THE DOUBTFUL CONSTITUTIONALITY OF THE CLINIC ACCESS BILL

Michael Stokes Paulsen* and Michael W. McConnell**

Editors’ note: This essay was originally prepared as written testimony on S. 636, the “Freedom of Access to Clinic Entrances Act of 1993,” (“FACE”) on May 20, 1993. Since that testimony was delivered, versions of the bill have passed both the House of Representatives and the Senate, and as this essay is being prepared for publication, the bill is heading for a conference committee. All references to the language of the bill are to the version pending before the Senate on May 20, 1993. Some of the modifications made in the Senate version after that date were responsive to some of the constitutional objections raised by Professors Paulsen and McConnell, but the final resolution of these issues has not occurred.

INTRODUCTION

This is not the first time in this nation’s history that street demonstrations, sit-ins, and civil disobedience have been in the forefront of political activity on a particular issue, nor is this the first time such activities have crossed the line into unlawful or even violent protest. The abolitionist movement, the labor movement, the women’s suffrage movement, the various anti-war protests, the civil rights movement, and numerous other causes have all made themselves heard through the use of pickets, blockades, street marches, and sit-ins, many of which obstructed the lawful right of other citizens to go about their business, and many of which were intended to persuade, embarrass, or

* Associate Professor of Law, University of Minnesota Law School.

** William B. Graham Professor of Law, University of Chicago Law School.

We wish to note four principles that have guided the nation in the past and that should guide us in resolving the matter of abortion clinic protests today. First, no one is entitled to violate the rights of others by trespass, assault, violence, or threat of violence, merely because they are acting in pursuit of a cause that may be just. Thus, some punishment is in order for abortion protestors who violate the law. Second, punishments must be narrowly tailored, so that only those who have committed unlawful acts are punished, and punished only for the unlawful acts themselves. Statutes must be both drafted and enforced in such a way as to distinguish clearly between lawful and unlawful expressive conduct. Third, the punishment must be proportionate. A participant in a nonviolent sit-in for a political cause should not be treated as a hardened criminal. An excessive punishment betrays a hostility toward the protest. Fourth, no particular cause or point of view should be singled out. If a Klansman is fined $100 for trespassing on the property of a local civil rights organization, then a freedom rider should be fined $100—not less, not more—for the same sort of trespass on the property of a discriminatory merchant. If anti-nuclear protestors are let off with a slap on the wrist, then anti-fluoridation protestors should be treated the same way. The great virtue of relying on general rules of tort and criminal law, rather than targeting each form of protest with a separate statute, is that tort and criminal law apply indiscriminately to all conduct of the same nature.

The proposed Federal Access to Clinic Entrances Act, S. 636 (hereinafter, S. 636, or the proposed Act), should therefore be of grave concern to those who value our heritage of fair play toward political protests. To our knowledge, this would be the first statute designed to

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2 We are concerned about other provisions of the bill, especially section 2715(d), which requires a federal government investigation of uncertain dimensions into pro-life activity on the request of an abortion provider, and section 2715(e)(1)(B), which forces pro-life protestors to pay sums of money to abortion clinics (beyond mere compensation for damages inflicted) and which may violate the principles of Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that the First Amendment prohibits requiring teachers, as a condition of employment, to contribute, through union dues, to the support of ideological causes with which they might not agree). In this Essay, we concentrate on the constitutionality of the substantive prohibitions contained in the legislation.
regulate political protests of one movement only. It is explicitly and unabashedly selective. It imposes severe sanctions on a demonstrator at an abortion clinic without imposing any sanction on an otherwise identical demonstrator at a nuclear power plant or at a research hospital engaged in animal experimentation. Moreover, the penalties required under S. 636 are excessive. The proposed Act would throw participants in a peaceful sit-in demonstration in prison for one year, three years if they are found to have violated the Act twice. A concerned citizen might go to a clinic one Saturday morning and peacefully sit on the steps with posters to dramatize the enormity of the evil she perceives therein and spend the next year of her life in jail. Constitutional questions aside, members of Congress should think deeply about the injustice of imposing so severe a sanction on a person who has acted peacefully and out of conscience. Finally, the statute is not confined to violent—or even to unlawful—acts, but could be enforced against ordinary protestors who get in the way of an abortion clinic patron and whose message of moral condemnation the patron finds intimidating. And because its penalties are so severe and its definitions so indistinct, the Act will surely chill the free speech rights of the entire pro-life protest movement. The vast majority of abortion protests are conducted nonviolently and within the bounds of the law, but even these peaceful protestors will face the real prospect of legal harassment by their ideological opponents.

The constitutional right to protest against abortion—forcefully and face-to-face if necessary—is no less important than the constitutional right to abortion.\(^3\) Those who seek abortions have no constitutional right to be spared the indignity and distress of learning that many of their fellow citizens consider the act of abortion tantamount to murder.

