsley, *Talk Is Cheap*, CHRISTIAN GALLERY NEWS SERV., <http://www.christiangallery.com/pictures.html> (last visited Jan. 27, 2013); see also *The*

targeting abortion providers, Christian Gallery News Service displays letters, testimony, and interviews of anti-abortion activists who have been convicted of crimes—commonly murder and acts of terror—against physicians and clinics.¹⁵⁰ Christian Gallery News Service also hosts a page titled “Counter Terrorism List For Abortion Abolitionists,” which lists the addresses of convicted and fugitive anti-abortion terrorists so that other activists, and presumably fans, may write to them.¹⁵¹ One of the more disturbing, but not unique, posts on the Christian Gallery News Service is a message entitled “Biblical Justice for Baby-Murderers,” in which the author, Patrick Johnston, explains that “[k]illing a murderer isn’t ‘murder’ any more than arresting a kidnapper is ‘kidnapping.’”¹⁵²

More recently, Pro-Life Nation, an initiative started by Operation Rescue, “whose purpose is to implement a comprehensive, unified, and goal-oriented strategy to end abortion in the United States,” began hosting a database of “Wanted” poster-style information.¹⁵³ The website purports to contain information on more than 700 “Abor-

Propagandist, S. POVERTY L. CTR. INTELLIGENCE REP., Spring 2002, <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2002/spring/the-propagandist> (“The 57-year-old Georgian, [Horsley], warns that ‘domestic terrorism heralds the shape of things to come’ [and] . . . has become the most public face of anti-abortion extremism in America.”); *Alleged Abortionists and Their Accomplices*, *supra* note 3 (describing the Ninth Circuit as “hysterical” for finding the Nuremberg Files to be a true threat).

¹⁵⁰ See, e.g., Linda Wolfe & Neal Horsley, *Accused Abortion Clinic Attacker Says FBI Thinks She Helped Eric Rudolph After He Became a Fugitive*, CHRISTIAN GALLERY NEWS SERV. (Mar. 10, 2003), <http://www.christiangallery.com/philips.htm>; Neal Horsley, *Clay Waagner Claims Breakthrough in Necessity Defense: Could Affect Jim Kopp Case*, CHRISTIAN GALLERY NEWS SERV. (Dec. 6, 2002), <http://www.christiangallery.com/WaagnerNecessity.html> (displaying interview with man praised by anti-abortion movement for sending fake anthrax to women’s health clinics); *Jim Kopp’s Message to America*, CHRISTIAN GALLERY NEWS SERV. (June 7, 2003), <http://www.christiangallery.com/kopptranscript.htm> (displaying a transcript from the trial of the man convicted of murdering Dr. Barnett Slepian in Buffalo, New York).

¹⁵¹ *Counter Terrorism List for Abortion Abolitionists*, CHRISTIAN GALLERY NEWS SERV., <http://www.christiangallery.com/counterterrorism.htm> (last visited Jan. 27, 2013) (“This list contains contact information, when available, for any person who is captured and/or incarcerated or currently underground for using force to deter and/or arrest terrorists working to kill, maim, or otherwise mutilate God’s unborn children.”).

¹⁵² Patrick Johnston, *Biblical Justice for Baby-Murderers*, CHRISTIAN GALLERY NEWS SERV. (Sept. 18, 2002), <http://www.christiangallery.com/biblicaljustice.htm> (referring to the killing of a physician who provides abortion services as “enforcing the law, not breaking it”).

