

FACEING HATE: USING HATE CRIME LEGISLATION TO DETER ANTI-
ABORTION VIOLENCE AND EXTREMISM

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This paper explores the use of state and federal hate crime legislation to bolster the protections provided by the Freedom of Access to Clinic Entrances Act (“FACE”).² FACE became law in 1994,³ in response to the widespread pandemic of clinic violence and blockades in the 1980s and 1990s.⁴ Its legislative intent, as conveyed through legislative history, is to “secure the rights of women seeking reproductive health services”⁵ and address “violence against women, violence against doctors, [and] violence against nurses.”⁶

Part I of this paper exposes the problematic holes in FACE protections, particularly with respect to the targeted harassment of abortion providers outside the immediate vicinity of abortion clinics. Part II explains hate crime legislation as a unique tool to address head-on our growing national problem of domestic terrorism, including the actions of anti-choice extremist groups. Part III describes the utility of federal hate crime legislation to shift public sentiment, tapered by Commerce Clause limitations and other issues affecting their legislative reach. Part IV focuses on the possibility of state crime legislation for sentence enhancement, and uses a Louisiana state law as an example of a piece of hate crime legislation

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2. 18 U.S.C. § 248 (2012). Many thanks to the staff at the Center for Reproductive Rights for the idea and inspiration to pursue this topic.

3. Pub. L. No. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248 (2012)).

4. *Abortion Clinic Violence: Hearings Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. 213-36 (June 10, 1993) (statement of Janet Reno, U.S. Att’y Gen.).

5. *Id.* at 213.

6. Michael Wines, *Senate Approves Bill to Protect Abortion Clinics*, N.Y. TIMES (May 13, 1994), <http://www.nytimes.com/1994/05/13/us/senate-approves-bill-to-protect-abortion-clinics.html?pagewanted=all>.

that successfully targets the anti-choice conduct in question. Part V discusses the expansion of hate crime legislation to cover providers as a protected class, and Part VI defines the potential for existing state hate crime legislation to be used as a prosecutorial tool in the conviction of anti-choice extremists. Part VII closes with an acknowledgement of drawbacks and limitations to these strategies from both legal and cultural standpoints.

I. THE GAPS OF FACE: TARGETED HARASSMENT AGAINST PROVIDERS

In *Living in the Crosshairs*, Professor David S. Cohen provides a textual analysis of FACE's provisions. FACE protects both the patients seeking reproductive health services, as well as the providers offering such services, by "prohibit[ing] three actions (as well as attempts to engage in these three actions): (1) restricting the patient's or provider's movement, (2) injuring a patient or provider, and (3) making the patient or provider reasonably fear bodily harm to herself or someone else."⁷

FACE has survived the Commerce Clause scrutiny of *Lopez* and *Morrison* in several federal circuit decisions, mainly due to "the existence of an interstate market for both providers and recipients of reproductive health services, and the substantiality of the threat posed to interstate commerce in such services by activity proscribed in the act."⁸ Many states have enacted "their own versions of FACE or similar statutes, allowing prosecutors to bring criminal or civil charges under state law, and giving providers broader opportunities for enforcement of the law."⁹

According to Cohen, FACE "only applies to actions that are accomplished by force, by threat of force, or by making it difficult, dangerous, or impossible for the patient or provider to enter or leave a facility." Additionally, said actions must be motivated by the victim's "involvement with abortion" or as a way to "prevent that person from being involved with abortion."¹⁰ Cohen reports the changing landscape of anti-abortion protests as a result of this legislation: "In the seventeen years before FACE, there were 347 reported clinic invasions and 634 clinic

7. DAVID S. COHEN & KRISTEN CONNON, *LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM*, 208 (2015).

8. Karl Manheim, *Dueling Federalisms: Recent Rulings by The Rehnquist Court Have Reignited the Historic Debate Over the Meaning of the Tenth Amendment*, 21 L.A. LAWYER 33, 34, 36 (December, 1998).

9. NAT'L ABORTION FED'N, *LEGAL REMEDIES TO ADDRESS CLINIC VIOLENCE AND HARASSMENT: A HANDBOOK FOR NAF MEMBERS* 6 (2014); These states include: California, Colorado, Connecticut, D.C., Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New York, North Carolina, Oregon, Washington, and Wisconsin. See NAT'L ORG. FOR WOMEN LEGAL DEF. AND EDUC. FUND & THE FEMINIST MAJORITY FOUND., *DRAWING THE LINE AGAINST ANTI-ABORTION VIOLENCE AND HARASSMENT* 14 & 18 n.47; See NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUND., *WHO DECIDES? A STATE BY STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS* 15 (25th ed. 2016).