\(^3\) Thus, we must respectfully disagree with Attorney General Reno's approach to S. 636 which dismisses the bill's effects on free expression as less important than the policy of protecting abortion:

> The bill . . . is an effort to protect individuals in the exercise of their right to choose an abortion and to eliminate the harmful effect on interstate commerce resulting from interference with the exercise of that right. That justification is surely sufficient to override any incidental effect that the bill may have on expression.

Thus, we urge the members of this committee to put aside any opinions they might have, one way or another, on the abortion question, and ask: is S. 636 the sort of legislation I could support, consistently with the First Amendment, if it applied to all political protests, including those with which I profoundly agree?

We note that the testimony in support of the constitutionality of this legislation was presented by witnesses who strongly support abortion rights. We doubt that anyone not sharing that conviction would be so confident of their assessment of this bill. All too often it seems that legal scholars' and politicians' appraisals of constitutional issues—even of freedom of speech—are influenced by their views on the underlying substantive question.4 We have tried to be aware of this possibility in ourselves. In the interest of full disclosure, we feel that the committee should be aware that both of us favor reasonable restrictions on the practice of abortion (though we do not approve of all the tactics or objectives of the pro-life protest movement). We believe, however, that the legal position we present here is the one we would take in the case of protests espousing views we detest as well as those espousing views with which we are to some extent in sympathy. What animates us in this matter is the conviction that protecting the First Amendment rights of those we oppose is vitally important to protecting the First Amendment rights of everyone.

4 Unfortunately, First Amendment problems with proposed legislation are often overlooked for reasons of political convenience or expediency. A recent example is Congress's enactment of the Flag Protection Act of 1989, 103 Stat. 777, 18 U.S.C. § 700 (Supp. 1990), in an attempt to circumvent the Supreme Court's First Amendment decision in Texas v. Johnson, 491 U.S. 397 (1989), which invalidated a state law prohibiting flag burning. The Department of Justice, among others, testified that the proposed statute was plainly unconstitutional under Johnson, and a constitutional amendment was needed if flag burning were to be prohibited. Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Committee on the Judiciary, United States Senate on S. 1336, H.R. 2978, and S.J. Res. 180, 101st Cong., 1st Sess. 69 (1989) [hereinafter Flag Hearings] (testimony of William P. Barr, Assistant Att'y Gen., Office of Legal Counsel). The Supreme Court subsequently declared the Flag Protection Act unconstitutional for many of the same reasons advanced by the Department in the congressional hearings. United States v. Eichman, 496 U.S. 310 (1990). At the time, however, Congress had been assured by some legal scholars that a flag protection statute would be entirely constitutional. See, e.g., Flag Hearings, supra at 148 (testimony of Laurence H. Tribe before the Senate Judiciary Committee Regarding Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson).
There are two main constitutional problems with S. 636 as currently drafted. First, the terms of S. 636’s prohibition are unconstitutionally vague and overbroad, abridging a great deal of constitutionally protected expression. This overbreadth is substantial and, in our opinion, renders the entire bill unconstitutional on its face. This defect can be remedied only by making substantial changes in the bill’s wording. Second, even that part of the bill that reaches constitutionally proscribable conduct, rather than protected expression, raises grave constitutional concerns in that it appears targeted at such conduct because of the viewpoint with which it is associated—the anti-abortion viewpoint. Such a content-based or viewpoint-based punishment of civil disobedience, even if directed only at unlawful conduct in connection with such demonstrations, violates the First Amendment under the Supreme Court’s recent ruling in *R.A.V. v. City of St. Paul.* Again, this constitutional flaw can be remedied, but not without fairly major changes in the bill as drafted. We will describe and develop each of these constitutional defects in turn.

**I. VAGUENESS AND OVERBREADTH**

S. 636 suffers from the First Amendment problems of vagueness and overbreadth. The two concepts are related, but distinct. A statute is unconstitutionally vague where its terms are “so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application . . . .” As the Supreme Court has repeatedly made clear, an especially stringent vagueness standard must be applied to laws that touch on First Amendment freedoms. The vice of vagueness in the First Amendment context is that, because an individual cannot be certain whether or not his conduct is prohibited by the statute, the vagueness of the statute exerts a powerful chilling effect on a wide range of protected First Amendment activity. “[P]ersons whose expression is constitutionally protected may well re-

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5 112 S. Ct. 2538 (1992) (holding a Minnesota ordinance facially invalid because it was impermissibly content-based).


frain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." 8 The First Amendment does not tolerate statutes that exert such a deterrent effect on expression.

Whether or not a statute is vague, a statute is unconstitutionally overbroad where it "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms." 9 Obviously, the more vague a statute's language, the more susceptible it is to a construction that sweeps unnecessarily broadly and thereby regulates constitutionally protected First Amendment activity. Thus, while a statute can be overbroad even if it is clear (the statute may clearly reach too broadly and invade the realm of First Amendment rights), overbreadth is often found in combination with vagueness. 10 S. 636 contains both types of problems.

