Golden Gate University Law Review

Volume 33
Issue 1 *Ninth Circuit Survey*

Article 3

January 2003

Sticks and Stones May Break Your Bones ... But Words May Break the Bank: Monetary Damages For 'True Threats' and the Future of Free Speech After Planned Parenthood of the Columbia/ Willamette v. American Coalition of Life Activists

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NOTE

STICKS AND STONES MAY BREAK YOUR BONES . . . BUT WORDS MAY BREAK THE BANK: MONETARY DAMAGES FOR 'TRUE THREATS' AND THE FUTURE OF FREE SPEECH AFTER *PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE V. AMERICAN COALITION OF LIFE ACTIVISTS*

INTRODUCTION

> The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.
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> -Oliver Wendell Holmes-[1]

In May of 2002, an *en banc* panel of the Ninth Circuit held that the use of "Wanted" style posters to list personal information about abortion providers by anti-choice groups was not protected by the First Amendment.[2] Prior to this case, three abortion providers, all of whom had been subjects of similar wanted-style posters, were murdered.[3] Seen in the context of these murders, the majority reasoned that the

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[1] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[2] Planned Parenthood of the Columbia/Willamette, Inc., v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).

[3] The murdered doctors were Dr. David Gunn, Dr. George Patterson and Dr. John Britton. *See* Background Section *infra* notes 12 to 24.

posters had "acquired currency" as a harbinger for the impending death of the poster's subject.[4] When viewed through this lens, the majority held that the posters amounted to 'true threats' that landed outside the usually wide purview of the First Amendment.

In finding the defendants civilly liable for threatening speech, the court upheld a permanent injunction prohibiting the use of the poster format. Although an enormous punitive damages award of over $108 million was vacated and remanded to determine if it comported with due process, the court nevertheless stayed a general damages award of over $525,000.[5] This Note contends that the use of wanted-style posters, while of questionable taste, is nothing more than a form of political activism that is generally protected by the First Amendment.[6] Furthermore, this Note argues that excessive monetary judgments for speech made on issues of social and political import improperly narrows freedom of speech.

In support of these contentions, this Note is divided into five parts. Part I introduces the plaintiffs and defendants in Planned Parenthood and provides a detailed description of the content of the posters as well as the other evidence used to find the defendants liable for threatening speech.[7] Part II presents a brief description of the details of, and impetus for, the enactment of the Freedom of Access to Clinic Entrances Act ("FACE"), as the act provides the basis for liability.[8] To

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[4] *Planned Parenthood of the Columbia/Willamette,* 290 F.3d at 1079.

[5] *Id.* at 1066, 1088. The Plaintiffs' sued under both the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. § 248(a)(1), as well as under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962. While the a discussion of the RICO claims is outside the scope of this Note, it is important here to observe that when the compensatory and punitive damage award of the FACE claims are added to the RICO damage awards, the total damages awarded were $120,868,893.00. *See also id.* at 1062, 1066n.4.

[6] *See e.g.*, United States v. Watts, 394 U.S. 705, 706 (1969) (given our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."). *Id.* (citing New York Times Co. v. Sullivan, 383 U.S. 254, 270 (1966)); *see also* National Association for the Advancement of Colored People v. Claiborne Hardware, 458 U.S. 898 926-927 (1982) (where liability is based on "a public address--which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach the suggested basis for liability with extreme care."). *Id.*

[7] *See infra* notes 12 to 63 and accompanying text.

[8] *See infra* notes 64 to 71 and accompanying text. The plaintiffs also alleged that

highlight that the majority's position in Planned Parenthood did not comport with current First Amendment jurisprudence, Part III analyzes the major decisions handed down in this area in the past four decades.[9] Part IV offers a synthesis of the facts of the instant case with the precedent set forth in the cases discussed in Part III. Part IV argues that under the Supreme Court's 'true threat' precedent, as well as the Ninth Circuit's own standard for defining a 'threat,' the posters and supporting evidence must be viewed as the type of political speech that has long been protected by the First Amendment.[10] Finally, Part V looks at other cases where liability was premised on a violation of FACE and suggests that even if liability was proper in the instant case, the remedy was not.[11] Injunctive relief is the least restrictive with respects to prohibiting political speech and should be the preferred remedy if political speech steps outside the protections provided by the First Amendment.

I. BACKGROUND

A. CONTEXTUAL BACKDROP

On March 10, 1993, Dr. David Gunn was shot and killed as he entered the Pensacola, Florida clinic where he performed abortions. Prior to his murder, Dr. Gunn's name, address, photograph and other personal information were the subject of two different wanted-style posters. The first "Wanted" poster stated in large, bold font that Dr. Gunn was an "abortionist."[12] The poster instructed the reader to attempt to persuade Dr. Gunn to leave his profession by writing personal letters as well as praying and fasting.[13] The second poster, entitled "Unwanted," was more straightforward and deliberate. It stated that Dr. Gunn killed children at designated locations,

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the defendants violated both state and federal RICO statutes. *See* Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists, 945 F.Supp. 1355 (D. Or.1996). As previously noted, the RICO charges are outside the scope of this Note. However, the portion of the overall damages award that was based on RICO statutes will be discussed briefly in Part V *infra* notes 215 to 242.

9 *See infra* notes 72 to 137 and accompanying text.

10 *See infra* notes 138 to 214 and accompanying text.

11 *See infra* notes 215 to 247 and accompanying text.

12 *Planned Parenthood of the Columbia/Willamette, Inc.*, 290 F.3d at 1063-1064.

13 *Id.* at 1064.

and that he should be considered "heavily armed and very dangerous" to "defenseless unborn babies."[14]

Around the time of Dr. Gunn's murder, a similar wanted-style poster circulated depicting the name, address and physical description of Dr. George Patterson, an abortion provider who operated a clinic in Mobile, Alabama. On August 21, 1993, less than six months after the murder of Dr. Gunn, Dr. Patterson was shot and killed in front of his Mobile clinic.

Dr. John Baynard Britton replaced Dr. Gunn and continued to provide abortions at the Pensacola clinic. On July 29, 1994, Paul Hill, an anti-choice activist shot and killed Dr. Britton as he entered another abortion clinic in the Pensacola area. James Barrett, Dr. Britton's volunteer escort was also killed in the attack. Hill wounded James Barrett's wife, who was present at the scene and witnessed her husband's murder. As with Dr. Gunn, Dr. Britton was the subject of an "Unwanted" poster. The poster listed his home and office addresses and phone numbers, as well as his photograph and physical description.[15] It further stated that Dr. Britton was wanted for "crimes against humanity" and that he should be considered "armed and extremely dangerous to women and children."[16]

The purpose of this Note is not to enter the abortion fray and discuss whether Michael Griffin or Paul Hill, both of whom were ultimately convicted of the murders of doctors Gunn and Britton, should have been allowed to present a defense of justifiable homicide at trial.[17] Nor is the purpose to explore the connection, if any, between the posters and the murders of doctors Gunn, Patterson and Britton. Rather, the sole purpose of this Note is to analyze whether the use of subsequent posters—which depicted different doctors but contained essentially the same type of personal information—should be considered political speech protected by the First Amendment, or a 'true threat.'

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[14] *Id.*

[15] Planned Parenthood of the Columbia/Willamette, Inc., 41 F. Supp. 2d 1130, 1135 (D. Or. 1999).

[16] *Planned Parenthood of the Columbia/Willamette, Inc.*, 290 F.3d at 1063.

[17] Burnett, Crane, Dodds, Foreman, McMillan, Ramey and Stover, all defendants in the instant case, prepared a statement following Gunn's murder that supported Griffin's acquittal based on a theory of justifiable homicide. *See id.* at 1064.

Recently, in Planned Parenthood of the Columbia/Willamette Inc., v. American Coalition of Life Advocates, (hereinafter, Planned Parenthood) the Ninth Circuit narrowly decided en banc that the use of such posters, as well as a website that contained similar personal information about abortion providers and their supporters, was not protected speech.[18] The court held that the use of these mediums to convey personal information about abortion providers constituted threatening speech in violation of FACE.[19] FACE imposes criminal and civil liability on anyone who by "force or threat of force" interfere with those engaged in providing reproductive health services.[20] In Planned Parenthood, FACE exposed the defendants to civil penalties in the form of an enormous monetary award as well as a permanent injunction.[21]

The subject of abortion, while certainly a moral and philosophical issue to some, is undoubtedly a highly politicized issue to most Americans. Speech on highly charged political issues has traditionally been given a wide berth with respect to

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[18] *Id.* at 1088-1089. As of the current date, five decisions have been published regarding this case, three in the District of Oregon, and two handed down from the Ninth Circuit. The first was the district court's denial of the defendants Motion to Dismiss in Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 945 F. Supp. 1355 (D. Or. 1996) [hereinafter *Planned Parenthood I*]. The second published opinion was the court's denial of the defendants Motion for Summary Judgment in Planned Parenthood of the Columbia/Willamette, Inc., v. American Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998) [hereinafter *Planned Parenthood II*]. Next came the district court's issuance of a permanent injunction against the defendants in Planned Parenthood of the Columbia/Willamette, Inc., v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999) [hereinafter *Planned Parenthood III*]. Fourth, finding that the district court erred in allowing the jury verdict to stand because it commingled the non-violent actions of the defendants with the violent actions of the third parties, a three-judge panel of the Ninth Circuit reversed and remanded in Planned Parenthood of the Columbia/Willamette, Inc., v. American Coalition of Life Activists, 244, F.3d 1007 (9th Cir. 2001) [hereinafter, *Planned Parenthood IV*]. Fifth, citing that the issues in the case were "obviously important," the Ninth Circuit reheard the case *en banc*. There, holding that "ALCA's conduct amounted to a true threat and is not protected speech," a six to five majority reversed the panel's earlier decision and reinstated the trial courts findings as to injunctive relief and civil damages, but vacated the punitive damages award and remanded the for consideration of whether the award comported with due process. Planned Parenthood of the Columbia/Willamette, Inc., v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) [hereinafter, *Planned Parenthood V*].

[19] *See* 18 U.S.C. § 248(a).

[20] *Id.*

[21] *See Planned Parenthood V*, 290 F.3d at 1066. In addition to the permanent injunction the compensatory and punitive damage award of the FACE claims, when added to the RICO damage award, totaled $120,868,893.00. *See id. See also*, note 5 *supra.*

First Amendment protection.[22] Speech that incorporates the use of personal information about a political adversary and then disseminates that information via posters or the internet in an effort to either persuade like-minded individuals to action, or to dissuade the adversary, is at the core of our notion of free speech. While this form of activism is of questionable taste and is no doubt distressing to those in the opposing camp, neither the fear it engenders nor the tastelessness of the method takes the speech outside of the purviews of the First Amendment.[23] In short, unless such activism amounts to a 'true threat' it is protected and guaranteed by the First Amendment.[24] This Note argues that the majority in Planned Parenthood failed to properly interpret and apply over four decades of precedent that defined what constitutes a 'true threat.' Furthermore, in allowing the injunction to stand and endorsing the crushing monetary damage award, the court silenced previously protected speech and improperly narrowed the constitutional protections of the First Amendment.