10. Cohen, *supra* note 6, at 208-09.

blockade. . In the nineteen years after FACE, there were 52 reported clinic invasions and 144 blockades . . .”¹¹

While FACE seems effective in addressing violence and threats occurring within the immediate vicinity of these clinics, incidences of targeted harassment of providers have increased, including hate mail, phone calls, stalking, and home picketing.¹² Cohen hypothesizes that adding providers as a protected class under existing hate crime legislation could create enhanced penalties for FACE violations, leading to greater deterrence.¹³ Establishing abortion providers as a protected class under hate crime legislation may also have the effect of expanding successful FACE arrests and convictions, by emphasizing to local law enforcement, prosecutors, judiciary, and the general public that the targeting harassment that abortion providers undergo is a serious national problem worthy of address.¹⁴

Patients obtaining abortion or reproductive health services, currently protected under FACE, could be integrated into existing hate crime legislation as well, in order to achieve the same effects on patient-side clinic violence and harassment. Cohen has stated that within his research interviews, many providers “expressed a need for FACE to have stiffer penalties to better dissuade protesters from violating the law.”¹⁵ Hate crime laws can be used to address these providers’ concerns, by either enhancing FACE’s punitive effect, or else providing an alternate channel for the prosecution to use.

II. HATE CRIMES: HALTING DOMESTIC TERRORISM IN ITS TRACKS

There are various justifications for promulgating hate crime laws to extend criminal sentences, punishing such conduct to a greater extent than

11. *Id.* at 209.

12. *Id.* at 209 & 297 n.8.

13. Cohen, *supra* note 6, at 252: “Adding this language would ensure that crimes targeted at abortion providers because of their work in abortion care would be punished more seriously and possibly deter some extremists from targeting abortion providers. . . .”

14. See e.g., *Hate Crimes Violence: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. 19 (Aug. 4, 1999) “But we know that even [the 8,049 hate crimes reported in 1997] significantly underestimate[] the true level of hate crimes. Many victims do not report these crimes. Police departments do not always recognize hate crimes. Many don’t collect any hate crime data. And about 80 percent of those that do, even some in large metropolitan areas, report few or no hate crimes in their jurisdictions, even when most observers conclude a larger problem exists.” (statement of Eric H. Holder, Deputy Att’y Gen.).

15. Cohen, *supra* note 6, at 251. “As FACE currently stands, a criminal conviction for a first offense is subject to a fine and up to one year in jail; for a second offense, it is up to three years. The penalty can be greater if bodily injury or death results and must be less if the violation is ‘nonviolent physical obstruction.’ In a FACE civil lawsuit, the maximum monetary award is \$5,000 if a private individual brings the case or \$10,000 if the attorney general does.”

conduct motivated by other factors. First, it must be emphasized that criminal sentencing often takes into account the *mens rea* of the perpetrator, so taking biases into account is not completely foreign to our criminal justice system.¹⁶ Because perpetrators target their victims based on characteristics common to a community, they “not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs.”¹⁷ This is understood to be the *in terrorem* effect of this class of crimes, in which the targeting of one victim “sends shockwaves through the entire community sharing that characteristic, instilling fear and unease.”¹⁸

The *in terrorem* ripple phenomenon provides a strong link between individual acts of hate and widespread acts of domestic terrorism.¹⁹ While some hate crimes are isolated on an intrastate local level, many hate crimes are perpetrated as part of the highly-orchestrated plans of domestic terrorist organizations.²⁰ Even intrastate, small-scale hate crimes are indicative of pervasive nationwide xenophobia, white supremacy, and patriarchal biases. “Such hate crimes, committed solely because the victims have a different skin color or a different faith or are gays or lesbians, leave deep scars not only on the victims but on our larger community. They are acts of violence against America itself.”²¹

Mainstream media has underreported the upswing of clinic violence in the past year, and refused to link the violence to the Center for Medical Progress (“CMP”) and other extremist-affiliated organizations as its obvious catalysts. Media Matters, a politically progressive media watchdog,²² has pooled what little coverage there has been on the issue, which sparked NARAL to petition the DOJ to investigate these incidents as domestic terrorism.²³ The DOJ responded to our national problem of

16. See, e.g., Model Penal Code § 2.02(2).

17. N.Y. PENAL LAW § 485.00.

18. Matthew Trout, *Federalizing Hate: Constitutional and Practical Limitations to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009*, 52 AM. CRIM. L. REV. 131, 134 (2015).