¹⁵³ *Pro-Life Nation Launches with Interactive New Tool: AbortionDocs.org*, OPERATION RESCUE (Jan. 17, 2012), <http://www.operationrescue.org/archives/pro-life-nation-launches-with-interactive-new-tool-abortiondocs-org/>; see also ABORTIONDOCS.ORG, <http://abortiondocs.org/disclaimer/> (last visited Jan. 27, 2013).

tionists” and 600 “Surgical Abortion Clinics” to “aid in the end of abortion through peaceful, legal means.”¹⁵⁴ However, Operation Rescue has a longer history directly associated with “Wanted” posters.¹⁵⁵ In 2010, Philip “Flip” Benham, the former director of Operation Save America (now Operation Rescue), was found guilty and sentenced to probation for misdemeanor stalking of a North Carolina physician when he blanketed a neighborhood with “Wanted” posters.¹⁵⁶

Such examples, taken together with the publication of information that has frequently been correlated with the murder of physicians, come within the reasoning of Justice O’Connor in *Black*: “[R]egardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a ‘symbol of hate.’ And while cross burning *sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed.*”¹⁵⁷ The similarities between the history of the Ku Klux Klan’s cross-burnings and the acts of heinous violence against individuals targeted by such displays (as discussed by Justice O’Connor), as well as the publication of physicians’ information on the Internet prior to their murder, cannot be denied.¹⁵⁸

Admittedly, the Christian Gallery News Service appears to be a fringe publication of the anti-abortion movement, but the content it produces has found its way into the mainstream.¹⁵⁹ The assault and subsequent murder of Dr. George Tiller reflects the dangers of the rhetoric used by the fringe of the anti-abortion movement. Tiller was even the subject of widespread targeting by such non-fringe figures as Fox News Channel hosts.¹⁶⁰ Bill O’Reilly, a host on the Fox News

¹⁵⁴ *Disclaimer*, ABORTIONDOCS.ORG, <http://abortiondocs.org/disclaimer/> (last visited Jan. 27, 2013).

¹⁵⁵ See Franco Ordoñez & Courtney Ridenhour, *Anti-Abortion Activist Guilty of Stalking Charlotte Doctor*, CHARLOTTE OBSERVER (July 2, 2011), <http://www.charlotteobserver.com/2011/07/02/2423347/anti-abortion-activist-guilty.html> (Phillip “Flip” Benham, former director of Operation Save America, was found guilty of stalking a physician after releasing a “Wanted” poster targeting the doctor.).

¹⁵⁶ *Id.*

¹⁵⁷ *Black*, 538 U.S. at 357 (emphasis added) (citation omitted).

¹⁵⁸ *Id.*; see also *Planned Parenthood*, 290 F.3d at 1083 (noting that the FBI took physicians’ appearance on “Wanted” posters as a true threat of impending violence).

¹⁵⁹ See, e.g., *The O’Reilly Factor* (Fox News Network television broadcast May 30, 2007) (adopting nickname for Dr. Tiller created and used by anti-abortion extremist movement).

¹⁶⁰ *Id.*

Channel, repeatedly referred to Dr. Tiller as “Tiller the baby killer,” while discussing whether the physician’s actions constituted murder and trying to relate the topic back to politics.¹⁶¹

Killing babies, that’s the subject of this evening’s “Talking Points Memo.” No matter what you think about the abortion issue, you should be very disturbed by what continues to happen in Kansas. This man, Dr. George Tiller, *known as Tiller the baby killer*, is performing late term abortions without defining the specific medical reasons why. . . . Tiller is executing fetuses¹⁶²

Similarly, in January 2012, a North Carolina state representative called for a return to public hangings for murderers and stated that “[he] would include abortionists” to act as a deterrent to such practices.¹⁶³ The adoption of extreme statements by individuals in such prominent areas further establishes the context with which the trier of fact must interpret a statement and the glaring faults inherent in the reasonable speaker standard.

Unlike the reasoning used by the Ninth Circuit, if what constitutes hyperbolic rhetoric versus a true threat can change in the national context, the reasonable speaker standard obviously fails to be objective.¹⁶⁴ If a nickname as defamatory as “the baby killer,” commonly used by extremist groups, can move from the fringes of abortion activism to a television news program, the position of the reasonable speaker is obviously too malleable.¹⁶⁵ The reasonable speaker standard also has the potential to fail on a more local level, as

¹⁶¹ *Id.*; see also *George Tiller—The Baby Killer—Link Page*, ARMY OF GOD, <http://www.armyofgod.com/GeorgeTillerindex.html> (last visited Jan. 27, 2013) (arguing that George Tiller is akin to Adolf Hitler and that both were guilty of mass murder).