B. THE CASE

In October 1995, four abortion providers Dr. Robert Crist, Dr. James Newhall, his wife, Dr. Elizabeth Newhall and Dr. Warren M. Hern, along with two clinics that provided abortion services, including Planned Parenthood of the Columbia/Willamette, filed a lawsuit in the federal district court for the district of Oregon seeking injunctive relief and over 200 million dollars in damages.[25] The suit named as defendants several individual activists, all of whom were directors of either the American Coalition of Life Advocates ("ACLA") or the American Life Ministries ("ALM"), as well as the organizations themselves. The ACLA was a newly-formed

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[22] *See e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.*

[23] *See* Watts v. United States, 394 U.S. 705 (1969).

[24] True threats are proscribable under the holding of *Watts*. *See Watts*, 394 U.S. at 707. The Supreme Court has also recognized other types of speech that fall outside the First Amendment including 'incitement,' Brandenburg v. Ohio, 395 U.S. 444, 448 (1969); and 'fighting words,' Chaplinsky v. New Hampshire, 315 U.S. 568, 572-573 (1942).

[25] *See Planned Parenthood I*, 945 F. Supp. at 1355.

anti-choice group that advocated the use of violence to bring an end to the institution of legalized abortion in the United States.[26] The founding members of the ALCA had at one time been members of Operation Rescue, the foremost anti-choice organization in the United States.[27] The founders of ACLA split from Operation Rescue when the latter publicly condemned murders of doctors Gunn, Patterson and Britton and the use of violence against abortion providers in general.[28] The ACLA's commitment to the use of violence to end abortion is evidenced by the statement of one of the founders who noted that if someone were to condemn the use of violence against abortion "they probably wouldn't have felt comfortable working with us."[29]

The plaintiffs alleged that they had been the targets of threats by the ACLA and the ALM, as well as the individual named defendants. The plaintiffs brought their suit under the recently enacted FACE statute, which imposes both civil and criminal liability on any person who uses "force or threat of force . . . [to] . . . intimidate . . . or attempt to intimidate . . . any person . . . providing reproductive health services."[30] The defendants argued that the "Wanted" style posters and website[31] were neither threatening, nor intimidating and filed a motion to dismiss followed by a motion for summary judgment.[32] Both motions were denied and the case went to trial in January of 1998.

After a month long trial, the jury deliberated for four days and found for the plaintiffs. The jury ordered the defendants to pay the plaintiffs over $525,000 in general compensatory damages and over $108 million in punitive damages.[33] In addition to this large monetary damage verdict, the trial court later held that allowing the defendants to maintain the website and continue to use both the "Wanted" and "Unwanted" style

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[26] *See Planned Parenthood III*, 41 F. Supp. 2d at 1136.

[27] *See Planned Parenthood V*, 290 F.3d at 1064.

[28] *Id.*

[29] *See Planned Parenthood III*, 41 F. Supp. 2d at 1136.

[30] 18 U.S.C. § 248(a)(1).

[31] Allegations based on the "Nuremberg Files" web site were amended to the complaint after the case was originally filed.

[32] *See Planned Parenthood I*, 945 F. Supp. at 1355 (Motion to Dismiss), and *Planned Parenthood II*, 23 F. Supp. 2d at 1182 (Motion for Summary Judgment).

[33] *See Planned Parenthood V* at 1066n.4; *see also* Part V *infra* notes 215 to 218. The jury also awarded over 12 million dollars on both Federal and Oregon RICO claims. *Id.*

posters would place the plaintiffs in a constant fear of death and bodily harm.[34] In response to this finding, the trial court issued a permanent injunction that enjoined and restrained the defendants from republishing or reproducing the posters and from further distributing any information contained in the "Nuremberg Files" website.[35]

The ACLA and the individual defendants timely appealed the decision, claiming that the First Amendment protected their actions.[36] After reviewing the record *de novo,* the panel stated that neither the posters nor the website mention violence or expressly threaten anyone. Moreover, the court found that the statements were made in the context of public discourse on a highly politicized issue. Although the panel noted that words alone are not dispositive in assessing whether the statements constituted a 'true threat,' they found that only so much could be inferred from the context of the speech.[37] The court conceded that the publishing of the plaintiffs' personal information might make it easier for persons to carry out violent attacks against them, but held that political speech may not be punished if its only sin is that it may make it more likely that "someone will be harmed at some unknown time by an unrelated third party."[38] Given that the defendants' statements were made publicly and did not expressly threaten the plaintiffs, the court vacated the damages verdict and remanded with instructions to dissolve the injunction.[39]

Citing that the issues in the case were "obviously important," the Ninth Circuit granted the plaintiffs' petition to rehear the case *en banc.*[40] The plaintiffs argued that the trial court correctly allowed the jury to use the murders of doctors

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[34] *See Planned Parenthood III,* 41 F. Supp. 2d at 1155-1156.

[35] *See id.*

[36] *See Planned Parenthood IV,* 244 F.3d at 1013.

[37] *See United States v. Hart,* 212 F.3d 1067, 1071 (8th Cir. 2000). There, the defendant parked a Ryder Truck in front of an abortion clinic. The court held that in light of the use of a Ryder truck in the Oklahoma City bombing-the defendant knew or should have known that clinicians would fear for their lives. Thus the use of the truck, and not any words spoken by the defendant, was considered a 'true threat.' Note, however that liability was also premised on the fact that the defendant told his father that he intended to threaten the clinicians in order to save the lives of unborn babies. *See id. See also* Part IV *infra,* notes 196 to 203.

[38] *See, Planned Parenthood IV,* 244 F.3d at 1015.

[39] *Id.* at 1019-1020.

[40] *See Planned Parenthood V,* 290 F.3d at 1062.

Gunn, Patterson and Britton as a contextual backdrop to find that the posters and website constituted 'true threats' within the meaning of FACE. The plaintiffs contended that the case was properly delivered to the jury and that the verdict as well as the injunction ordered by the district judge should be reinstated.[41] In contrast, the ACLA argued that the district court decision should be reversed because "liability was based on speech that constituted neither an incitement to imminent lawless action nor a 'true threat,' and as such was merely political speech."[42] The defendants further contended that their otherwise, protected political speech could not be mitigated into the realm of unprotected speech simply because there was a context of violence created by the actions of third parties.[43]

In a narrow 6 to 5 decision the panel agreed with the plaintiffs' contentions, finding first, that the district court properly applied existing 'true threat' jurisprudence to the jury instructions, and second, that the ALCA was aware that the wanted-style posters and the information contained on the website would be interpreted by reproductive services providers as "serious threats of death or bodily harm" in violation of FACE.[44] The panel was "independently satisfied that to this limited extent, the ACLA's conduct amounted to a true threat and [was] not protected speech."[45] The *en banc* panel thus affirmed the district court findings as to the general damages and equitable relief.[46]

C. THE THREATS

At trial, and ultimately on appeal, three specific "threats" were at issue. The first was a wanted-style poster entitled "The Deadly Dozen," which was either created or endorsed by each defendant. The poster contained the names and home addresses of thirteen separate abortion providers. The second

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41 *See id.* at 1071.

42 *Id.* at 1071-1072.

43 *Id.* at 1071.

44 *Id.* at 1067.

45 *Id.*

46 *Id.* at 1086. Note that the panel vacated the punitive damages portion of the jury verdict and remanded to see whether the award comported with due process. *See id.*

threat was a wanted-style poster (the Crist Poster) portraying Dr. Robert Crist, one of the four physicians who initially filed suit against the defendants. The final threat was the "Nuremberg Files," a website that contained personal information about over four hundred abortion providers and their supporters that the defendants contributed to and operated. As the information contained in these two types of mediums constituted the bulk of the evidence used to find the defendants liable for threatening and intimidating the plaintiffs, the content of each will be described thoroughly.

1. The "Deadly Dozen" Poster

In January 1995, defendant ACLA created and printed the "Deadly Dozen" poster. At the top, the poster reads "GUILTY" and underneath, in smaller print, "OF CRIMES AGAINST HUMANITY." The poster explains that during WWII the Nazi's allowed abortion for Jewish women and the Allies prosecuted those Nazis as war criminals under "Allied Control Order No. 10" during the Nuremberg trials of 1945-1946.[47] Underneath this information lays the heading "THE DEADLY DOZEN." Under this heading the poster lists the names and the home addresses of thirteen physicians who provide abortions. Of the thirteen physicians on the list, three, Dr. James Newhall, Dr. Elizabeth Newhall and Dr. Warren Hern were plaintiffs in the instant case. The poster offers a "$5,000 REWARD" "for information leading to the arrest, conviction and revocation of license to practice medicine."[48] At the bottom of the poster, in large print, reads the word "ABORTIONIST." Following the ACLA's release of the poster during a rally in Washington, D.C., the FBI contacted each of the physicians named on the poster and offered the services of the U.S. Marshals to provide twenty-four hour personal security for the physicians and their families.[49] Upon hearing that the poster had garnered such a response by both the physicians and the authorities, defendant ALM republished the poster in its own *Life Advocate* magazine.[50]

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47 *See Planned Parenthood V*, 290 F.3d at 1064.
48 *Id.*
49 *See Planned Parenthood III*, 41 F. Supp. 2d at 1132.
50 *Id.*

2. *The Crist Poster*

In August of 1995, eight months after the release of the "Deadly Dozen" poster, the ACLA released a similar poster focusing on Dr. Robert Crist. The ACLA released the "Crist Poster" during a rally on the steps of the old federal courthouse in St. Louis, which not coincidentally, was the same federal courthouse where the infamous *Dred Scott* case was decided.[51] Each of the named defendants either assisted in the creation of the poster, or ratified its release.[52] As with the Deadly Dozen poster, the top of the Crist Poster reads, in large print, "GUILTY," and below, in smaller print, "OF CRIMES AGAINST HUMANITY." After divulging Dr. Crist's personal information, including his home and business addresses, the poster implores the reader to "write, leaflet or picket his neighborhood to expose his bloodguilt." In still smaller print, the poster offers a "$500 REWARD" "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines."[53] Again, as with the "Deadly Dozen" poster, the word "ABORTIONIST" appears in large, bold font at the bottom of the poster. Immediately following the release of the Crist Poster, the St. Louis police contacted Dr. Crist and suggested that he take additional security precautions in light of the poster.[54]

3. *The Nuremberg Files Website*

In 1996, at a rally in Washington, D.C., commemorating the valor of those incarcerated for anti-abortion violence, the ACLA unveiled the "Nuremberg Files" website. The website's stated purpose was collecting dossiers on abortionists in anticipation of one day prosecuting them for crimes against humanity.[55] The founders wanted to use the information to

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[51] *See* Dred Scott v. Sandford, 60 U.S. 393 (1856). *See also Planned Parenthood V*, 290 F.3d at 1065 (there, the defendants were trying to draw a correlation between the Dred Scott Court's holding that blacks were considered property under the constitution, and that in the eyes of the defendant's, so too were unborn babies under our current law). *Id.*

[52] *See Planned Parenthood III*, 41 F. Supp. 2d at 1133.

[53] *See Planned Parenthood V*, 290 F.3d at 1065.

[54] *See Planned Parenthood III*, 41 F. Supp. 2d at 1133.