19. See, e.g., Barbara Perry & Shahid Alvi, ‘We are all vulnerable’: The *in terrorem* effects of hate crimes, 18 INTERNATIONAL REVIEW OF VICTIMOLOGY 57 (January, 2012).

20. See, e.g., Jerome P. Bjelopera, *Sifting Domestic Terrorism from Hate Crime and Homegrown Violent Extremism*, CRS INSIGHT, (June 13, 2016), <https://www.fas.org/sgp/crs/terror/IN10299.pdf>.

21. Hate Crimes Timeline (June 7, 1997), <http://www.hrc.org/resources/entry/hate-crimes-timeline>.

22. Olivia Kittel & Rachel Calvert, *LA Times And WA Spokesman-Review’s Coverage of Planned Parenthood Arsons Shines Compared To National Print And Cable News*, Media Matters (Oct. 9, 2015), <http://mediamatters.org/research/2015/10/09/la-times-and-wa-spokesman-reviews-coverage-of-p/206061>.

23. NARAL, *Tell the Department of Justice: Investigate Clinic Violence as Domestic Terrorism*, http://actnow.prochoiceamerica.org/sign/151006_clinicviolence/?utm_source=pr#VyZt4tCdLzL (last visited May 1, 2016).

domestic terrorism in mid-October of 2015 by establishing a new post addressing domestic terrorism, though it is unclear whether this was in response to anti-abortion extremist activity or domestic terrorism more generally.

Since 9/11, domestic terrorists have murdered almost twice as many American citizens as compared to foreign terrorists, so the new DOJ position is long overdue.²⁴ The Southern Poverty Law Center published a helpful report in Feb 2015 about domestic terrorism and how the Department of Homeland Security's Domestic Terrorism Executive Committee had been all but disbanded after Republicans condemned their release of a 2009 report linking an upsurge in domestic terrorism to Obama's 2008 election.²⁵ The use and misuse of the word "terrorism" in describing political and violent acts is illuminating for those of us who recognize the hypocrisy of campaigns to close borders to refugees carried out by the same politicians who encourage domestic terrorism at home through violent rhetoric and legislation meant to assault reproductive healthcare access.

III. FEDERAL AND STATE HATE CRIME LAWS: OPPORTUNITIES AND LIMITS

The Hate Crimes Prevention Act of 2009 (hereafter, "HCPA"), also known as the Shepard-Byrd Act, was enacted as an amendment within the Defense Department Authorization Act for 2010.²⁶ The HCPA provides funding and assistance to state and local jurisdictions for hate crime prosecutions and investigations, but also significantly expanded the scope of current federal hate crime laws for the first time since the Civil Rights Act of 1968. Section 249(a)(2) expands the class of victims, criminalizing willful acts of violence or attempts to commit such violence when motivated by gender, disability, sexual orientation, or gender identity.²⁷

Sections (a)(2)(B)(iv) (I-II) of the HCPA outlaw conduct that (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate or foreign commerce.²⁸ State and local authorities are typically the enforcers of criminal law, and the majority of hate crime prosecutions occur below the federal level. Furthermore, the Supreme Court's decisions in *U.S. v.*

24. Justin Salhani, *Right-Wing Terrorists Are Killing More Americans Than Jihadists Are, And Now The DOJ Will Act*, ThinkProgress (Oct. 16, 2015), <http://thinkprogress.org/world/2015/10/16/3713318/doj-creates-new-post-to-focus-on-threats-from-rightwing-radicals-and-other-domestic-terrorists/>.

25. Southern Poverty Law Center, *Age of the Wolf: A Study of the Rise of Lone Wolf and Leaderless Resistance Terrorism*, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/lone_wolf_special_report.pdf.

26. National Defense Authorization Act, H.R. 2647, 111th Cong. (2010).

27. 18 U.S.C. § 249.

28. 18 U.S.C § 249(a)(2)(B)(iv)(I-II).