S. 636 would impose, as a matter of federal law, severe criminal and civil penalties on any person or group who:

[b]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any other class of persons from, obtaining or providing abortion-related services. 11

The bill would impose the same penalties on any person or group who "intentionally damages or destroys the property of a medical facility or in which a medical facility is located, or attempts to do so, because such facility provides abortion-related services[.]" 12

Although this language has been described by supporters as narrow and precise, in fact its plain meaning extends beyond the conduct its

sponsors claim to be concerned about proscribing. Subsection (a)(1) applies whenever certain action is taken "by force or threat of force or by physical obstruction." Such action is prohibited when it "intentionally injures, intimidates or interferes with" (or attempts to injure, intimidate or interfere with) "any other person or class of persons" because that person is seeking to obtain, or assist another in obtaining, an abortion. A violation thus may be established by showing a person has "by physical obstruction... intimidat[e]d or interfer[e]d with" a person seeking to obtain or assist another in obtaining an abortion.

This language certainly goes beyond the "terrorists" who figure so prominently in rhetoric in support of the bill. It obviously can extend to peaceful, nonviolent civil disobedience such as sit-ins and prayer vigils on clinic property, and, unless the language is narrowed, appears to proscribe such constitutionally protected conduct as sidewalk counseling or picketing, which could be said to "obstruct" passage to a clinic. We do not contend that the terms "force or threat of force," "injure," or "damage or destroy the property" are vague or overbroad. The problem is with the terms "physically obstruct" and "intimidate or interfere." Since the statute requires both elements—the conduct must both "physically obstruct" and "intimidate or interfere"—it is unconstitutionally vague on its face if either of these terms is unconstitutionally vague or overbroad.

A. The Terms "Obstruction," "Intimidates," and "Interferes With": The Basic Problem

The terms "obstruction," "intimidates," and "interferes with" are, in context, imprecise and unconstitutionally overbroad. They could be construed to include much entirely lawful conduct. Taken literally,

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We note S. 636 is not limited in its application to conduct taking place at or near the premises of abortion facilities. Thus, the prohibitions of the bill may well apply within the home to parents who "intimidate" or physically prevent their minor daughter from obtaining an abortion. In addition, S. 636 is not limited in its application to interferences with persons who are seeking lawful abortion services. As written, the bill appears to make it a federal crime to attempt to enforce state laws (of unquestioned constitutional validity) prohibiting abortions of viable fetuses or prohibiting minors from obtaining abortions without parental notice. The bill's language thus gives rise to some no doubt unintended consequences quite aside from those posing First Amendment vagueness problems.
one may "obstruct" another by merely hindering or impeding that person's progress or activity—in short, by being in a person's way. In the context of common anti-abortion expression at abortion facilities, such an understanding of "obstruct" might be taken to describe a sidewalk counselor who steps in front of a pregnant woman to hand her a leaflet, or who seeks personally to dissuade her from aborting her child, or to a picket line that such a woman must cross in order to enter the abortion facility. Such conduct may well physically hinder or impede a woman from obtaining an abortion in the sense of slowing her progress to the abortion clinic door, but without actually preventing such access.

These examples highlight the vagueness of S. 636. A pro-life picketer or leafletter must necessarily guess at the meaning and application of the bill with respect to various types of conduct in connection with First Amendment expression. This problem is of course multiplied by the sheer enormity of the penalties attached to guessing wrongly—up to a year in prison for a single violation and three years for second or subsequent violations, to say nothing of civil remedies and attorneys' fees. Moreover, if each person obstructed constitutes a separate offense, the amount of possible prison time becomes a function of the number of complaining abortion clinic patrons and employees. Given that a violation could consist of entirely peaceful protest


15 In her testimony before the Senate Committee on Labor and Human Resources, Attorney General Reno stated that "men and women of common intelligence will have little difficulty discerning what conduct [S. 636] prohibits." Hearings, supra note 3 (testimony of Janet Reno). However, when asked about the application of the bill to certain specified actions, Attorney General Reno generally refused to answer, deferring such questions to the courts or stating it was impossible to answer hypotheticals with precision. But if the Attorney General of the United States can offer no guidance as to the understanding of the key terms of the statute, how can we expect a sidewalk counselor, on pain of penalty of up to three years in prison, to be certain that she understands them correctly?