[55] *See* Leigh Noffsinger, Comment, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH.

ensure that "once the tide of this Nation's opinion turns against the wanton slaughter of God's children" and abortion becomes a crime, abortion providers would have a different fate than many Nazi war criminals at Nuremberg, who were set free due to a lack of evidence.[56] Under the heading of "ABORTIONIST," the website listed the names of over two hundred abortion providers, as well as the names of another two hundred "accomplices," most of whom were politicians, judges, police officers and other abortion rights supporters.[57] The names of the four physician plaintiffs all appeared under the heading of "ABORTIONISTS." Employees and directors of the two health clinic plaintiffs also appeared in the Files.[58] In addition to the lists of providers and supporters, the site contained a legend, which stated that the names that appeared in black font were "Still Working," those that were greyed-out were "Wounded," and those with a red strikethrough were "Fatalities." The names of doctors Gunn, Patterson and Britton all had a strikethrough.[59]

None of the "threats" at issue contain any expressly threatening language. The posters offer "Rewards" for any member of the ACLA who is successful in persuading (via lawful means such as picketing, fasting or praying) any doctor to desist from providing abortions. The posters do not offer rewards to anyone who kills a doctor. Nor do they contain any express language that could be construed as suggesting that others commit violence against the doctors, such as wanted "dead or alive." Similarly, the website contains no explicit threat. And while it does contain the personal information of those listed, there is nothing to suggest that the creators themselves intended that the information be used to help commit violence against the doctors.

Lack of an express threat is not dispositive. The courts have held that threats can be implied from the context in which

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L. REV. 1209, 1213 (1999).

[56] *See* Nuremberg Files website at http//.www.christiangallery.com/atrocity.

[57] *See Planned Parenthood V,* 290 F.3d at 1065.

[58] *See Planned Parenthood III,* 41 F. Supp. 2d at 1133.

[59] *See Planned Parenthood V,* 290 F.3d at 1065. *See also* Leigh Noffsinger, Comment, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy,* 74 WASH. L. REV. 1209, 1213 (1999).

they were delivered.[60] This is true, even in instances where no words were spoken between the deliverer of the threat and his intended target.[61] The lack of any express threat in *Planned Parenthood* means that the court had to infer the "threats" entirely from the context in which they were delivered. That "context" was the murders of the other doctors by third parties who had no relation to the defendants in the instant case.[62] Where the court or a jury must infer a threat entirely from context, there is a distinct possibility that the sins of the unassociated violent actors will be visited upon the non-violent defendants on trial for allegedly threatening behavior.[63] When courts impose liability where there is no express threat and no evidence that the defendants intended to convey a threat, political activists who take unpopular political positions may suffer, and the umbrella of the First Amendment becomes less effective.

II. THE FREEDOM OF ACCESS TO CLINICS ENTRANCES ACT AND ITS CONSTITUTIONAL REQUIREMENTS.

Congress enacted FACE in May of 1994.[64] The Act was signed into law during the air of violence that encapsulated the murders of doctors Gunn and Patterson and was primarily enacted to counter the growing number of methods employed by anti-choice activists to deny women access to clinics that provide reproductive services.[65] The Senate noted that in the

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[60] *See e.g., Watts*, 394 U.S. at 708 (1969).

[61] *See Hart*, 212 F.3d at 1069-1070 (8th Cir. 2000) (there, the defendant parked a Ryder Truck in front of an abortion clinic. The court held that in light of the use of a Ryder truck in the Oklahoma City bombing-the defendant knew or should have known that clinicians would fear for their lives. Thus, it was the use of the truck was the 'true threat' and not any words spoken by the defendant). *Id.*

[62] *See Planned Parenthood V*, 290 F.3d at 1090 (Kozinski, J., dissenting). There was no evidence that the defendants in the instant case ever engaged in violent acts against abortion providers. *Id.*

[63] *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J. L. & PUB. POL'Y 283, 346 (2001). "Some of the most difficult cases to analyze are those where the alleged threat is not explicit...the courts reliance on subjective factors often results in decisions that restrict speech that ought to be protected by the First Amendment." *Id.* Furthermore, without a showing of intent, "there is a danger that ambiguous statements, not intended as threats will be interpreted as threats under the reasonable speaker/listener test." *Id.* at 316.

[64] *See* 18 U.S.C. § 248.

[65] *See* H.R. Rep. 103-306 (1993), reprinted in 1994 U.S.C.C.A.N. 699 (1994).

previous fifteen years, documented instances of violence, including bombings, arson and physical blocking of clinic entrances numbered in the several thousands.[66] In an effort to curb the trend of violence and intimidation tactics used against both the women who sought abortions and the doctors who provided them, the Act allows for the imposition of civil and criminal liability on any person who uses "force or threat of force" to intimidate or attempt to intimidate people from obtaining or providing reproductive health services.[67] FACE does not define what is meant by the term "threat," but the creators admonished that the Act should not be construed to "prohibit any expressive conduct protected from legal prohibition by the First Amendment."[68] Therefore, liability for using "force or threat of force" requires that the court define what constitutes a threat in a way that is consistent with the First Amendment.[69]

FACE provides a cause of action to any person prevented from either obtaining or providing reproductive services by the conduct proscribed by the statute.[70] In terms of the civil remedies available to the aggrieved, the Act gives discretion to the court and allows for any appropriate relief, including temporary and permanent injunctions as well as compensatory and punitive damages.[71]

III. *WATTS, BRANDENBBURG* AND *CLAIBORNE HARDWARE*: ARTICULATING THE 'TRUE THREAT' STANDARD

The core issue in *Planned Parenthood* is the point at which impassioned, inflaming and even caustic political speech crosses the line and loses the protections of the First Amendment. In some areas, the courts have drawn a bright line between protected and unprotected speech. Thus, we know that speech that tends to incite immediate lawless action is unprotected,[72] as is speech that, when taken in context, is

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[66] *See Id.* (documenting specific instances of violence and intimidation including bombings, instances of arson and acid attacks).

[67] 18 U.S.C. § 248(a)(1).

[68] *Id.* § 248(d)(1).

[69] *See Planned Parenthood V,* 290 F.3d at 1071.

[70] 18 U.S.C. § 248(c)(1)(A).

[71] 18 U.S.C. § 248(c)(1)(B).

[72] *See Brandenburg,* 395 U.S. at 448.

likely to provoke immediate violence, usually characterized as "fighting words."[73] Similarly, speech that, again, when taken in context constitutes a 'true threat' also falls outside the protections of the First Amendment.[74] But at what point does speech become truly threatening to the listener? In the area of 'true threat' jurisprudence, the line drawn by the Court is much less distinct. One reason for the haziness is that both Supreme Court decisions, as well as those of lower courts, often commingle, though not necessarily wrongly, the prohibition of speech and conduct using both incitement and 'true threat' theories.[75]

While the issue has been narrowed in the years since the Supreme Court first announced a standard in *Watts v. United States*, several important questions still remain unanswered. The most important of which is at what point does the context in which the threat was made take on more importance than the speaker's intent to actually threaten the listener? This question becomes especially important if, as in *Planned Parenthood*, there was no explicit threat and there was no evidence that the defendants intended to threaten or physically harm the plaintiffs.

Much of the 'true threat' precedent came out the somewhat tumultuous eras that included both the civil rights and anti-war movements. *Watts v. United States* involved an explicit threat to kill then President Lyndon Johnson.[76] In August 1966, Watts attended a public rally at the Washington Monument to protest the war in Vietnam.[77] After the rally, attendees divided into smaller discussion groups.[78] Watts was part of a group discussing the subject of police brutality. At one point, Watts—who was 18 at the time and had just received his draft notice—was overheard by an Army Counter Intelligence Agent as stating, "I'm not going [to Vietnam]. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[79] Watts was convicted under a 1917 statute that

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[73] *See Chaplinsky*, 315 U.S. at 572-573.

[74] *See Watts*, 394 U.S. at 706. "What is a threat must be distinguished from what is constitutionally protected speech." *Id.*

[75] *See e.g., Claiborne Hardware*, 458 U.S. 898 (1982).

[76] *Watts*, 394 U.S. at 705-706.

[77] *Id.* at 705.

[78] *Id.* at 706.

[79] *Id.*

prohibited any person from knowingly and willfully making a threat to take the life of the President of the United States.[80] Illustrating the importance of intent in 'true threat' jurisprudence, both of the lower courts grappled with the meaning of the statute's "knowingly and willfully" requirement. In upholding Watts' conviction, The United States Court of Appeals for the District of Columbia found that the requirement is met if the words were spoken "with an apparent determination to carry them out."[81]

In reversing the conviction, the Supreme Court noted that regardless of the statute's intent requirement, the government was first required to prove that the speech constituted a true threat.[82] The Court found that the type of political hyperbole Watts engaged in, taken in context, did not fit within this statutory scheme.[83] In announcing its decision, the Court stated that Congress's selection of the word 'threat' in the statute must be set against the backdrop of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[84]

Although the decision in *Watts* falls well short of establishing a bright line distinction between protected speech and a 'true threat,' the opinion is nonetheless noteworthy in three important respects. First, the Court announced that taken in context, Watts' speech was not threatening because it was clear that he had neither the immediate ability nor the inclination to carry out the threat.[85] Second, the opinion suggests that although some speech may be expressly threatening, such speech remains protected by the First Amendment unless, taken in context, that speech would constitute an immediate threat to the intended target.[86] Third, connecting Watts' "threat" to kill LBJ with our long tradition of protecting and even encouraging "robust and wide-open"

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80 *Id.*
81 *See id.* at 707.
82 *Id.* at 708.
83 *Id.*
84 *Id.* (citing *New York Times Co.*, 396 U.S. at 270).
85 *Watts*, 394 U.S at 707.
86 *Id.* at 708.

political debate, the opinion indicates that even expressly threatening speech can fall within the purview of the First Amendment if the speech is made in a political, as opposed to private, context.[87]

Less than six months after its decision in *Watts*, the Supreme Court further distinguished unprotected speech from protected political advocacy in *Brandenburg v. Ohio*.[88] In *Brandenburg*, the petitioner was the self-professed leader of a Ku Klux Klan group based in Hamilton County, Ohio.[89] The petitioner invited a reporter from a Cincinnati news station to attend and film one of the Klan's upcoming organizational meetings.[90] The reporter accepted and he and a cameraman attended the meeting. The film showed twelve men dressed in full Klan garb.[91] While portions of the film were incomprehensible, several of the attendees can be heard making derogatory remarks about African Americans and Jews.[92] At one point, the petitioner addressed the gathering and stated, "We're not a revengant (sic) organization, but if our President, our Congress and our Supreme Court continues to suppress the white, Caucasian race, its possible that there might have to some revengence (sic) taken."[93]

Petitioner was arrested and convicted of violating Ohio's now defunct Criminal Syndicalism Act.[94] The Act prohibited any person from voluntarily assembling and advocating the duty, necessity or propriety of violence or unlawful methods of terrorism as a means of accomplishing political reform.[95] In striking down the Ohio Act as a violation of both the First and Fourteenth Amendments, the U.S. Supreme Court noted that the statute failed to distinguish between mere advocacy from "incitement to imminent lawless action."[96] The Court noted, "the mere abstract teaching...of the moral propriety or even

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87 *Id.* (*citing New York Times Co.*, 396 U.S. at 270).

88 *See e.g., Brandenburg*, 395 U.S. at 444-448.

89 *Id.* at 445.

90 *Id.*

91 *Id.* at 445, 446.

92 Phrases that were audible included; "[B]ury the niggers, we intend to do our part" and "[N]igger will have to fight for every inch he gets from now on." *Id.* at 444-446 (1969).

93 *Id.*

94 *Id.* at 445.

95 *Id.* at 444.