Lopez and U.S. v. Morrison, establish boundaries curbing Congress's ability to regulate the violent activity of private actors. In addition to Commerce Clause concerns, the final hurdle in federal hate crime implementation can be found within the federal mandate of the Department of Justice itself, which "defer[s] prosecution in the first instance to State and local law enforcement officials, except in highly sensitive cases in which the Federal interest in prompt Federal investigation and prosecution outweighed the usual justifications of the backstop policy."²⁹ The matter must, in other words, implicate a "substantial Federal interest" that is "demonstrably unvindicated" by state or local action.³⁰³¹

Despite these shortcomings, federal hate crime legislation remains a powerful way to shape public perception of traditionally marginalized groups on a nationwide scale. Bias and hate is implicitly condoned and at times overtly encouraged by the government through discriminatory legislation. By explicitly acknowledging the experiences of those who have suffered violence under animus due to sexual orientation, gender, disability, religion, race, or national origin, the legislature initiates a long process in reversing the effects of centuries of state-sanctioned hatred. Hate crime legislation is a way for the law to reorient causation away from victim and towards the offender's wrongful conduct, by pathologizing rather than tacitly normalizing (and thereby condoning) discrimination.³²

IV. EXPANDING ON THE STATE LEVEL

As discussed above, the limitations affecting federal hate crime legislation include constitutional concerns related to the Commerce Clause and First Amendment, which ultimately affected the jurisdictional

29. *The Matthew Shepard Hate Crimes Prevention Act of 2009; Hearing on S. 909 Before the S. Comm. on the Judiciary*, 111th Cong. 175–76 (2009) (statement of Eric Holder, Att'y Gen.).

30. *Id.*; see 18 U.S.C. § 249(b).

31. Human Rights Campaign, *A Guide to State-Level Advocacy Following Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act* 74, <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HRC-Hate-Crimes-Guide-2014.pdf>.

("Prior to federal prosecution of a hate crime, the attorney general or his or her designee must certify, in writing, that (1) the state does not have jurisdiction, (2) the state has requested that the federal government assume jurisdiction, (3) the verdict or sentence obtained pursuant to state charges left demonstratively unvindicated the federal interest in eradicating bias-motivated violence, or (4) a prosecution by the United States is in the public interest and necessary to secure substantial justice.").

32. See, e.g., Mark Austin Walters & Jessica Tumath, *Gender Hostility, Rape and the Hate Crime Paradigm*, 77 *The Mod. L. Rev.* 563, 579-84 (2014). ("...whether the additional stigma of 'hate' will have any deterrent effect on individual offenders is less important than the impact that it may have on broadly held social attitudes towards rape perpetrators and victims...Rather it is the potential for longer term norm creation which is of greatest significance. An important purpose of hate crime law is to shape social mores by policing the boundaries of acceptable behavior.").

("interstate") and punitive ("willfully violent acts") breadth of the legislation. The *de facto* implementation of the law is similarly adversely affected by the Department of Justice's backstop policy, which mandates federal interference within state-based actions only in matters that sufficiently implicate federal interests. State hate crime legislation can fill in the gaps in federal law, and provide coverage for crimes committed without a federal nexus.

Some state hate crime laws criminalize violent hate crimes outright, and could potentially provide an alternate form of redress for victims. Hate crime conviction sentences tend to be harsher than FACE convictions, which may create a deterring effect on anti-abortion extremist groups. Some state crime laws do not criminalize hate crimes, but instead create sentencing enhancements for hate crime perpetrators, which may provide the same deterrent effect.

In addition to harsher punishments, state hate crime laws may be able to cover a wider range of anti-abortion conduct than what is currently under federal legislative scope. While the HCPA would only be able to provide redress for violent FACE violations (should providers and patients be added as protected classes), some state hate crime laws provide protection to enumerated classes against threats, vandalism, and other nonviolent acts.³³ Adding abortion providers as a protected class to such state hate crime laws would consequently extend the sentences of protesters who threaten providers or commit other nonviolent acts in violation of FACE.

"As of January 2014, 45 states have enacted hate crime statutes. . ."³⁴ 27 of those states protect gender as a class.³⁵ According to the Human Rights Campaign's Hate Crimes Guide, "most hate crimes will continue to be prosecuted at the state level."³⁶ As a result, state hate crime legislation must follow in the footsteps of the HCPA, adding sexual orientation and gender to their enumerated protected classes.³⁷ Additionally, state legislation must surpass federal legislation in order to provide adequate

33. See, e.g., Cal. Penal Code § 422.6 (the "Bane Act").

34. Trout, *supra* note 17, at 135.

35. *Id.* For a helpful chart of State Hate Crime laws, see Anti-Defamation League, *State Hate Crime Statutory Provisions* (Mar. 2013), http://www.adl.org/assets/pdf/combating-hate/state_hate_crime_laws_march_2013.pdf.