In her testimony before the Senate Committee on Labor and Human Resources, Attorney General Reno advocated that "the enhanced penalty for 'second and subsequent offenses' be made applicable even when the defendant has not been previously convicted of a prohibited activity." Id. This would, of course, further heighten the constitutional problems of the bill since it would be possible to violate this statute many times in a single morning. Thus, the sidewalk counselor or picketer trying to guess whether her speech is punishable or not would be risking not just one year in prison but three, for each "count" (after the first) arising from a single course of conduct.
activity (and, except for the prohibitions of this bill, entirely lawful activity), the chilling effect on protected speech caused by the threat of such disproportionately severe penalties cannot be overstated. If ever there were a case where “persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression,”16 S. 636 is such a statute.

Such expressive conduct as picketing, leafleting, and sidewalk counseling is plainly protected by the First Amendment. It therefore may not be restricted—let alone subjected to the threat of enormous civil and criminal liability—on the basis that it might annoy or inconvenience the hearer. As the Supreme Court has repeated: “‘Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.’”17 “Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”18 So long as persons are free to walk through the picket line, reject or throw away a leaflet, or walk around or past a sidewalk counselor, the minor inconvenience or annoyance that may be caused by such “obstructions” must be tolerated as part of the constitutional protection of free expression.

This is not to say that the First Amendment grants a right to block free ingress to and egress from a facility open to the public. It does not.19 Rather, it is to say that the First Amendment requires great pre-

19 See Cameron v. Johnson, 390 U.S. 611 (1968) (holding a Mississippi law not overbroad since it did not prohibit picketing unless such activity obstructed or unreasonably interfered with ingress and egress to or from a courthouse).
cision of regulation in this area.\textsuperscript{20} As the United States Court of Appeals for the Fifth Circuit held in a case involving a state law regulating protests by farm workers, to be constitutional the term “obstruction” must be defined or narrowed so that it does not include “mere momentary interferences which are so temporary and incidental that they do not constitute imminent threats of violence or public disorder.”\textsuperscript{21} The Fifth Circuit referenced\textsuperscript{22} the decision in \textit{Sherman v. State},\textsuperscript{23} where a court was able to save the constitutionality of a Texas statute by incorporating a definition of “obstruction” from elsewhere in the Texas penal code: “the ‘rendering impassable or the rendering unreasonably inconvenient or hazardous the free ingress or egress to the struck premises.’”\textsuperscript{24} Here, similarly, it is necessary for either Congress or the courts to narrow and define the term “obstruct” so that it does not include interferences that do not constitute imminent threats of violence or public disorder, such as leafleting, picketing, or counseling.\textsuperscript{25} To avoid constitutional infirmity, subsection (a)(1) should be amended to make clear that only those physical obstructions that \textit{actually prevent entrance} to an abortion facility or make entrance \textit{unreasonably inconvenient or hazardous} are unlawful.


\textsuperscript{21} Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 559 (5th Cir. 1988).

\textsuperscript{22} Id.

\textsuperscript{23} 626 S.W.2d 520 (Tex. Crim. App. 1981).

\textsuperscript{24} Id. at 526 (quoting Tex. Penal Code § 42.03(b)).

\textsuperscript{25} In \textit{Cameron}, 390 U.S. 611, the Supreme Court upheld on a facial challenge a statute making it unlawful for any person to “engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises.” The litigants in that case did not challenge the term “obstruct,” but focused instead on the term “unreasonably.” Id. at 616. As noted in the text, subsequent courts faced with a specific challenge to the vagueness and overbreadth of the term “obstruct” have felt it necessary to impose a narrowing construction. See, e.g., \textit{Howard Gault Co.}, 848 F.2d at 544. It bears mentioning that in \textit{Cameron}, the district court had found on evidence stipulated by the parties that the protestors had made entry to and exit from the courthouse “impossible.” Cameron v. Johnson, 381 U.S. 741, 745 (1965) (Black, J., dissenting).
B. The Term “Intimidate”

Even more problematic from a constitutional standpoint is that “physical obstruction” becomes unlawful under S. 636 where it has the intent or effect of “intimidat[ing]” pregnant women from aborting their pregnancies or of “intimidating” others from performing or assisting others in procuring abortions. A prohibition on expressive conduct because of its “intimidating” effect proscribes a substantial amount of constitutionally protected speech solely because of its persuasive impact, in plain violation of the First Amendment and numerous Supreme Court precedents.

The word “intimidate” as used in S. 636 would unconstitutionally permit a violation to be based on the subjective reaction of abortion clinic patrons and personnel to anti-abortion speech. A person may well feel “intimidated” by being forced to confront the fact that others consider her conduct to be deeply immoral—“murder” in the eyes of many pro-life advocates. But no citizen has a right to insulate herself from the opinions of others, however traumatic or offensive those opinions may be to her. By making a violation turn on the sense of affront, embarrassment, annoyance, intimidation, or chagrin experienced by the pregnant woman who encounters pro-life pickets or sidewalk counselors as she is preparing to abort her fetus or unborn child, S. 636 is plainly unconstitutional.