96 *Id. at* 448.

moral necessity for a resort to force and violence, *is not the same* as preparing a group for violent action."[97] Under *Brandenburg,* speech that condones and even advocates the use of violence in the abstract is constitutionally protected by the First Amendment, so long as the speech, taken in context, is not likely to lead to imminent lawless action.[98]

Thus, while not expressly referring to *Watts, Brandenburg* expands the standard articulated there. *Watts* stands for the principle that expressly threatening speech must be taken in context, and the context must include the speaker's ability to *immediately* harm the intended target.[99] The standard articulated in *Brandenburg*, that speech remains protected even if it advocates the use of violence, so long as such advocacy will not result in "imminent lawless action" is consistent with *Watts*. Even though *Brandenburg* was decided using an incitement theory, what emerges from the two decisions is a narrower definition of what constitutes a 'true threat.' First, threats made publicly involving political or social issues deserve heightened scrutiny by the courts.[100] Second, a threat must be taken in context, and the context must include the speaker's desire and ability to immediately harm the intended target.[101] And finally, speech that expressly or impliedly advocates the use of violence to effect social or political change remains protected by the First Amendment, unless that speech, taken in context, is likely to incite immediate lawless action.[102]

The Supreme Court's unanimous decision in *NAACP v. Claiborne Hardware* further reinforces the standards gleaned from both *Watts* and *Brandenburg*.[103] *Claiborne Hardware* arose out of a seven year boycott of white merchants by the local chapter of the NAACP in Claiborne County, Mississippi.[104] The economic boycott sought to force the merchants to comply with a list of demands issued by the NAACP seeking justice and racial equality for the African

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97 *Id.* (emphasis added).
98 *Id.*
99 *Watts*, 394 U.S. at 705 (1969).
100 *See id.*
101 *Id. See also Brandenburg,* 395 U.S. 446-448 (1969).
102 *Id.*
103 *See e.g., Claiborne Hardware,* 458 U.S. 886 (1982).
104 *Id.* at 889-890.

Americans who patronized the downtown stores.[105] The white merchants filed suit in Mississippi state court alleging that the boycott amounted to malicious interference with their business interests.[106] The trial court agreed, awarding the merchants over one million dollars in damages based on the merchants loss of earnings and goodwill over the seven year boycott.[107] In addition to awarding civil damages, the court issued a broad based injunction that banned the use of 'store watchers.'[108] The injunction and sizable damages award effectively broke the boycott.[109]

The use of threatening speech was a major factor in the lower court's decision to award damages and grant the injunction.[110] In bringing their suit, the merchants alleged that several African American patrons in Claiborne County were threatened into participating in the boycott.[111] As evidence of this contention the merchants pointed to several speeches made by Mr. Charles Evers, the Field Secretary of the NAACP in Mississippi. Mr. Evers was instrumental in organizing the boycott and made several speeches throughout its duration to the members of the First Baptist Church.[112] During the April 1, 1966 meeting at which the decision to boycott was reached, Evers warned the crowd that the African Americans in the town would be watched, and anyone caught trading with the white merchants "would be answerable to him."[113] Similarly, the merchants pointed to another speech given by Evers on April 19, 1969, in which he stated that all boycott-violators would be "disciplined" by their own people.[114] Two days later, Evers admonished the crowd at First Baptist stating that "if we catch any of you going in any of them racist stores, we're gonna break your damn necks."[115]

The lower court noted that African Americans who violated

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105 *Id.* at 889.
106 *Id.* at 889, 890.
107 *Id.* at 893.
108 *Id.*
109 *Id.*
110 *Id* at 894.
111 *Id.*
112 *Id.* at 898-903.
113 *Id.* at 900.
114 *Id.* at 902.
115 *Id.*

the boycott were "disciplined" in a variety of ways. First, the boycott organizers placed "store-watchers" known as "Deacons" or "Black Hats" in front of the merchants' stores.[116] The "Deacons" noted the names of those in the African American community who were actively violating the boycott. The violators' names were read aloud at weekly NAACP meetings, as well as reproduced in the local *Black Times* newspaper.[117]

In addition to the seemingly innocuous threat of embarrassment in the community, boycott violators also faced the very real threat of physical violence. The trial court admitted evidence that indicated that the homes of two boycott violators were shot at, a brick was thrown through the windshield of one of the violator's cars, and a woman's flower garden was trampled by a youth who had witnessed her trading with white merchants.[118] Another man testified that four men beat him when he failed to observe the boycott.[119]

The Mississippi Supreme Court upheld Evers' and the NAACP's liability based on the lower court's common law tort theory.[120] The court held Evers jointly and severally liable for the civil damages and found that his speeches amounted to unprotected threats, and that these threats led to acts of violence in an effort to effectuate the boycott.[121] In dismissing Evers' argument that his speech was protected by the First Amendment, the court stated that the "evidence shows the volition of many black persons was overcome out of sheer fear."[122] Furthermore, the court opined that many boycotters were forced to participate in the boycott based on Evers' threats, and the use of violence and intimidation by supporters of the boycott.[123]

A discussion of what constitutes unprotected speech was central to the U.S. Supreme Court's reversal of the lower court's decision. Although the Court again stopped short of articulating a 'true threat' test, the unanimous opinion nonetheless adds to the standards set forth in *Watts* and

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116 *Id.* at 903-904.
117 *Id.* at 904.
118 *Id.*
119 *Id.* at 905.
120 *Id.* at 894.
121 *Id.* at 895.
122 *Id.* at 894.
123 *Id.* at 894-895.

Brandenburg. The Court noted that although Evers' speeches certainly contained threats, and those threats were acted upon, his speeches were still within the protections of the First Amendment.[124] In commenting on the 'threat' of social ostracism and the use of social pressure as a means to enforce the boycott, the Court noted that, "speech does not lose its protected character simply because it may embarrass others or coerce them into action."[125] Finally, the Court acknowledged that while Evers' statements may have been considered coercive and intimidating to non-participants, his speeches and conduct were still protected by the First Amendment.[126]

The real marvel of the opinion is that the Court protected speech that expressly threatened an identifiable group of people that had every reason, both objectively and subjectively, to fear the truth of those threats based on a history of intimidation and violence practiced by the boycotters. In finding that Evers' speeches and threats were protected by the First Amendment, the Court noted that the emotionally charged speeches were made publicly for the purpose of uniting the African American community to realize their political and economic powers.[127] The Court noted that even if Evers' express threats to "discipline" and to "break the damn necks" of boycott-breakers were construed as inviting unlawful activity, his speech was nonetheless protected under *Brandenburg,* because advocating the use of violence is a protected form of speech unless, taken in context, it tends to incite "imminent lawless action."[128] Although there was evidence that acts of violence against non-participators followed one of Evers' speeches, his conduct did not transcend the protection of the First Amendment because the violence did not immediately follow the speech.[129]

Finally, in vacating the damages award, the Court commented on the difficulty of imposing monetary liability for conduct made up of constitutionally protected activity.[130] The

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124 *Id.* at 907.
125 *Id.* at 910.
126 *Id.* at 911.
127 *Id.* at 928.
128 *Id.* (citing *Brandenburg,* 395 U.S. at 448).
129 *Claiborne Hardware,* 485 U.S. at 928.
130 *Id.* at 918.

Court noted that in these circumstances, a "precision of regulation is demanded" that requires courts and juries to determine with specificity exactly what damages, if any, were proximately caused by the defendants' unprotected conduct, as only these damages are recoverable.[131] The Court recognized that while a variety of remedial measures are available to the states to deal with violence and threats of violence, "damages [must be] restricted to those directly and proximately caused by the wrongful conduct chargeable to the defendants."[132] The court stated that it is of "prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality."[133] Since the conduct of Evers and the NAACP was constitutionally protected, the Court found that none of the business losses incurred by the businessmen were proximately caused by the boycott.[134] Therefore, because the lower court's determination of liability was premised on unsubstantiated findings of causation it "screen[ed] reality," and could not stand.[135]

Admittedly, no hard and fast test exists for defining just when one's speech or conduct will be deemed a 'true threat.' But, by combining the conclusions of *Watts, Brandenburg* and *Claiborne Hardware* a workable standard begins to emerge. *Watts* limits a 'true threat' to arising only in situations where the words were immediately threatening to the intended target of the threat. Moreover, *Watts* suggests that both the content of the threat, as well as the context in which it was made, must be taken into account in assessing the immediacy requirement of what constitutes a 'true threat.' *Brandenburg* stands for the principle that the mere advocacy of violence does not take speech outside the First Amendment, unless the advocacy, taken in context, tends to incite immediate lawless action.

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131 *Id.*

132 *Id.* at 918 (citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (noting that although, "[T]he careful limitations on damages liability imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy, *[T]hat limitation is no less applicable, however, to the important First Amendment interests at issue in this case.*"). *Id.* (emphasis added)).

133 *See Claiborne Hardware,* 458 U.S. at 924 (citing Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941)).

134 *See Claiborne Hardware,* 458 U.S. at 924.

135 *Id.*

Similar reasoning is found in *Claiborne Hardware.* First, following *Watts,* the public context in which the speeches were made was important in finding that Evers' coercive speech and tactics were protected. Second, following *Brandenburg*, speech that advocated the use of violence was protected, even though violence ensued, because the violence didn't occur immediately after the speech, nor was it directly attributable to it. Third, recognizing our "profound national commitment" to "robust and wide-open debate" *Watts, Brandenburg* and *Claiborne Hardware* all emphasized the heightened First Amendment protections garnered by speech made in the political arena.[136] Finally, where monetary damages are based on speech or conduct that could be properly considered constitutionally protected activity, *Claiborne Hardware* dictates that courts must approach the problem with a "precision of regulation" to ensure that no constitutionally protected freedoms are impinged upon by insufficient findings.[137]

IV. APPLICATION OF THE 'TRUE THREAT STANDARD TO THE FACTS OF *PLANNED PARENTHOOD*

While the Constitution clearly protects most speech, it surely does not protect all speech. Individuals have a constitutional right to be safeguarded against both speech and actions that pose an *immediate* threat to life or limb.[138] But at what point does a listener's fear that the speaker, or someone acting in concert, will harm him override the speaker's actual intent to harm? The question is more pointed if, as is the case here, the court does not even have an explicit threat from which to glean the speaker's intent. FACE seeks to punish the speaker's intent to convey a threat to use force to intimidate the listener.[139] Should we require a showing of an actual intent to convey a threat, or is the context in which the message was delivered enough to infer that a threat was delivered? Should the standard be whether a reasonable listener would feel threatened by the remark, or whether it should have been

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136 *See id.* at 913.

137 *See id.* at 916.

138 *See Claiborne Hardware*, 458 U.S. at 927-928; *see also Brandenburg,* 395 U.S. at 448.