36. Human Rights Campaign, *supra* note 24, at 12.

37. The Anti-Defamation League provides a model penalty-enhancement hate crime legislation that advocates and legislators can look to for guidance in addressing the aforementioned gaps in state hate crime laws, and includes criminal and civil penalties for both violent and nonviolent crimes committed against victims "by reason of the actual or perceived race, color, religion, national origin, sexual orientation or gender of another individual or group of individuals. . .". See Anti-Defamation League, *Hate Crimes Law 4* (2012), <http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf>.

redress for “non-violent hate crimes or hate crimes committed solely against another’s property.”³⁸

Finally, state hate crime law amendments are crucial for local law enforcement, even if the HCPA is successfully amended to cover patients and providers. Many local jurisdictions refuse to prosecute hate crimes relating to gender and sexual orientation because they “interpret a lack of state-level hate crimes laws to mean that crimes motivated on those bases do not deserve the full attention of the law.”³⁹ Federal and state hate crime legislation emphasize the gravity of hate crimes and serve to condemn the biases that may be present in local law enforcement in addition to perpetrators.

Louisiana’s hate crime statute serves as an example of legislation that includes clinic violence within its purview. After removing signs from Louisiana abortion clinics, police charged William Kennedy with committing a hate crime in addition to his criminal property damage charges. In addition to protecting offenses based on gender, the statute affords protection against hate crimes targeting persons “because of actual or perceived membership or service in, or employment with, an organization.”⁴⁰ As Katherine Mattes, a criminal law professor at Tulane University School of Law, explains: “The law enhances punishment for someone who targets a victim because of the victim’s association with a certain group of people, in this case, likely those providing abortion services.”⁴¹

V. EXPANDING FEDERAL HATE CRIME PROTECTION FOR PROVIDERS

Abortion providers seem to be unlikely candidates for hate crime protection at first blush, seeing as they contain no similar physical or otherwise immutable innate characteristics like the protected classes under current legislation. However, abortion providers share a common identity characteristic for which they are targeted by anti-abortion extremists.⁴² Though the service they provide is an entirely legal and fundamentally-protected constitutional right, this class of individuals and

38. Human Rights Campaign, *supra* note 30, at 12.

39. *Id.* at 75.

40. LA. REV. STAT. ANN. § 14:107.2 (West Supp. 2015).

41. Teddy Wilson, *New Orleans Abortion Clinic Vandal Charged With Hate Crime*, REWIRE.COM (Aug 14, 2015), <http://rewire.news/article/2015/08/14/new-orleans-abortion-clinic-vandal-charged-hate-crime/> (last visited May 4, 2016).

42. Parallels can be drawn between clinic violence and more traditionally recognized hate crimes, seeing as both could be caused by religious extremism. An arsonist in Missouri, for example, firebombed a Planned Parenthood and a mosque within the span of one year, due to the strong religious convictions against both Islam and reproductive health services. See Michelle D. Anderson, *Missouri Man Pleads Guilty to Arson Attempts at Planned Parenthood Facility*, REWIRE.COM (Apr. 20, 2016), <http://rewire.news/article/2016/04/20/missouri-man-pleads-guilty-attempting-arson-twice-joplin-planned-parenthood/> (last visited May 4, 2016).

their families live in constant fear of violence, due to targeted harassment that manifests in the form of phone calls, home picketing, death threats, burglary, assault, acid attacks, stalking, and even murder.⁴³

Perhaps the most persuasive qualitative evidence towards labeling abortion providers as a vulnerable, marginalized class is the collective memory that haunts them, exhibiting the *in terrorem* effect described in Part III.⁴⁴ In an interview, one provider even analogized his daily paranoia and fear to that experienced by victims of racial animus-based discrimination.⁴⁵ A 1999 study exploring the correlation between witnessing/experiencing violence and exhibiting signs of PTSD among clinic staff and providers concluded that such workers “exhibited a relatively high degree of PTSD symptom reporting compared to general civilian or even combat populations.”⁴⁶

Given the decades-long history of violence against providers, even seemingly empty threats and minor incidences contain the historical weight of murder within them, making every incidence of harassment all the more traumatic.⁴⁷ This personal trauma creates vicarious trauma for family members and “disrupt[s] the delivery of reproductive health care services to make the industry at times ineffective and nonproductive.”⁴⁸

Adding providers as a class can serve to memorialize these sentiments in legislation. FACE can work in tandem with federal and state crime legislation, with hate crime legislation beginning where FACE coverage ends, and vice versa. On their face, FACE laws protect against threats and harassment, yet the nonviolent provisions are not adequately

43. See generally COHEN, *supra* note 6.

44. See *supra* Part III; B. Perry and S. Alvi, *supra* note 16; COHEN, *supra* note 4, at 128-29 (“Providers expressed fear in chilling ways when talking about how the murders of other providers affected them. In particular, providers spoke passionately about how deeply the 1998 murder of Dr. Barnett Slepian in his Buffalo home and 2009 murder of Dr. George Tiller in his Wichita church still resonate with them.”).