On two occasions, the Supreme Court has struck down government action regulating or punishing expressive conduct on the ground that it was “intimidating.” In Organization for a Better Austin v. Keefe, the Supreme Court invalidated an injunction prohibiting the circulation of allegedly “coercive and intimidating” leaflets highly critical of an individual’s business practices:

[The Appellate Court was apparently of the view that petitioners’ purpose in distributing their literature was not to inform the public, but to ‘force’ respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners were engaged openly]

and vigorously in making the public aware of respondent’s real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.  

This same language was quoted with approval by the Court in *NAACP v. Claiborne Hardware Co.* This case is especially relevant to S. 636. At issue in *Claiborne Hardware* was a highly “intimidating” civil rights protest and boycott, including many unlawful acts committed by supporters of the boycott. A civil rights group organized a campaign, including marches and picketing, to encourage black citizens of a Mississippi county to boycott local white merchants. As the Court found, the boycott effort involved both constitutionally protected free speech activity and also unlawful violence. Shots were fired through the windows of blacks who resisted the boycott, threatening telephone calls were made, and an elderly preacher was stripped and beaten, among several other acts and threats of violence.

In *Claiborne Hardware*, as in proposed S. 636, parties opposed to the activities of the protestors sought damages and injunctive relief not only against the persons responsible for such unlawful acts but against the entire protest. The Supreme Court reversed the lower court’s award, based as it was on an undifferentiated mix of constitutionally protected speech and unprotected tortious acts, holding that only the latter could be prohibited. The Supreme Court specifically found protected by the First Amendment a number of aggressive tactics employed by the protestors—tactics not dissimilar to those sometimes employed by pro-life protestors today and often characterized as “intimidating” or invasions of privacy by operators of abortion businesses:

Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addi-

27 Id. at 419 (emphasis added).
tion, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. *Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.*

Significantly for purposes of S. 636, the Court specifically rejected the idea that speech could be restricted or punished because others were "intimidated":

"To the extent that the [lower] court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment."

Lower courts have reached similar conclusions. In one notable case, the United States Court of Appeals for the Ninth Circuit in *Wurtz v. Risley* struck down on grounds of facial overbreadth a Montana statute defining the criminal offense of "Intimidation," including "intimidation" by threats to commit unlawful acts. Citing *Claiborne Hardware and Organization for a Better Austin* for the proposition that speech which coerces is not necessarily removed from First Amendment protection, the Ninth Circuit held that:

"[t]he statutory language applies so broadly to threats of minor infractions, to threats not reasonably likely to induce a belief that they will be carried out, and to threats unrelated to any induced or threatened action, that a great deal of protected speech is brought within the statute.*

The court continued:

29 Id. at 909-10 (emphasis added).
30 Id. at 921 (emphasis added).
31 719 F.2d 1438 (9th Cir. 1983).
32 Id. at 1442.
Speakers may refrain from delivering their constitutionally protected messages for fear of the statute's application... It is that chilling effect that the first amendment forbids. We therefore conclude that... [the Montana statute] is void on its face for overbreadth.33

Indeed, in the specific context of abortion protests, a federal district court held and the Fourth Circuit affirmed that language similar to that in S. 636 would be unconstitutional. In NOW v. Operation Rescue,34 the court issued an injunction against certain activities of an anti-abortion group under 42 U.S.C. § 1985(3). The plaintiffs had requested an injunction against anti-abortion activities that "tend to intimidate, harass or disturb patients or potential patients of the clinics."35 This the court refused to do, noting that

[d]efendants have a significant First Amendment right to express their views on the vitally important issue of abortion and nothing in the permanent injunction should be construed to limit that right. Defendants' First Amendment right to express their views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of defendants' views on the issue of abortion. Thus injunctive relief must not abridge defendants' First Amendment rights to express their abortion views in an appropriate manner in the vicinity of abortion clinics.36

The court distinguished between an injunction against activities that would "intimidate" patients and a more closely tailored injunction against trespass, denial of access to the clinics, and defacement or

33 Id. at 1443.
35 Id. at 1497.
36 Id.
damage to clinic property. This First Amendment holding was affirmed by the Fourth Circuit.

Our point is a simple one: while the state may punish actual assaults or physical interferences placing a person in reasonable apprehension of immediate bodily harm, a statute forbidding conduct of an "intimidating" nature sweeps far too broadly into the realm of protected First Amendment expression.

C. The Term "Interferes"

The phrase "interferes with" raises vagueness and overbreadth objections similar to the words "obstruction" and "intimidate." In Dornan v. Satti, the United States Court of Appeals for the Second Circuit invalidated Connecticut's Hunter Harassment Act, which prohibited persons from "interfer[ing] with the lawful taking of wildlife by another person" or "harass[ing] another person who is engaged in the lawful taking of wildlife." The state attempted to apply the statute against a woman who "interfered" with several duck hunters by "sp[eking] to them about the violence and cruelty of hunting." The court found the term "interferes" so vague and overbroad that it could not be cured even by a narrowing construction. The court therefore held the statute unconstitutional on its face.