¹⁶² *The O’Reilly Factor*, *supra* note 159 (emphasis added).

¹⁶³ Blue Aardvark, *NC State Rep: Public Hanging for Abortion Providers*, DAILY KOS (Jan. 28, 2012), <http://www.dailykos.com/story/2012/01/28/1059346/-NC-State-Rep-Public-Hangings-for-abortion-providers>.

¹⁶⁴ *Planned Parenthood*, 290 F.3d at 1075 n.7 (stating that there is not a difference between the holding of an Eighth Circuit case applying a reasonable listener standard and the Ninth Circuit’s application of a reasonable speaker standard).

¹⁶⁵ *The O’Reilly Factor*, *supra* note 159; see also *The O’Reilly Factor* (Fox News Network television broadcast June 4, 2009) (stating that the media was attacking him for characterizing Tiller as a mass murderer, when he was merely stating his “opinion on his methods”).

can be seen by the recent erosion of reproductive rights by state governments throughout the United States.¹⁶⁶ For example, in Indiana, the state legislature passed a law that greatly restricts access to women's health clinics which provide abortion services by prohibiting funding of Planned Parenthood facilities, banning abortions after twenty weeks of gestation and requiring that all providers offer women the opportunity to view an ultrasound before receiving services.¹⁶⁷ Also, in January 2012, an appellate court upheld a Texas law requiring doctors to perform an ultrasound on any woman seeking an abortion prior to performing any procedures.¹⁶⁸ Even if the patient refuses to view the ultrasound, Texas doctors are required to describe it to the patient, unless the woman was impregnated through incest or rape, or the fetus is abnormal.¹⁶⁹ Similarly, in 2012, Virginia passed a bill requiring that any woman seeking an abortion must undergo an abdominal ultrasound, although the original iteration of the bill called for a transvaginal ultrasound.¹⁷⁰ Although such actions by elected officials merely show a great aversion to abortion and a woman's right to choose, they also show that these measures are supported by the population that elected those state officials.

Furthermore, as stated by Michael Bray in his rant regarding where to place blame for the murder of Dr. George Tiller, many people may disagree with or even condemn overt acts of violence against physicians.¹⁷¹ Such a stance says nothing about one's sympathies for non-violent intimidation tactics, such as "Wanted" posters

¹⁶⁶ See *2011 Mid-Year Legislative Wrap Up*, CTR. FOR REPROD. RTS. 1, 15 (2011), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/state_midyr_wrapup_2011_8.10.11.pdf ("In at least twenty states, legislation designed to restrict women's access to reproductive health care and impinge on their constitutional rights has already become law.").

¹⁶⁷ *Id.* at 8.

¹⁶⁸ Terry Baynes, *Texas Abortion Law Requiring Doctors to Play Fetal Heart Sounds Upheld by Appeals Court*, NAT'L POST (Jan. 10, 2012), <http://news.nationalpost.com/2012/01/10/texas-law-requiring-pre-abortion-ultrasound-doesnt-violate-constitution-appeals-court/>.

¹⁶⁹ *Id.*

¹⁷⁰ Sabrina Tavernise, *Virginia: Pre-Abortion Ultrasound Mandate Enacted*, N.Y. TIMES, Mar. 8, 2012, at A21.

¹⁷¹ Bray, *supra* note 43 ("[T]he leaders of the 'prolife movement' and teachers of the Scriptures . . . declare such defensive actions to be *wrong!* They have refused to consistently call abortion murder by affirming the legitimacy of justifiable homicide; i.e. the necessary force required to prevent what is called murder.").

and the Nuremberg Files, used in the effort to end abortion. By adopting a reasonable listener standard, the courts would require the trier of fact to look to the impact of the statement upon the target, not what a reasonable speaker, who may have great sympathy towards those using non-violent, but intimidating, tactics to end abortion, would consider to be a true threat in a given location, at a given time.