139 *See* 18 U.S.C. § 248(a)(1).

reasonably foreseeable to the speaker that the remark would inspire fear in the listener? The Ninth Circuit was presented with these difficult questions in *Planned Parenthood.*

Though the Ninth Circuit's interpretation of FACE requires a showing that the actor intended to threaten, the majority in *Planned Parenthood* seems to indicate that the context in which the defendant's implied threats were delivered is almost entirely dispositive.[140] Without requiring that the defendants convey an explicit threat, or at a minimum, require a showing of intent to threaten, the majority allowed liability to be premised on the plaintiffs' fear, which was based, given the plaintiffs' testimony, on the context of violence that surrounded the un-related actions of third parties.[141] But before silencing political discourse, the First Amendment requires more than a showing that the plaintiffs were subjectively afraid of the defendant's tactics—it requires that they were 'truly threatened' by them.[142]

The majority in *Planned Parenthood* is guilty of two colossal oversights. First, the majority failed to apply the standards announced in *Watts, Brandenburg* and *Claiborne Hardware* to the facts of *Planned Parenthood*, citing that those decisions "provided benchmarks, but no[t] definitions," as to what constitutes a 'true threat.'[143] Most glaring in this respect is the court's refusal to acknowledge and apply the factual similarities between *Claiborne Hardware* and the instant case. In abandoning this precedent, the court relies on its own "reasonable speaker test" to define what is meant by a 'true threat.' The second oversight occurred when the court then curiously failed to apply the reasonable speaker test to the facts of the instant case. Instead, the court deceives the reader by relying on cases that employed the reasonable speaker test, yet bear little or no resemblance to the facts of *Planned Parenthood.* As will become clear, the likely reason for both

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[140] *See Planned Parenthood V,* 290 F.3d. at 1078. The majority argued that "[i]ndeed context is *critical* in true threats cases and history can give meaning to the medium" in which the treat was delivered. *Id.* (emphasis added).

[141] *See Planned Parenthood V,* 290 F.3d at 1091 (Kozinski, J., dissenting). "Plaintiffs themselves explained that the fear they felt came, not from the defendants, but from being singled out for attention by abortion protesters across the country." *Id.*

[142] *See Watts,* 394 U.S. at 707. "What is a threat must be distinguished from what is constitutionally protected speech." *Id.*

[143] *See Planned Parenthood V,* 290 F.3d at 1071.

these omissions is that the ACLA's actions *could not* be considered a 'true threat' even by the standard announced by the majority, nor could the majority uphold the decision while remaining faithful to the holdings of *Watts, Brandenburg* and *Claiborne Hardware.*

A. DISMISSING *WATTS, BRANDENBURG* AND *CLAIBORNE HARDWARE*: FAILING TO APPLY THE STANDARDS TO THE FACTS OF *PLANNED PARENTHOOD*

ACLA contends that liability was improperly based on political speech that constituted neither a 'true threat' nor incitement to imminent lawless action.[144] Since both the posters and the website contain no explicit threat, the ACLA argued that the case is really an incitement case in disguise.[145] Given the lack of an express threat, the ACLA argues that the case should be analyzed against the holding of *Claiborne Hardware,* and that in light of that case, the decision should be reversed. As noted above, *Claiborne Hardware* stands for the principles that (1) the First Amendment protects intimidation and threats of social ostracism as well as offensive and coercive speech; (2) speech made publicly on highly charged political issues lies at the core of the First Amendment and courts must assess the imposition of liability with *extreme* care; and (3) civil liability for offensive and coercive speech cannot be imposed solely on account of a person's association with individuals who commit violence *unless* the individual incited or authorized the violence himself.[146]

The similarities between *Claiborne* and *Planned Parenthood* are clear. First, both cases involved the efforts of groups engaged in the pursuit of a common political goal. Second, both groups used intimidating and coercive tactics to advance their political agendas; here the defendants attempted to coerce the plaintiffs into ceasing to provide abortions, and in *Claiborne Hardware* the effort was to force others to comply with the boycott.[147] Third, in both cases the defendants

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[144] *See Planned Parenthood V,* 290 F.3d at 1070-1071.

[145] *See id.* 1072.

[146] *See Claiborne Hardware,* 458 U.S. at 910, 926-928 (citing *Brandenburg,* 395 U.S. at 448).

[147] *See Planned Parenthood V,* 290 F.3d at 1095 (Kozinski, J., dissenting).

gathered publicly available information about their political adversaries and disseminated that information in an effort to coerce and intimidate the latter into action. Finally, similar to *Claiborne Hardware,* the defendants here face liability because their efforts to coerce others in furtherance of their political agenda were placed against the backdrop of the violent attacks made by unassociated third parties.

The only apparent difference between the two cases is the outcome. In *Claiborne Hardware,* direct threats made as part of a political and social effort that were followed by violent acts of associated third parties were considered simply "emotionally charged rhetoric" that did not "transcend" the First Amendment.[148] Here, public speech made on an issue of social, moral and political importance that merely intimidated the listener and *was not* followed by violence, was enough to support a crushing monetary judgment and an injunction that silenced, what the defendants believed was nothing more than political activism.

The majority, however, rejects the idea that *Claiborne Hardware* is analogous, and points to several apparent dissimilarities between the cases. The majority's effort to distinguish *Claiborne Hardware* from the instant case does not withstand scrutiny and only serves to highlight the majority's unfamiliarity with the facts of either *Claiborne Hardware, Planned Parenthood,* or both. First, the majority attempts to distinguish *Planned Parenthood* by pointing to the fact that *Claiborne Hardware* was not decided under a threat statute, thus the Court did not need to consider whether Evers' statements were 'true threats.'[149] This is only partially true. While *Claiborne Hardware* did not arise under a threat statute, respondents argued that liability was proper because Evers "threatened violence" to coerce participation in the boycott.[150] In addressing this allegation, the Court undertook to establish whether Evers' speeches were outside the First Amendment, either as 'true threats,' or incitement to imminent lawless activity.[151] Whether the case arose under a threats statute is not important when answering whether the First Amendment

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148 *See Claiborne Hardware,* 458 U.S. at 928.
149 *See Planned Parenthood V,* 290 F.3d at 1073.
150 *See Claiborne Hardware,* 458 U.S. at 897.
151 *See id.* at 927.

protects the speech. Clearly, as the majority in *Planned Parenthood* recognized, a 'true threat' for the purposes of FACE requires a "definition which comports with the First Amendment."[152] It makes little impact on the present case that it was decided under FACE, since it is the First Amendment that defines the effectiveness of FACE. Similarly, it made little difference to the outcome of *Claiborne Hardware* that the case did not arise under a threat statute. In each, the question essentially is not whether the speech or conduct violated the statute, but whether it fell outside the protections of the First Amendment. Since the Court addressed whether Evers' speeches were threatening, the majority here errs in alluding to a dissimilarity because the present case was decided under a statute.

Second, the majority attempts to distinguish *Claiborne Hardware* from the instant case by arguing that in *Claiborne* there was no context in which to place Evers' speeches, while the murders of doctors Gunn, Patterson and Britton provided context in which to analyze the threatening nature of the ACLA's speech *Planned Parenthood.*[153] This again is unfaithful to the facts of both *Claiborne Hardware* and *Planned Parenthood.* First, Evers' threats to "break the damn necks" of non-participators are *directly* threatening, thus context was not necessary in that instance to determine whether the speech was threatening, as the threat is apparent on the face of the statement. Second, in *Claiborne Hardware* there was ample context in which to assess whether Evers' speech was threatening. It was well noted in the trial record that non-participators were subject to instances of physical violence and social ostracism.[154] Thus, lack of context does not distinguish *Claiborne Hardware* from the instant case.

The majority further attempts to distinguish *Claiborne Hardware* from *Planned Parenthood* by arguing that in the former, Evers did not threaten specific individuals, while here, the ACLA clearly singled out the Plaintiffs. While it is true that the ACLA specifically identified and targeted the Plaintiffs, this fact does not distinguish the case from

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152 *See Planned Parenthood V,* 290 F.3d at 1071.
153 *See id.* at 1073.
154 *Claiborne Hardware,* 458 U.S. at 902-906.

Claiborne Hardware. It is clear from the facts of *Claiborne Hardware* that the names of specific individuals who broke the boycott were announced at weekly NAACP meetings as well as reprinted in the town's weekly *Black Times* newspaper.[155] Surely those who broke the boycott and were singled out at the meetings and in print felt threatened or intimidated, not by Evers or the NAACP, but by the fact that those participating in the boycott knew who they were. This is no different from the facts of *Planned Parenthood.* Here, the plaintiffs testified that their fear came not from being directly threatened by the defendants, but from being singled out for attention from right-to-life groups.[156] Furthermore, given the small population of Claiborne County, Mississippi, and the zealous efforts of the "Deacons" to enforce the boycott by stationing themselves outside the storefronts, it is reasonable to infer that individuals who broke the boycott felt threatened by Evers' speeches. The fact that both cases involved apparent threats directed to specific targets highlights the factual similarities between the cases, not their dissimilarity.

The majority also emphasizes that *Claiborne Hardware* provided no evidence that either Evers or the NAACP participated in, or authorized any violence against those who did not participate in the boycott.[157] While it is certainly true that neither Evers nor the NAACP participated in violence, this fact does not distinguish *Claiborne Hardware* from *Planned Parenthood.* Here, like *Claiborne Hardware*, there is no evidence that the ACLA, or any of the named defendants ever authorized or participated in violent acts against the plaintiffs. Moreover, the record in *Planned Parenthood* notes only one instance where an individual participated in the making of a "wanted" poster and later resorted to violence, but that individual was not a defendant in the instant case.[158]

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[155] *See id.* at 903-904.

[156] *See Planned Parenthood V,* 290 F.3d at 1091. Dr. Newhall, one of the plaintiffs testified at trial that her fear "came from being identified as a target . . . [and that] . . . all the John Silva's [anti-abortionists] in the world know who I am, and that's my concern." *Id.* Similarly, Dr. Hern, also a plaintiff, testified that he was terrified when he found out he was on the list stating that, "its hard to describe that . . . you are on a list of people who have been brought to public attention this way." *Id.*

[157] *See Planned Parenthood V,* 290 F.3d at 1073-1074.

[158] *See id.* at 1091 (Kozinski, J., dissenting). Paul Hill, a right-to-life activist, participated in the making of Dr. Britton's 'Wanted' poster and then shot him some seven months after the poster was released. *Id.*

Again, the majority fails to distinguish *Claiborne Hardware* from the facts of *Planned Parenthood.*

Finally, the majority attempts to distinguish *Claiborne Hardware* by arguing that unlike *Planned Parenthood*, where the plaintiffs took seriously the perceived threats made by the defendants, no one took Evers' threats seriously, thus the Court was able to find that they were not 'true threats.'[159] To support this contention, the majority opines that African Americans must not have felt threatened *since they continued to shop at the boycotted stores.*[160] This logic cannot withstand scrutiny, and upon closer examination actually hurts the majority's cause. First, under the Ninth Circuit's own definition, a 'true threat' is based, not on the listener's fear, but on the speaker's belief that his words or actions will convey his intent to cause physical harm.[161] Thus, for the purposes of characterizing Evers' speech as a threat, it does not matter whether the threat was heeded, but only whether Evers knew his words would be interpreted by the listener as threatening. Surely Evers intended such a result. Second, since the majority asserts that threats are not 'true threats' unless they are heeded by the listener, then *a fortiori* the threats in the instant case must not be considered 'true threats' *since the plaintiffs here continued to perform abortions after they became aware of the posters.*[162] As the conduct of the threatened party is not dispositive as to whether a statement is a 'true threat,' it follows that *Claiborne Hardware* is indistinguishable from *Planned Parenthood* in this regard.

As the dissent properly notes, the few dissimilarities that do exist between the two cases only highlight that the *Planned Parenthood* is far weaker factually to support liability for threatening speech.[163] First, *Claiborne Hardware* involved explicit threats to specific targets that were followed by violence.[164] Here, the defendants made statements that lacked

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159 *See Planned Parenthood V,* 290 F.3d at 1074.