D. "Substantial" Overbreadth

The overbreadth of S. 636's language is substantial. In the context to which S. 636 is directed—anti-abortion protests and civil disobedience at abortion clinics—the bill's language plainly reaches a significant amount of protected First Amendment activity. A large number of the potential applications of such statutory language are likely to involve protected expression, like sidewalk counseling, direct person-to-

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37 Id.
40 Id. at 434.
41 Id. at 436-37. See also Houston v. Hill, 482 U.S. 451, 466 (1987) (invalidating a municipal ordinance on similar grounds).
person attempts at persuasion, and peaceful picketing. Given the extraordinary penalties and civil remedies available to punish violations, S. 636 would doubtless have a severe chilling effect on entirely lawful (indeed, constitutionally protected) pro-life speech and expression at abortion clinics. In this context, the substantial overbreadth of the bill’s prohibition renders it unconstitutional.\(^\text{42}\)

We are aware that other federal criminal statutes use some of the same language as is used in subsection (a)(1)’s prohibition, including forms of the word “intimidate.”\(^\text{43}\) In their testimony before the Senate Committee on Labor and Human Resources, Professor Laurence Tribe and Attorney General Janet Reno placed considerable emphasis on such statutes in defending the approach of S. 636.\(^\text{44}\) We believe this reliance is misplaced for two related reasons.

First, it is a logical mistake to rely on the mere existence of such statutes—the constitutionality of which as applied to speech activities generally has not been tested by the courts—as supporting the constitutionality of a bill using the same language. This begs the question-in-chief. It seems to us plain from the cases discussed above that some applications of these statutes would violate the First Amendment. For example, neither 18 U.S.C. §245(b) nor 18 U.S.C. §594 could constitutionally be applied to punish otherwise lawful leafleting at polling places, even if such leafleting were thought to “intimidate” or “coerce” persons into not voting.\(^\text{45}\) Nor could 18 U.S.C. §112(b), which pro-

\(^{42}\) See Board of Airport Comm’rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (holding a local Los Angeles resolution banning all “First Amendment activities” within the “Central Terminal Area” of airports unconstitutionally overbroad); \(\text{Hill, 482 U.S. at 458}\) (finding a municipal ordinance unconstitutional because of its overbreadth).

\(^{43}\) See, e.g., 18 U.S.C. § 245(b) (1948) (prohibiting interference with right to vote, to enjoy federal benefits or employment, and to serve on federal juries); 18 U.S.C. § 594 (1948) (prohibiting intimidation or coercion for the purpose of interfering with the right to vote in federal elections); 18 U.S.C. § 112(b) (1948) (prohibiting intimidation, coercion, or harassment of foreign officials); 18 U.S.C. § 372 (1948) (making it unlawful to “conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office”).

\(^{44}\) \(\text{Hearings, supra note 3 (testimony of Janet Reno). Id. (statement of Laurence H. Tribe)).}\)

\(^{45}\) Cf. Burson v. Freeman, 112 S. Ct. 1846, 1857 (1992). In \(\text{Burson, a plurality of justices upheld a statute banning election day leafleting and campaigning within 100 feet of the polls because of the state’s long-standing, traditional interests in preventing voter intimidation and election fraud. Id. at 1851-56 (plurality opinion of Blackmun, J.). Unlike S. 636, the statute upheld in Burson did not ban “intimidating” speech but all political speech within a certain radius—avoiding the vagueness and overbreadth problems of S. 636 by...}\)
hibits intimidation, coercion, or harassment of foreign officials, be applied to prohibit demonstrations directed at foreign embassies because of their emotional impact on foreign officials (so long as such demonstrations complied with other lawful regulations). Clearly, then, not all applications of the statutes relied on by Professor Tribe and Attorney General Reno would be permissible under the First Amendment. It is noteworthy that many of these statutes were drafted before the development of modern First Amendment doctrine. It is therefore a serious mistake to rely uncritically on such “borrowed” statutory language where the constitutionality of such language has not been tested as applied to expressive activity and where such attempted application would likely be struck down under applicable Supreme Court precedent (decided after the enactment of such statutory language) protecting “intimidating” or “coercive” speech. To borrow such statutory language is to borrow constitutional trouble.

The second reason why it may be improper to rely on such statutes has to do with the degree of unconstitutional overbreadth in such statutes in relation to their legitimate sweep. While some applications of these other federal statutes would be unconstitutional, this does not mean those statutes are unconstitutional on their face. Under the overbreadth doctrine, the entire statute is not unconstitutional unless the overbreadth is “substantial” in relation to the statute’s legitimate objects of regulation. The situations to which these other statutes are directed, and the contexts in which they are likely to be applied are not as closely and directly associated with traditional First Amendment activity like picketing and leafleting on public sidewalks as is the prohibition of S. 636. It is therefore possible that these other statutes adopting a more categorical restriction. There is no majority opinion in Burson and nothing within the plurality opinion that in any way impairs the authority of Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), or NAACP v. Claiborne Hardware, 458 U.S. 886 (1982), in this regard.