45. COHEN, *supra* note 6, at 135.

46. Kevin M. Fitzpatrick and Michele Wilson, *Exposure to Violence and Posttraumatic Stress Symptomatology Among Abortion Clinic Workers*, 12 J. TRAUMATIC STRESS 227, 239 (1999); see COHEN, *supra* note 6, at 136 (“Many providers spoke of their experiences dealing with targeted harassment as akin to the sort of trauma police or members of the military suffer . . . they feel that their lives are similar to those who are trained to work on battlefields and crime scenes.”).

47. See Feminist Majority Foundation, *supra* note 11 (“Beginning in the early 1990’s, an undeniable pattern emerged between the use of WANTED posters and the murder of the doctors named on the posters. Drs. Gunn, Britton, Slepian, and Tiller were all murdered by anti-abortion extremists; all had been featured prior to their murder on WANTED posters with their home and clinic addresses and in some cases, their photograph.” Nonviolent threats, including the use of WANTED posters, have increased dramatically since 2010, “from 26.6% of clinics to 51.9% of clinics.”).

48. Fitzpatrick & Wilson, *supra* note 40, at 240.

enforced because the concept of what constitutes a “threat” varies according to who hears it.⁴⁹

Adding providers to federal hate crime legislation can highlight to local law enforcement and the courts the gravity of such threats, validating in the eyes of the general public the collective understanding of providers that such nonviolent harassment contains violent undertones. In recognition of their vulnerability as a targeted class, hate crime laws may aid law enforcement in understanding these threats from a more subjective, reasonable *provider* perspective, rather than merely a reasonable person perspective.

Although FACE does add protections for “true threats,” there are cases in which anti-choice extremists have not been held accountable for their violent, threatening rhetoric. For example, anti-choice extremist Angel Dillard sent a threatening letter to Dr. Mila Means, a Wichita-based family doctor who expressed the intent to become the area’s sole abortion provider.⁵⁰ Though the letter referenced the murder of abortion provider Dr. Tiller by Dillard’s anti-choice collective, and hinted at explosives being planted underneath her car, a federal judge dismissed the DOJ’s FACE claim and qualified Dillard’s letter as constitutionally protected speech.⁵¹ A recent article in Rewire (formerly RH Reality Check) draws connections between Dillard’s threats and David Daleiden’s heavily doctored videos meant to expose Planned Parenthood’s profits off the sale of “fetal parts.”⁵²

The question remains as to the point where “inflammatory” speech becomes “unlawful,” and to what extent such inflammatory speech leads to fraudulent and violent action. Notwithstanding the fact that Dillard and Daleiden have intimate ties with the same extremist groups that have been known for their violent attacks on clinics and providers, their rhetoric alone has been known to incite and legitimate further violence. This is evinced by the uptick in clinic violence since the CMP videos were released,⁵³ perhaps most obviously by Robert Lewis Dear Jr.’s mass

49. See, e.g., *Elonis v. United States*, 135 S.Ct. 2001 (holding that a federal threats statute would not be satisfied by a showing that a reasonable person would foresee that the statement would induce fear within the recipient of the threat); see also, COHEN, *supra* note 6, *generally*.

50. Michelle D. Anderson, *Department of Justice Lawyer Argues Angel Dillard’s Letter Posed “True Threat,”* REWIRE.COM (May 3, 2016), <http://rewire.news/article/2016/05/03/departement-justice-lawyer-argues-angel-dillard-letters-letter-posted-true-threat/> (last visited May 4, 2016).

51. *Id.*

52. Jessica Mason Pieko, *Dillard, Daleiden, and Dear: A Summer of Abortion Violence Trials Starts Now,* REWIRE.COM (May 3, 2016), <http://rewire.news/article/2016/05/03/dillard-daleiden-dear-summer-abortion-violence-trials-starts-now/> (last visited May 4, 2016).