160 *Id.* (emphasis added).

161 *See id.* (citing United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

162 *See Planned Parenthood V,* 290 F.3d at 1066. Dr. Crist did stop practicing medicine for some time after the release of the poster out of "fear for his life," but he did in fact return. *Id.*

163 *See id.* at 1095 (Kozinski, J., dissenting).

164 *See Claiborne Hardware,* 458 U.S. at 928.

an express threat, and the statements were not followed by any acts of violence.[165] Second, *Claiborne Hardware* involved statements that were threatening on their face.[166] In *Planned Parenthood*, given the lack of an express threat, the jury heard two weeks of testimony regarding recent violence against abortion providers—violence which was not committed by the defendants—in order to give the threats their proper context.[167] In *Claiborne Hardware*, direct threats made on issues of a political nature, followed by violent acts of unassociated third parties were considered "political hyperbole" and protected by the First Amendment. Here, socially and politically expressive public speech that contained no express threat and *was not* followed by violence was enough to support a permanent injunction and a remarkable damages verdict. Though a far weaker case factually, the majority here chose to impute liability, while the Supreme Court refused to do so in *Claiborne Hardware.*

In addition to rejecting Claiborne as factually analogous, the majority also turns away from one of its central holdings—taken from *Watts* and *Brandenburg*—that speech made publicly on political or social issues requires heightened scrutiny before it can be stripped of its First Amendment Protections.[168] Here, the alleged threats were communicated publicly. Both the posters and the website were unveiled at political rallies seeking to garner support for the defendant's political points of view.[169] Undoubtedly, the posters and the

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[165] *See Planned Parenthood V,* 290 F.3d at 1072.

[166] *See Claiborne Hardware,* 458 U.S. at 902. During an April 21, 1969 speech Evers told listeners that if any African American broke the boycott he would "break your damn neck." *Id.* Similarly, in another speech Evers informed listeners that they would be "answerable to him" if they shopped at stores owned by the white merchants. *Id* at 900.

[167] *See Planned Parenthood V,* 290 F.3d at 1078.

[168] *See Watts*, 394 U.S. at 708 (given our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials") *Id.* (citing *New York Times Co.* 376 U.S. at 270. *See also Claiborne Hardware*, 458 U.S. at 926-927 (where liability is based on "a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach the suggested basis for liability with extreme care"). *Id.*

[169] *See Planned Parenthood V,* 290 F.3d at 1064-1065. The Deadly Dozen Poster as well as the Nuremburg Files website were unveiled at a Washington, D.C., rally protesting *Roe v. Wade.* Similarly, the Crist Poster was unveiled on the footsteps of the St. Louis Courthouse that handed down the Dred Scott decision in an effort to draw a

website were devices used to convey the defendants' sociopolitical message. The majority however, declines to frame the defendants' statements as amenable to heightened protections stating that, threatening speech is proscribable "however communicated."[170] Instead of analyzing whether the defendants' statements were entitled to heightened protection—as mandated by *Watts* and *Brandenburg*—the majority simply finds first that the statements were 'true threats,' then correctly states that threats are not entitled to First Amendment protection.[171] Here, the majority puts the cart before the horse. What they should have done is first address whether the statements could properly be considered threats in light of the political backdrop in which they were made, given the heightened protection such speech deserves, and then address whether within this context, the speech was threatening.[172] To decline to place the defendants' statements within this contextual framework is contrary to the holding of *Watts, Brandenburg* and *Claiborne Hardware.*

Though factually and legally relevant, the majority chooses to ignore the importance of *Claiborne Hardware.* The reason is obvious. Were the court to acknowledge *Claiborne Hardware* it would have no choice but to reverse given the similarities between the two cases. Recognizing the importance of robust public debate, *Watts, Brandenburg* and *Claiborne Hardware* told us that speech publicly directed at issues of social and political importance should be analyzed with extreme care before liability is imposed and speech silenced. *Planned Parenthood* involves socially and politically important speech and thus should have invoked this heightened standard. Yet, the majority rejects this assertion.[173] Similarly, *Claiborne Hardware* holds that the First Amendment protects intimidating speech that aspires to coerce others to take a particular action. *Planned Parenthood* involved the efforts of a

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correlation between blacks being considered property, and unborn babies, according to the defendants, also being considered property under current law. *Id.*

170 *See Planned Parenthood V,* 290 F.3d at 1076 (citing Madson v. Women's Health Ctr. Inc., 512 U.S. 753 (1994)).

171 *Planned Parenthood V,* 290 F.3d at 1076. .

172 *See id.* at 1088-1089 (Reinhardt, J., dissenting).

173 *See id.* at 1076. "Neither do we agree that threatening speech made in public is entitled to heightened constitutional protection just because it is communicated publicly rather than privately." *Id.*

political minority to coerce their political adversaries into taking certain actions in furtherance of their political agenda. Yet the majority claims that the two cases are not analogous.[174] Finally, relying on *Brandenburg*, *Claiborne Hardware* holds that liability for intimidating and coercive speech cannot be imposed on the basis of a persons association with individuals who commit violence, *unless* the individual himself authorized or incited the violence.[175] The instant case involves statements that are not expressly threatening, yet could become so when viewed against the backdrop of violent acts committed by third parties who are unassociated with the defendants. Liability here was undoubtably premised on the actions of those third parties.

The majority reasoned that *Claiborne Hardware* was not analogous and thus, not applicable. Instead, they articulated a "reasonable speaker test" and then failed to apply it. The reason they failed to apply it mirrors the reason they elected to dismiss *Claiborne Hardware*: namely that the application of its own test would, like an acknowledgment of *Claiborne Hardware*, require that the court reverse.

B. OBFUSCATION: THE REASONABLE SPEAKER TEST AND THE MAJORITY'S FAILURE TO APPLY IT.

In place of the 'benchmarks' provided by the Supreme Court, the Ninth Circuit employed a "reasonable speaker test" to decide if the posters and the website were 'true threats' and thus outside the protections of the First Amendment.[176] The test holds that whether a statement may be considered a 'true threat' is governed by whether a "reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement *as a serious expression of intent to harm or assault.*"[177] The panel defined a threat as, "an expression of an *intention* to inflict evil, injury or damage upon another," and stated that alleged threats must be

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[174] *See id.* at 1072.

[175] *See Claiborne Hardware,* 458 U.S. at 926-928 (citing *Brandenburg*, 395 U.S. at 448).

[176] *See Planned Parenthood V,* 290 F.3d at 1074.

[177] *See id.* (emphasis added) (citing United States v. Orozco-Santillan, 903 F.2d 1262, 1625 (9th Cir. 1990)).

weighed "in light of their entire factual context, including the surrounding events."[178] Under this test, a 'true threat' exists where a reasonable person would foresee that the listener would believe he was about to be subjected to physical violence.[179]

After articulating the standard from which the liability of the defendants will be judged, the court fails to apply it. Rather than assess whether the defendants conduct constituted a 'true threat,' the court uses a sleight of hand, citing other cases where a 'true threat' was found under the reasonable speaker test, but whose facts bear no resemblance to those of *Planned Parenthood.* Instead of analyzing whether liability was proper under the reasonable speaker test, the court tells us that context in which the alleged threat was communicated is critical.[180] Instead of pointing to evidence that the defendants' 'threats' communicated a serious expression of intent to physically harm or intimidate the plaintiffs—as required by the reasonable speaker test and FACE—the court opines that the posters and websites were symbols that had acquired a "currency of death" in the wake of the previous murders.[181] These symbols, according to the majority, effectively put the defendants on notice that their conduct was likely to convey a threat.[182] By pointing to context, symbols and currencies, the majority is attempting to divert the reader's attention from their utter failure to provide evidence that the defendants expressed an *intention* to threaten the plaintiffs. In drawing the reader's attention away from this crucial fact, the court is able to find the defendants liable without any showing that their conduct failed the majority's own test.

The majority cites several cases to support their contention that liability was proper in the instant case. Although the cases found that the defendant's speech or conduct amounted to a "true threat," none are factually or legally relevant to *Planned Parenthood.* In *United States v. Dinwiddie,* liability was

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178 *See id.* at 1075.

179 *See id.*

180 *See id.* at 1078. The majority noted that "indeed context is critical in a true threats case." *Id.*

181 *See id.* at 1079.

182 *See id.* at 1085. "The posters are a true threat because like Ryder trucks and burning crosses, they connote something that they do not literally say, yet both the actor and the recipient get the message." *Id.*

premised on the defendant making express threats directly to the intended target.[183] There, the defendant made several remarks outside an abortion clinic warning the plaintiff /doctor to, "remember Dr. Gunn...This could happen to you...Whoever sheds a man's blood, by man his blood shall be shed."[184] She further stated, "[Y]ou have not yet seen violence until you see what *we* do to you."[185] The Eight Circuit interpreted FACE's 'force or threat of force' to proscribe Mrs. Dinwiddie's conduct and upheld an injunction ordering her to stop violating FACE.[186]

Similarly, the majority relies on *United States v. Kelner.* In *Kelner*, the defendant was convicted of transmitting an interstate threat in violation of a federal statute.[187] *Kelner* involved threats made against Yasser Arafat prior to a 1974 visit to the United Nations in New York.[188]

During a television interview, the defendant—dressed in military fatigues and holding a handgun—stated that, *"[W]e* have people who have been trained and . . . who intend to make sure that Arafat and his lieutenants do not leave this country alive."[189] When pointedly asked by the reporter if he intended to kill Arafat, the defendant replied "*We* are planning to assassinate Mr. Arafat."[190] Kelner argued that his statements were "political hyperbole" protected by the First Amendment.[191] The Second Circuit disagreed. In affirming the defendant's conviction the court looked to the explicitness, immediacy, specificity and context of the statements.[192] Given that the threats were explicit ("*we* are planning to assassinate"); immediate ("we have people who have been trained and are out now"); specific ("Arafat and his lieutenants") and the context (military clothing and the handgun), the court reasoned that

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

184 *Dinwiddie*, 76 F.3d at 917.

185 *Id.* (emphasis added).

186 *Id.* at 929.

187 18 U.S.C. § 875(c) criminalizes transmitting "in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." *Id.*

188 *See* United States v. Kelner, 534 F.2d 1020, 1021 (2d Cir. 1976).

189 *See Kelner*, 534 F.2d at 1021 (emphasis added).

190 *Id.* (emphasis added).

191 *Id.* at 1022.

192 *Id.* at 1028.

Kelner's statements were true threats and not protected by the First Amendment.[193]

Dinwiddie and *Kelner* are so factually dissimilar to *Planned Parenthood* that their appearance as support for the majority's position is suspect. First, both *Dinwiddie* and *Kelner* involved express threats; the former, a direct threat to the intended target, while the latter communicated his threat to a specific target via the television. Moreover, in invoking the first person plural ("we are planning to assassinate" and "You haven't seen violence until you see what *we* do to you") both parties expressed, not only intent to threaten, but also intent that they or someone acting in concert would harm or assault the victims.[194] As the dissent in *Planned Parenthood* properly notes, when a statement expressly threatens violence, the speaker expresses intent to harm the target, and then admits that he or she is among those that will help bring about that harm, it is hardly surprising that courts impose liability.[195]

The above cases could be considered analogous to *Planned Parenthood* only if the defendants there had either: (1) directly confronted the plaintiffs and expressly threaten that they intended to harm the plaintiffs—as was the case in *Dinwiddie*—or, (2) created posters or a website in which the defendants expressly stated that it is their intent to assassinate or murder the plaintiffs, similar to *Kelner*. Of course, this was not the case. Here, the only evidence offered to illustrate the defendants' requisite intent to threaten were implied "statements," which were then placed against the backdrop of the violent acts of third parties.