46 Boos v. Barry, 485 U.S. 312. (1988). Indeed, 18 U.S.C. § 112(b) was upheld against constitutional challenge only after it was given an authoritative narrowing construction removing peaceful picketing from its ambit. Committee in Solidarity v. FBI, 770 F.2d 468, 474 (5th Cir. 1985).

might be susceptible to a "saving construction" despite the apparent overbreadth of their language.\(^4\)

The simple point here is that S. 636 embraces a substantial amount of constitutionally protected conduct with relation to its sweep in a way that these other statutes may well not. In none of these other instances is the principal application of the statute to the situation of protests or acts of civil disobedience. Those statutes might sometimes apply to protests, but S. 636 is about protests. The proposed bill is specifically and exclusively concerned with protecting abortion businesses and their patrons from anti-abortion protest activity. Unlike other statutes employing similar language, the very object of S. 636's regulation touches closely on First Amendment freedoms.

We wish to be clear, however, that we are not defending the use of such overbroad language in these other statutes. In our view, the better course would be for Congress to revise the language of such statutes to conform with the evolution of First Amendment doctrine over the past several decades. All that we are saying is that, because the overbreadth of these other statutes may not be "substantial," the courts might save Congress from some of the consequences of its poor use of language in the past by giving the statute a narrowing construction. But that "safety valve" is not available with respect to S. 636 because its language reaches a truly substantial amount of constitutionally protected conduct.

\[E. \text{ Congressional Attempts to Add Restrictions to the Potential Sweep of S. 636 Fail to Save the Bill.}\]

Under the heading of "rules of construction," new § 2715(f)(5) provides that "[n]othing in this section shall be construed or interpreted to . . . prohibit expression protected by the First Amendment to the Constitution."\(^4\) It should almost go without saying that this statement is legally gratuitous: Congress has no power to prohibit expres-

\[^4\text{See generally Boos, 485 U.S. at 330-31 (holding a District of Columbia statute making it unlawful to congregate and demonstrate within 500 feet of a foreign embassy to be facially violative of the First Amendment and not subject to a saving construction); Ferber, 458 U.S. at 769 (holding a New York statute was not unconstitutionally overbroad pursuant to the "substantial overbreadth rule" of Broadrick v. Oklahoma, 413 U.S. 601 (1973)).}\]

\[^4\text{S. 636, 103rd Cong., 1st Sess. §3, new section 2715(f)(5).}\]
sion protected by the First Amendment.\textsuperscript{50} More importantly, however, such a savings provision does nothing to save the statute from vagueness or overbreadth problems. It does not define more precisely the terms being used, nor does it narrow the scope of unconstitutional applications of the statute. Indeed, S. 636 omits language contained in the House version of the bill which, while still insufficient, at least makes clear that certain expressive activity is not sought to be regulated. H.R. 796, as marked-up in committee, provides that “[t]his section does not prohibit (1) any expressive conduct, including peaceful pickets or peaceful protests, protected by the [First Amendment].”\textsuperscript{51} At a minimum even this language should be revised to make clear that the prohibitions of the bill are intended only to reach conduct that is independently unlawful and to make clear that the bill does not purport to render unlawful any expressive conduct that would otherwise—that is but for S. 636—be lawful.

II. TARGETING OF PRO-LIFE EXPRESSION AND ACTIVITY

The most fundamental premise of First Amendment law is that government may not penalize speech or conduct on the basis of its content or viewpoint. Recently, in the case of \textit{R.A.V. v. City of St. Paul},\textsuperscript{52} the Supreme Court made clear that this principle applies even to government regulation of the unprotected aspects of expression: government may not regulate even unprotected speech or conduct out of hostility to the views being expressed by such conduct.

The second major constitutional problem with S. 636 concerns this principle of discriminatory treatment of certain expressive conduct because of its content or viewpoint. The bill’s plain purpose and essential feature is to prohibit and punish as unlawful certain conduct—conduct that commonly occurs in political protests of various sorts—\textit{only in connection with anti-abortion protests}.

\textsuperscript{50} Committee in Solidarity v. FBI, 770 F.2d 468, 474 (5th Cir. 1985).

\textsuperscript{51} H.R. 796, 103rd Cong., 1st Sess. §2, new section 248(d)(1).