53. See National Abortion Federation, *2015 Violence and Disruption Statistics: A dramatic escalation in hate speech, threats, and violence* (Apr. 2016) <http://5aa1b2xfmfh2e2mk03kk8rsx.wpengine.netdna-cdn.com/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf> (“2015 “reflect[s] a

shooting at a Planned Parenthood in Colorado Springs, where he had repeatedly shouted “No more baby parts” in direct reference to Daleidon’s videos.⁵⁴

Given the tempestuous political climate surrounding reproductive rights and abortion access,⁵⁵ there would likely be many challenges from anti-choice legislators, who would rather label providers as villains instead of victims.⁵⁶ “The irony, of course, is that less socially acceptable groups are more likely to be marginalized and subject to discrimination and prejudice, but in turn, that prejudice is less likely to be construed as morally or legally wrong.”⁵⁷ In response, social movement organizations and lobbyists should emphasize the violent and terrorizing nature of anti-abortion extremists.

Hate crimes should be a bipartisan issue, and no class of individuals should have to live in fear simply because they made certain lawful life choices, whether one agrees with those life choices or not.⁵⁸ As one provider puts it: “Most communities do not want terrorism in their neighborhoods, and so I think it’s important to focus on that—that it’s not really about abortion, it’s about extremism and intimidation of people providing a legal service and how it affects the health care of women.”⁵⁹

dramatic increase in hate speech and internet harassment, death threats, attempted murder, and murder, which coincided with the release of heavily-edited, misleading, and inflammatory videos beginning in July.”).

54. *Id.*

55. See, e.g., Teddy Wilson, *235 Anti-Choice Bills Proposed in State Legislatures Since January*, REWIRE (Mar. 31, 2015, 3:39 PM), <https://rewire.news/article/2015/03/31/235-anti-choice-bills-proposed-state-legislatures-since-january/>.

56. Sara K. Rankin, *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 66 RUTGERS L. REV. 563, at 579 (2014) (In studying the legislative history of the HCSA, one can generalize four typical congressional challenges that will be made against abortion provider lobbyists, namely: “(1) an apparent requirement that the candidate group present compelling evidence of their vulnerability to bias crimes; (2) a tendency to critique the candidates’ proffered data as inflated or inadequate; (3) moral condemnation of the candidate group, including the portrayal of the candidates as criminals or perpetrators of violence; and (4) to a lesser extent, persistent technical arguments, such as objections to statutory definitions of the candidate group as vague or over-inclusive”).

57. *Id.* at 608.

58. Sen. Hatch (R-UT) on his support of sexual orientation inclusion in the HCSA: “I do not condone homosexual activity, and I do not support separate civil rights legislation for homosexuals. But I certainly do not believe anyone should be beaten up, vandalized, or otherwise criminally assaulted, regardless of what that person may be or what that person’s lifestyle is. . .” 136 CONG. REC. 1761 (1990).

59. Cohen, *supra* note 6, at 235.

VI. EXPANDING FEDERAL HATE CRIME PROTECTION FOR PATIENTS

Abortion patients, though less likely than abortion providers to experience long-term targeted harassment, may still experience traumatizing interactions with protestors upon entering and exiting the clinics. Because the overwhelming majority of patients and non-providers entering and exiting these clinics are women and trans men obtaining reproductive health services, any violent and nonviolent harassment could arguably fall under the purview of preexisting hate crime law, particularly law that criminalizes actions motivated by gender-related animus.

Abortion patients are arguably protected within this preexisting gender class already, seeing as they are being targeted simply because they are pregnant women or non-cis men seeking to exercise their fundamental, constitutionally-protected right to an abortion. Violence against clinic patients could be attributable to their “symbolic status”, i.e., their membership within a social category. “A social category is defined by one of more attributes that a set of individuals share, which have implications for how the individuals are perceived or treated.”⁶⁰ Studies have successfully tied abortion violence to gender-based animus in the past, including a 1988 study which concluded that “[abortion] bombings were more likely in states that had higher levels of rape and had not passed criminal domestic violence statutes...[and] appear to be a part of a broader subculture which tolerates violence against women.”⁶¹

A shift in prosecutorial strategy, rather than overt legislative action, may be most beneficial in protecting the rights and safety of clinic patients. Because of VAWA, rape and domestic violence are more widely viewed as crimes of gender-based animus and discrimination.⁶² Abortion patients arguably fit into the hate crime law paradigm to an even greater extent than rape or domestic violence victims, because they are almost always unknown to their attackers, who deem them to be interchangeable with all other individuals who share their targeted characteristics. These patients are targeted for who they are and what they represent in the eyes of anti-abortion extremists, simple vehicles with which they can deliver their message.