The majority also relies on *United States v. Hart* to illustrate that liability was proper in the instant case. At first blush, *Hart* appears somewhat analogous to *Planned Parenthood*. Closer scrutiny, however, reveals that while *Hart* also involved an implied threat, the defendant there displayed the requisite intent to threaten or intimidate that is lacking in the instant case. On September 25, 1997, Hart, an anti-choice activist, parked two Ryder trucks outside the entrances of two

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193 *Id.*

194 *See id.* at 1021. "We are planning to assassinate Mr. Arafat." *Id. See also Dinwiddie,* 76 F.3d at 917. "Patty, your have not seen violence yet until you see what we do to you." *Id.*

195 *See Planned Parenthood V,* 290 F. 3d at 1098 (Kozinski, J., dissenting).

Little Rock, Arkansas abortion clinics.[196] He was indicted and later found to have violated the same 'force or threat of force' clause of FACE used to find the defendants liable in *Planned Parenthood.*[197] The Eighth Circuit disagreed with Hart's argument the trucks, standing alone, could not constitute a 'true threat.'[198] In addition to context and the likely connotations made about Ryder trucks in the wake of the Okalahoma City bombing, the court relied on evidence that Hart was a regular demonstrator at the two clinics and that he could provide no legitimate reason for parking the trucks other than to threaten the plaintiffs.[199] Most importantly, testimony offered at trial by Hart's father indicated that Hart *intended* to threaten the plaintiffs. Hart evidently told his father that it would be worth it "if people believed there was a bomb in one or more of the trucks" if it helped to save the life of one baby.[200]

No doubt, the *Hart* court's finding that threats can be inferred from the medium provided the *Planned Parenthood* majority with basis for finding the defendants here liable for trafficking in threatening symbols and "currencies."[201] *Hart,* however, is distinguishable in at least two important respects. First, as the dissent properly notes, the threat in *Hart* "did not come from the message itself, but from the potentially dangerous medium used to deliver it." Thus, the "symbols" (the trucks) themselves were threatening because it was possible that they were filled with explosives. Clearly, the perceived threat in the instant case did not come from the paper on which the posters were printed, but from the possibility that someone might harm the plaintiffs based on the information contained in the posters.[202] *Hart* would be analogous only if the defendant there printed posters of Ryder trucks, or put images of Ryder trucks on an anti-choice website. Second, Hart was found liable because he intended to threaten the plaintiffs. Hart deliberately chose the Ryder truck because of the truck's

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196 *See* United States v. Hart, 212 F.3d 1067, 1069 (8th Cir. 2000).

197 *See Hart*, 212 F.3d at 1070.

198 *Id.* at 1072.

199 *Id.* at 1072.

200 *Id.* at 1070.

201 *See Planned Parenthood V,* 290 F.3d at 1085. "The posters are a true threat because like Ryder trucks and burning crosses, they connote something that they do not literally say, yet both the actor and the recipient get the message." *Id.*

202 *See supra* note 156.

connection to violence after Oklahoma City; telling his father that it would help saves babies lives if the clinicians believed there were explosives on the truck.[203] Although the case involved an implied threat, the *Hart* court was correct in upholding liability because the medium used to express the threat was itself potentially dangerous, and the defendant expressly stated that it was his intent to threaten the plaintiffs. Neither of these elements was present in *Planned Parenthood.*

The defendants in the cases relied upon by the majority displayed the intent to threaten required by both FACE and the reasonable speaker test.[204] Yet the majority displays no evidence that the defendants in the instant case intended to threaten the plaintiffs. Without evidence of intent, the defendants' conduct could not be construed as a 'true threat' even under the standard announced by the majority. In the absence of intent, the defendants' 'threats' must be viewed, at best, as an incitement or call for others to harm the plaintiffs.[205] And while it undoubtedly makes little difference to the plaintiffs whether the harm will come from the defendants themselves or some unassociated third-party, it does make a difference with respects to the First Amendment.[206] The Supreme Court has expressly stated that liability *cannot* be squared on the basis of violent acts committed by third parties *unless* the defendant incited those violent acts himself.[207]

It is precisely because they lack evidence of intent that the majority opinion traffics in "currenc[ies]" and symbols in order to find the defendants liable.[208] As their only credible basis for liability, the majority states that doctors Gunn, Britton and Patterson were murdered after their posters were released and

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[203] *See Hart*, 212 F.3d at 1070.

[204] *See Planned Parenthood V*, 290 F.3d at 1076. The intent to threaten (i.e., the intent that the statement will be understood as a threat) is subsumed within the statutory standard of FACE which requires that the threat be made with the intent to intimidate. "The requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." *Id.* (citing United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir. 1989) and construing the Fair Housing Act's "threat" provision, which, is essentially the same as the one that appears in FACE).

[205] *See Planned Parenthood V*, 290 F.3d at 1092 (Kozinski, J., dissenting.)

[206] *See Id.*

[207] *See Brandenburg*, 395 U.S. at 447-448.

[208] *See Planned Parenthood V*, 290 F.3d at 1079, 1085.

therefore the poster format had "acquired currency" as a death threat.[209] "Knowing this," the majority continued "and knowing the fear [the posters] generated among those in the reproductive health services community...the defendants deliberately identified [the plaintiffs] to intimidate them."[210] But a plaintiff's fear cannot form the sole basis for liability. Both FACE and the majority's own test require that the speaker intended to send the message that they intended to engage in physical violence.[211] Moreover, as the Supreme Court made clear in *Claiborne Hardware*, tactics that merely intimidate or coerce the listener cannot form the basis for liability unless the speaker incites imminent lawless action.[212] For speech to be considered a true threat there must be evidence that the speaker himself intended to convey the message that he, or his accomplices, would immediately harm the target.[213] Since the majority offers no evidence of the necessary intent, it follows that the defendants' conduct must not be considered a 'true threat.'

The failure of the majority to find the necessary intent may not be its fault. Some commentators have suggested that the reasonable speaker test is almost unworkable in instances where the threat is implied, precisely because it is difficult to find the requisite intent.[214] Whatever the shortcomings of the standard applied by the majority, it is clear that liability in the instant case was improper. There is no evidence to suggest that the defendants here intended to threaten that they, or someone acting in concert, would harm the plaintiffs. Furthermore, liability was improper as a matter of law because there is no evidence that the defendants conduct failed the reasonable speaker test. Moreover, reversal is required based

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209 *See Id.* at 1079.

210 *See Id.*

211 *See Id.* at 1091 (Kozinski, J., dissenting.)

212 *See Claiborne Hardware,* 458 U.S. at 910, 928 (citing *Brandenburg,* 395 U.S. at 447, 448).

213 *See Brandenburg,* 395 U.S. at 447-448.

214 *See* Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 HARV. J. L. & PUB. POL'Y 283, 346 (2001). "Some of the most difficult cases to analyze are those where the alleged threat is not explicit...the courts reliance on subjective factors often results in decisions that restrict speech that ought to be protected by the First Amendment." *Id.* Furthermore, without a showing of intent, "there is a danger that ambiguous statements not intended as threats will be interpreted as threats under the reasonable speaker/listener test." *Id.* at 316.

on the holdings of *Claiborne Hardware* and factual similarity between it and the instant case. As stated above, if the Supreme Court was unwilling to impute liability for intimidating and coercive speech where the speaker himself explicitly threatened violence and violent acts followed the speeches, it is absolutely *non sequitor* for the Ninth Circuit to premise liability on speech that was not expressly threatening and was not followed by violence.

V. THE REMEDY

The imposition of liability in *Planned Parenthood* was improper. So too was the remedy. The defendants here faced an unprecedented damages award for threatening speech. On the FACE claims, the jury awarded $405,834 to Planned Parenthood of the Columbia/Willamette ("PPCW"), $50,243 to Portland Feminist Women's Health Center ("PFWHC"), $39,656 to Dr. Crist, $15,797 to Dr. Elizabeth Newhall, $14,429 to Dr. Hern, and $375 to Dr. James Newhall as to general compensatory damages.[215] The Jury also awarded punitive damages on the FACE claims in the amounts of $29.5 million to PPCW, $23.5 million to PFWHC, $14.5 million to Dr. Crist, $14 million to Dr. Elizabeth Newhall, $13 million to Dr. Hern, and $14 million to Dr. James Newhall.[216] On the civil RICO claims the jury awarded the plaintiffs (after trebling) over $12 million dollars.[217] All told, the jury found that the defendants in the instant case 'threatened' the plaintiffs to the tune of over $120 million dollars.[218]

None of the cases cited by the majority *Planned Parenthood* that involved a FACE claim (cases premised on expressly threatening conduct by the defendants) awarded monetary judgments anywhere near the size of the one

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[215] *See Planned Parenthood V*, 290 F.3d at 1066.

[216] *Id.* at 1086. Although the majority vacated the punitive damages portion of the award and remanded to determine if it comported with due process, the award must be upheld unless it is considered "grossly disproportionate" *Id. See In re* Exxon Valdez, 270 F.3d 1215, 1241 (9th Cir. 2001).

[217] *Id.* Although the RICO claims are outside the scope of this note, the damages awarded under them will be discussed here briefly.

[218] Actually, when the compensatory and punitive damage award of the FACE claims are added with the RICO damage awards the total is $120,868,893.00. *Id.* at 1066.

awarded here. In fact, only one, *Hart,* even upheld the imposition of a monetary damage award, and that was merely a nominal "special assessment" fine in the amount of fifty dollars.[219] The jury in *Hart* found the defendant guilty of violating FACE by using the Ryder trucks to threaten the clinicians, and the court sentenced the defendant to probation and community service in addition to the fine.[220] Similarly, the remedy in *Dinwiddie* was not a large compensatory and punitive damage award, but rather a narrowly tailored injunction.[221] *Dinwiddie* too is instructive for the amount of care the court took in defining the parameters of the injunction. The court carefully outlined conduct that it would view as a violation FACE in the future, but also balanced Ms. Dinwiddie's interest in free expression.[222] Thus the court held that while Ms. Dinwiddie could no longer engage in conduct that violated FACE in the future, she was still free to engage in forms of protest that didn't violate FACE, such as distributing literature, picketing and speaking outside of the clinic.[223] The defendants in both *Hart* and *Dinwiddie* expressly threatened their intended targets, invoked fear in those targets and caused significant disruption in their daily lives, yet neither decision led to the financial ruin of the defendants, nor did it significantly chill free speech.

Similarly, *Claiborne Hardware* is indicia of the Supreme Court's hesitancy to impose monetary damages for speech or conduct that is, or may be, constitutionally protected. There, the Mississippi Supreme Court ruled that boycotters were coerced and threatened into participating in the boycott by Evers' speeches.[224] The threats and coercion used to effectuate

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[219] Note that both *Hart* and *Dinwiddie* were prosecutions by the U.S. government. While FACE directly limits the amount damages the government can recover in these actions (between $10,000 and $15,000 for first violation, and $15,000 to $25,000 for subsequent violations, the fact that the recovery is limited is irrelevant, what is relevant is the fact the defendants were not required to pay damages for the political speech that stepped from under the umbrella of the First Amendment. *See* 18 U.S.C. § (c)(2)(b)(i-ii).