Despite the argument presented by the Ninth Circuit that the difference between a reasonable speaker and reasonable listener standard “does not appear to matter much,”¹⁷² the recent attacks on reproductive rights and previous attacks on those physicians that provide access to these rights say otherwise. A reasonable person in Dr. Tiller’s position, for example, may have had a much different opinion of whether the ACLA’s rhetoric was intended to be threatening than a reasonable person who shares the ACLA’s perspective. A claim that physicians, in the general sense, should suffer or be executed for providing abortions is clearly hyperbolic rhetoric, but when that rhetoric is targeted at a specific physician, the nature, impact, and purpose of the statement change drastically.

When viewed from the perspective of the speaker, the determination of whether the statement is intended to threaten is too variable and subject to the sympathies of jurors. In Alabama, Texas, or Oklahoma, one may disagree with the use of force but consider intimidation a justified tactic to end abortion practices; in California or New York, that view could change drastically.¹⁷³ When the statement is considered from the position of the physician targeted by an extremist group, on the other hand, jurors are much less likely to consider their own sympathies, and more likely to render a uniform, objective standard of review and more consistent verdicts. A reasonable listener standard provides plaintiffs with a standard that looks to the impact of a statement in context based on how it affects those targeted by it, rather than a standard that is largely subject to the political and religious views of the region or state in which a claim is brought.

¹⁷² *Planned Parenthood*, 290 F.3d at 1075 n.7.

¹⁷³ *See, e.g., supra* note 13.

VI. STATUTORY REFORM

With no definition of what constitutes a threat, and minimal guidelines as to what constitutes intimidation, the FACE Act does not provide the necessary protection to those wronged by extremists within the anti-abortion movement, such as the Christian Gallery News Service or the ACLA.¹⁷⁴ For consistent relief to be granted to those targeted and affected by the intimidation tactics of the anti-abortion movement, the statute must be strengthened by explicitly stating what constitutes a threat, defining intent, and expressly calling for a reasonable listener standard. Currently, the FACE Act imposes criminal penalties, including imprisonment for a maximum of one year for a first offense, three years for a subsequent offense, \$10,000 in fines, up to ten years imprisonment for violations that include violent acts, and possibly a life sentence if that violent act causes the death of another.¹⁷⁵ Violation of the FACE Act also opens violators to civil liability, including \$5,000 in statutory damages per violation.¹⁷⁶ Though strong on its face, the FACE Act falls short of providing substantive relief to those harmed because it does not provide a proper foundation for a claim.

To strengthen the statute, Congress should add a definition of what constitutes a threat. Enumerating the factors stated in *Watts* would provide both substantive statutory relief to those wronged, as well as a clear, explanatory basis for advocacy within the bounds of free speech.¹⁷⁷ The FACE Act currently defines intimidation as the following: “to place a person in reasonable apprehension of bodily harm to him- or herself or to another.”¹⁷⁸ The phrasing of this definition clearly puts the focus on the recipient of a threat, and any definition of threat in the statute should explicitly state that a reasonable listener standard is to be applied. For example, a threat could be defined as: *Any statement made with the intent to intimidate a person or organization that provides abortion services, or a person seeking abortion services, using language, that when taken in context, with the actor having prior knowledge of that context, would cause a rea-*

¹⁷⁴ 18 U.S.C. § 248(e) (2006).

¹⁷⁵ *Id.* § 248(b).

¹⁷⁶ *Id.* § 248(c).

¹⁷⁷ *Metz*, 780 F.2d at 1002.

¹⁷⁸ 18 U.S.C. § 248(e)(3).

sonable target of such statements to be fearful of bodily harm or death to him- or herself or another. Including the caveat that the actor has prior knowledge of the context in which the statement was made prevents placing strict liability upon one who may be utilizing free speech rights without knowledge of the previous crimes perpetrated in the name of the anti-abortion movement. By including these minor clarifications, the statute would prevent some of the potential subjectivity inherent in the current interpretation of the statute through the reasonable speaker standard employed by courts such as the Ninth Circuit.