Trying anti-abortion violence convictions as hate crimes driven by gender-based animus, whether using the HCPA or correlative state hate

60. Richard Berk et al., *Thinking More Clearly about Hate-Motivated Crimes*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 126, at 127 (Gregory Herek & Kevin Berrill eds., 1992).

61. Freilich, *supra* note 55, at 325.

62. Walters, *supra* note 25, at 594-95 (“[B]y excluding gendered violence from hate crime policy, we also fail to recognize that the concept of hate crime might help to deepen the gender analysis of rape: most if not all women are selected as victims of sexual and domestic violence due to their gender and ignoring the gender animus present in many gender violence cases risks ‘...perpetuating the false—and often sexist—perceptions of why some men choose to rape women’”).

crime law, is an experimental prosecutorial strategy that may serve to expand the public's perception of such crimes as patriarchal acts of violence in addition to acts of religious extremism and domestic terrorism.

VII. DRAWBACKS AND SHORTCOMINGS

Section 249(a)(2) of the HCPA explicitly limits its jurisdictional application to actions affecting interstate and foreign commerce. It can be successfully challenged on federalist principles in individual applications if the defendant can show that the violent acts occur intrastate and do not substantially affect interstate commerce. *The Morrison* progeny, in limiting Commerce Clause authority to the matter in question, requires the violent conduct in question to trigger substantial interstate commerce concerns or effects.⁶³ *U.S. v. Morrison* constricted federal protections against gender-based violence, "reject[ing] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁶⁴

In limiting the conduct effect analysis to the conduct in question, the prosecution is barred from emphasizing statistics exposing the economic effects of such similar conduct on interstate commerce at large. This is particularly problematic in the case of hate crime legislation, because a single hate crime action is not likely to trigger interstate commerce concerns, yet may emphasize a pervasive and pernicious societal trend towards discrimination. Though the HCPA and other federal hate crime legislation is limited by First Amendment, Commerce Clause, and DOJ mandate limitations, they can still retain utility as powerful symbols of national condemnation of hate, bias, and discrimination around certain groups of marginalized people.

Abortion providers and patients, in contrast to other hate crime candidates, are not attacked for their immutable characteristics—such as the color of their skin or national origin. Anti-choice legislators can easily argue that such an identity is a choice, a choice that these individuals made with either actual or constructive knowledge of the stigma and harassment that might come along with such a decision. One could argue in response that religion, one of the first and non-controversially protected hate crime categories, is a choice that one makes and is free to make under the protection of the First Amendment.

The right to an abortion is similarly protected by the Constitution, under the due process clause of the Fourteenth Amendment.⁶⁵ In fact, the

63. *But see, e.g., U.S. v. Jenkins*, 909 F. Supp. 2d 758, 772 (E.D.Ky. 2012) (holding that the use of a car on a U.S. highway triggers the Interstate Commerce Clause); *U.S. v. Mullet*, 868 F. Supp. 2d 618 (N.D. Ohio 2012) (holding that the scissors used to attack the victim, and the mail used to lure the victim, traveled across state lines and therefore triggered the Commerce Clause).

64. *U.S. v. Morrison*, 529 U.S. 598, 617 (2000).

65. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

first hate crime laws promulgated in 1870 were directed against racist hate groups who sought to inhibit African Americans from exercising their rights under the Thirteenth and Fourteenth Amendments.⁶⁶ The Civil Rights Act of 1968 was similarly focused on protecting federal and constitutionally protected rights, such as voting. The HCPA and state hate crime laws are increasingly focusing on protection rooted in identity, rather than protection rooted in constitutional rights violations. There is nonetheless a clear history of legislation addressing hate crimes perpetrated in an attempt to obstruct a victim's exercise of constitutional rights.

Pursuing a gender animus-based hate crime prosecutorial strategy for clinic patients also has its drawbacks and logistical challenges. In a catch-22 Professor Martha Minow calls the "dilemma of difference," policies and legislation addressing anti-subordination may further entrench "[t]he stigma of difference" affecting minority groups.⁶⁷ As she explains: "These problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating two groups differently."⁶⁸ Particularly with respect to clinic patients, a prosecutorial emphasis on hate crime protection may further exacerbate cultural problems that remain pervasive within our society, including benevolent sexism, female infantilization, and sheltering paternalism.

66. See, e.g. the KKK Act of 1871, 17 Stat. 18 (1871); amended: 42 U.S.C. § 1985 (2012).

67. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW, 20 (1990).

68. *Id.*