[220] *See Hart*, 212 F.3d at 1070. Hart was sentenced to 4 years of probation, the first 12 to be served in home detention, 200 hours of community service and the $50.00 fine. *Id.*

[221] *See Dinwiddie*, 76 F.3d at 929.

[222] *See Planned Parenthood V,* 290 F.3d at 1098.

[223] *See Dinwiddie,* 76 F.3d at 929.

[224] *See Claiborne Hardware,* 458 U.S. at 890-891.

the boycott, held the court, amounted to malicious interference with the plaintiff's business.[225] The court subsequently awarded the businessmen over one million dollars in damages and lost profits.[226] The Supreme Court unanimously reversed.[227] Finding first, that Evers' conduct was inside the umbrella of the First Amendment and second, that courts must proceed with caution when monetary liability is imposed for speech or conduct that may be constitutionally protected.[228] In reversing the damages award, the Court stated that when addressing whether speech or conduct is compensable "in the context of constitutionally protected activity ... [a] precision of regulation is demanded."[229] This mandate, held the Court, requires that only damages proximately caused by the unlawful conduct may be recovered.[230] Moreover, the Court in *Claiborne Hardware* noted that "while States have broad power to regulated activity, [they do not] have the right to prohibit peaceful political activity."[231] The Court recognized that damages liability was a means by which the state could circuitously prohibit otherwise peaceful political activity, citing *Mine Workers v. Gibbs,* a case where the permissible scope of state remedies was "strictly confined" to the consequences of the unprotected conduct.[232] Although the limitation on damages in *Gibbs* resulted from a need to balance federal labor policy with state tort remedies, the Court nevertheless held that the careful damage limitations were no less applicable to the First Amendment issues in *Claiborne Hardware.*[233] Thus the Court recognized the chilling effect that large damages awards can have on otherwise protected activity and took steps to guard against it. However, neither the "precision of regulation" directive, nor the requirement that courts carefully limit damages liability when First Amendment principles form the core of the case were followed in the *Planned Parenthood.* At a minimum, they should have been.

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225 *See id.*
226 *See id.* at 893.
227 *See id.* at 887.
228 *See id.* at 916.
229 *See id.* at 916 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).
230 *See Claiborne Hardware,* 458 U.S. at 918.
231 *See id.* at 913.
232 *See id.* at 916-918.
233 *See id.* at 918.

Similarly, the fact that over twelve million dollars of the overall damages award was based on civil RICO should make little difference. Since *Claiborne Hardware* mandates that only those damages proximately caused by the unprotected conduct may be recovered when First Amendment principles form the core of the case, plaintiffs should not be allowed to recover circuitously, (via civil RICO statutes) that which they could not recover for directly. Although the Supreme Court has previously declined to apply the dictates of *Claiborne Hardware* to cases imposing RICO liability for the actions of anti-choice groups, the size of the RICO award here distinguishes *Planned Parenthood* from the earlier cases.[234] The evisceration of the First Amendment, as well as the chilling effect of a substantial damages award is foreboding to the would-be political activist in any form. Likely exposure to damages awards and the mere threat of lawsuits will chill speech regardless of the theory of liability chosen by the plaintiff.

Limiting recovery to only those damages proximately caused when political activists step outside the umbrella of the First Amendment is sound policy. The Supreme Court long ago recognized that the threat of financial ruin can have a seriously chilling effect on all manner of free speech.[235] It follows that injunctions are the proper remedy in cases where political activism crossed the line into unprotected speech. Injunctions have a *de minimus* effect on political dissidents, as those enjoined from participating in unlawful activity are still free to participate in lawful forms of activism. Moreover, injunctions are superior to monetary damages because at least they carefully define that which is prohibited.[236] A damages

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[234] In Northeast Women's Center, Inc. v. McMonagle, 886 F.2d 1342 (3d. Cir. 1989) anti-abortion protesters blocked access to the clinic, as well as trespassed in the clinic in at least four documented instances. The 3rd Circuit held that the protester's nine-year effort to disrupt the clinic's activities deprived the center of the use of a legal property interest, violating the Hobbs Act/RICO. However, the total award—including damages (after trebling), cost of repairing broken property, as well as attorneys fess and costs amounted to only $64,946.11. *See* Brian J. Murray: Note: *Protestors, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms,* 75 NOTRE DAME L. REV. 691, 724-28. In contrast, the RICO award here was over 12 million dollars. *See Planned Parenthood V,* 290 F.3d at 1066.

[235] *See Planned Parenthood V,* 290 F.3d at 1100 (Kozinski, J., dissenting) (citing *New York Times Co.,* 383 U.S. at 277-279).

[236] *See Planned Parenthood V,* 290 F.3d at 1100.

award, on the other hand, leaves future speakers at the mercy of local juries, who decide after the fact that the speech or conduct stepped outside the umbrella of the First Amendment.[237]

The cases relied upon by the majority in *Planned Parenthood* recognized injunctions and less restrictive alternatives as the proper tools to balance a plaintiffs' legitimate interest in safety with the defendants' constitutional right to protest. In this sense, *Dinwiddie* is instructive not only for the amount of care the court took in defining parameters of the injunction, but because the court declined to attach a monetary award to the judgment.[238] Similarly, in *Hart*, the defendant was not enjoined from any conduct, but merely faced probation, community service and a nominal fine.[239] Because of the limited nature of the sentences imposed by the courts, both Dinwiddie and Hart were still free to engage in protest; they just were not allowed to do so in violation of FACE. And while the defendants here are still free to engage in political protest, it better be of an inexpensive varietal, as they face enormous debt that is not dischargeable in bankruptcy and have little chance of ever regaining financial independence.[240] Further, and perhaps more importantly, the sheer size of the judgment will undoubtedly cause other protesters to take notice and circumscribe their conduct accordingly. To some, the verdict's restriction on the conduct of anti-choice groups seems appropriate and perhaps long overdue. But those who agree with the outcome must recognize that while today it is anti-choice groups that bear the enormous costs of failing to act within the First Amendment, tomorrow it may be a less repugnant group. The First Amendment "attempt[s] to secure the widest possible dissemination of information from diverse and antagonistic sources," when its

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237 *Id.*

238 *See Dindwiddie,* 76 F.3d at 928-929. *See also supra* note 219.

239 *See Hart*, 212 F.3d at 1070. Hart was sentenced to four years probation, the first twelve months to be served in home detention, 200 hours of community service and a special assessment of $50.00. *Id.*

240 *See In re* Treshman, 258 B.R. 613, 622 (D. Maryland 2001). Donald Treshman was the regional director of the ACLA and a defendant in *Planned Parenthood.* He filed for bankruptcy on November 2, 1999, shortly after the initial verdict. The court held that all judgments entered against him arising out of the case were nondischargeable pursuant to 11 U.S.C. § 523(a)(6). *Id.*

protections are limited, when there is silence on the issues of our time—even though that silence may well be a welcomed reprieve—we all lose.[241]

After *Planned Parenthood,* faced with the likelihood of substantial monetary judgments, speakers engaged in all forms of political activism will surely hesitate, "lest they find themselves at the mercy of a local jury."[242] No doubt the lesson of what the local jury did to the defendants in *Planned Parenthood* will not be lost on those who engage in political protest. Injunctions, or damage awards limited to only those damages "proximately caused" by the unprotected conduct are the proper remedies in cases that involve political speech that falls outside the protections of the First Amendment. Injunctions have a *de minimus* effect on speech. So too does the proximate cause limitation advanced in *Claiborne Hardware,* as a defendant is only liable for that which he should have, at the least, expected to be liable for. The defendants here could not have expected what a local jury did to them, and the "robust and wide open debates" guaranteed by the first amendment will surely suffer for it.

CONCLUSION

> Speech "may indeed best serve its high and noble purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stir people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea." [243]

In her inspired dissent, Judge Berzon noted that *Planned Parenthood* is proof positive that "hard cases make bad law, and . . . when a case is very hard . . . there is a distinct danger of making *very* bad law."[244] The learned judge is right on both accounts—*Planned Parenthood* was a very difficult case, and

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[241] *New York Times Co.*, 383 U.S. at 271.

[242] *See Planned Parenthood V,* 290 F.3d at 1100 (Kozinski, J., dissenting) (citing *New York Times Co.*, 383 U.S. at 277-279).

[243] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

[244] *Planned Parenthood V,* 290 F.3d at 1101 (Berzon, J., dissenting) (emphasis in original).

the outcome resulted in very bad law. The case was difficult because, like the majority, at least on some level, we want to find the defendants liable. Indeed even the staunchest defenders of the First Amendment failed to show up on the defendants behalf, with only the state chapter, but neither the national nor local chapter, of the ACLU filing an *amicus curie* brief on the defendants' behalf.[245] The absence of "friends" is hardly surprising. The defendants' tactics were nothing short of offensive, and certainly tasteless when viewed in the context of murders of doctors Gunn, Patterson and Britton. But being offensive is not a crime, neither is political activism, unless it incites imminent lawless action or 'truly' threatens the listener. Poor taste, coupled with the violent acts of unassociated third parties, however much it may bother us, is not enough to impose liability for threatening speech.

This is precisely why *Planned Parenthood* resulted in very bad law. The jury here heard day-after-day of testimony regarding the violent deaths of the doctors and the violent acts of others.[246] Yet the defendants here committed no acts of violence. Similarly, after combing the record and analyzing the violent and threatening acts of others, the majority here speaks not of intent and true threats, but of "symbols" and "currencies."[247] In doing so, the majority dismissed the standards articulated in *Watts* and *Brandenburg* and failed to acknowledge the clear similarities between *Claiborne Hardware* and the instant case. *Planned Parenthood* is bad law because it stands for the principle that implied threats with no showing of intent to harm can serve as the basis for liability. It is bad law because in allowing the jury verdict to stand, the court sent a powerful message to political activists in the unfortunate position of advocating messages that are acceptable to the majority. The message is simple: speak quietly, and on subjects that we all agree on, or it will cost you. After *Planned Parenthood*, that message is certainly expensive enough to make those political activists who advocate

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[245] *Id.* at 1061. *See also* Steven G Gey, Article: *The Nuremberg Files and the First Amendment Value of Threats,* 78 TEX. L. REV. 541, 542-544 (2000). Mr. Gey correctly chides civil libertarians for not coming to the defense of the defendants First Amendment claims during the first trial. *See id.*

[246] *See Planned Parenthood V,* 290 F.3d at 1078.

[247] *See Planned Parenthood V,* 290 F.3d at 1085.

unpopular positions take notice. Simply stated, *Planned Parenthood* is bad law because it eviscerates the protections of the First Amendment and in a very powerful way chills free speech.

After *Planned Parenthood* and its crushing damages award, freedom of speech is not only figuratively less "free," but also literally. Unpopular speech now carries a potentially ruinous financial burden. In dismissing *Claiborne Hardware* and finding the defendants' conduct outside the umbrella of the First Amendment, the majority put a heavy price tag upon what was once considered protected political discourse. The question now becomes—can we afford to pay?

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