VII. CONCLUSION

As the Supreme Court elaborated in *Brandenburg*, *Watts*, and *Black*, the right to free speech is not absolute and does not provide a defense when the speech in question is intended to put another in fear for his or her life.¹⁷⁹

The hallmark of the protection of free speech is to allow “free trade in ideas”—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . .

The protections afforded by the *First Amendment*, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.¹⁸⁰

For the anti-abortion movement, the right to protest at women’s health clinics remains unquestioned when it does not physically interfere with access to a clinic.¹⁸¹ That right to protest, though, does not include the right to threaten or intimidate another to reach the goal of ending abortion.¹⁸²

As the Court asserted in *Brandenburg*, *Watts*, and *Black*, speech advocating the use of violence to achieve a goal is protected

¹⁷⁹ See *Black*, 538 U.S. at 358; *Brandenburg*, 395 U.S. at 447; *Watts*, 394 U.S. at 707.

¹⁸⁰ *Black*, 538 U.S. at 358.

¹⁸¹ 18 U.S.C. § 248(a)(e).

¹⁸² E.g., *Planned Parenthood*, 290 F.3d 1058; *Hart*, 212 F.3d 1067.

when stated generally or as a principle, as do many anti-abortion extremist groups, when historical context is not taken into consideration.¹⁸³ The right to live without being in fear of imminent violence is fundamental and absolute.¹⁸⁴ By comparison, as the Court has stated for nearly 100 years, the right of free speech is not absolute.¹⁸⁵ The rhetoric used by organizations such as Operation Rescue and the Christian Gallery News Service presents such a circumstance.

Though the right to display nauseating, and often horrifying, images on placards or on websites is protected speech, there is clearly a point when actions move from protected speech to true threats, which do not receive the protections of the First Amendment. In *Hart*, the Eighth Circuit, using a reasonable listener standard, found that the parking of a cargo truck adjacent to a women's health clinic was a true threat.¹⁸⁶ What would otherwise be an innocent act was transformed, in this case the mere parking of a vehicle, to a true threat, attempting to bomb the clinic, which is clear due to historical context and the effect the action had on the employees of that clinic.¹⁸⁷

Unfortunately, in *Planned Parenthood*, by putting the focus on the speaker, the Ninth Circuit adopted a standard that allows for negative views of abortion and sympathies towards the use of intimidation as a viable tactic to stop abortion to fog the judgment of jurors. Just as in *Black*, where a cross was placed and lit on an African-American man's property, a person is justified in expecting consistency in the determination of whether such speech is meant to intimidate or threaten.¹⁸⁸ By adopting a reasonable speaker standard, the

¹⁸³ *Brandenburg*, 395 U.S. at 447; *Watts*, 394 U.S. at 707 (“What is a threat must be distinguished from what is constitutionally protected speech.”); *Black*, 538 U.S. at 359.

[T]he constitutional guarantees of free speech and free press do not permit a State 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.

Id. (quoting *Brandenburg*, 395 U.S. at 447) (internal quotation marks omitted).

¹⁸⁴ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (stating that threats which create a “fear of violence [and] the possibility that the threatened violence will occur” are not protected by the First Amendment).

¹⁸⁵ See *supra* notes 15-46; *Schenk*, 249 U.S. 47.

¹⁸⁶ *Hart*, 212 F.3d at 1072.

¹⁸⁷ *Id.* (“These circumstances . . . were reasonably interpreted by clinic staff and police officers as a threat to injure.”).

¹⁸⁸ *Black*, 538 U.S. at 350.

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Ninth Circuit precludes any such consistency. Consistency may never be guaranteed, but the adoption of a reasonable listener standard and its addition to the FACE Act is one step closer to such a goal. To allow political and religious beliefs to play a role in the determination of whether a statement targeting a physician in the context of a history of horrific violence is untenable and unjust.