\textsuperscript{52} 112 S. Ct. 2538, 2544 (1992).
The ostensible goal of S. 636 (though not the effect of S. 636 as presently drafted) is to prohibit only that conduct which lies outside the scope of First Amendment protection for expressive activity. This general objective is completely unexceptionable from a First Amendment standpoint. Virtually by definition, a law regulating only conduct unprotected by the First Amendment does not present the same constitutional difficulties as a law directly regulating speech or expression. Nonetheless, the First Amendment prohibits Congress from regulating even unprotected conduct when it seeks to do so because of the viewpoint sought to be expressed by that conduct or because of its connection with the lawful expression of views on a certain topic (e.g., abortion). As the Court stated in *R.A.V. v. City of St. Paul*, "nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses."\(^{53}\) Under *R.A.V.*, government may not regulate even "unprotected features" of expression (such as conduct that is unlawful regardless of any expressive component) "based on hostility... towards the underlying message expressed."\(^{54}\) Government may regulate such conduct, but its ability to do so selectively is limited: it may do so only "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."\(^{55}\)

S. 636, as presently drafted, presents a difficult constitutional issue under this test. The House version of the bill, H.R. 796, is plainly unconstitutional under *R.A.V.* H.R. 796 would prohibit blocking access to abortion clinic entrances "with intent to prevent or discourage any person from obtaining [an abortion]."\(^{56}\) Such a prohibition regulates certain civil disobedience activity explicitly on the basis of the views or ideas expressed thereby—an obvious First Amendment violation under *R.A.V.*\(^{57}\) S. 636 is more artfully drafted. It defines a violation not in terms of the ideas being expressed by the protest or civil disobedience (as does the House Bill) but in terms of the effect of such acts on persons engaged in the conduct (abortion) against which the

\(^{53}\) Id. at 2544.

\(^{54}\) Id. at 2545.

\(^{55}\) Id.


\(^{57}\) 112 S. Ct. at 2543-45.
protest or civil disobedience is directed, or the premises at which such conduct (abortion) takes place.

Professor Tribe’s analysis suggests that these verbal circumlocutions make all the constitutional difference in the world. The problem of S. 636’s selectivity is not so easily dismissed. Tribe is correct only to the extent that S. 636’s verbal circumlocution makes the constitutional infirmity of the Senate version far less obvious than that of the House version because the words of S. 636’s prohibition themselves, considered in isolation, do not necessarily indicate an intention to regulate anti-abortion civil disobedience out of hostility to the ideas being expressed. Nonetheless, the context surrounding the consideration of S. 636 might well lead a court to conclude (and should certainly lead Senators concerned with their own constitutional obligations to conclude) that S. 636 is targeted at expressive activity because of its anti-abortion message—that there is at least a “realistic possibility” that official suppression of ideas is afoot.”

First, the fact that the House bill, which bears the same title and is addressed to the same purposes as S. 636, overtly targets anti-abortion activity on the basis of its expressive purposes reveals something about the purpose of S. 636. The two bills are different versions of the same basic legislation. While it would be unfair to tarnish the Senate’s language with the errors of the House, it would also be naive to pretend that the same animus against pro-life civil disobedience reflected in the House bill does not in any way infect the Senate bill. It is entirely possible that a court would regard the verbal circumlocution of S. 636 as designed to accomplish the same anti-expressive purpose as the House version, and accordingly strike it down as merely a clever attempt to violate the First Amendment in a roundabout, rather than direct, manner.

Second, the context surrounding S. 636 suggests that its drafters and supporters were not legislating neutrally with respect to the protection of constitutional rights or the excesses of political protests, but were singling out and discriminating against a particular, unpopular political movement. How would one test such a thesis? We propose that one should look at two questions: (1) does the statute impose

58 Id. at 2547 (emphasis added).
more severe sanctions on violations committed by those involved in a particular political movement than the law imposes on similar violations committed by those involved in other causes? and (2) does the statute provide protections for private violations of the constitutional rights of both sides in the abortion controversy, or only one?

Both questions answer themselves. Abortion protestors are not the only political protestors to obstruct others in an attempt to intimidate or prevent them from exercising their legal rights, but they would be the only ones singled out for special punishments as a matter of federal law. Persons protesting animal research at universities or research facilities are not subject to such penalties. Gay rights protestors who unlawfully interfere with church services are not covered by S. 636. Nor does the bill apply to civil disobedience directed at other types of facilities that may involve federal interests, such as anti-war demonstrations at military installations, anti-nuclear sit-ins at nuclear power plants, or blockades of campus placement offices to protest recruiting visits by representatives of the nation's armed forces or intelligence services. In short, the bill is not concerned with controlling unlawful civil disobedience at any of several types of places where there is a federal interest in preserving rights of access, but only with punishing civil disobedience whose intent or effect is to prevent or discourage abortion. If the drafters of this legislation were genuinely concerned about the effects of unlawful political protest tactics in general, they would broaden the statute to encompass all such instances of unlawful protest that interfere with the rights of others, irrespective of the object of the protest.

In light of the failure of the bill to treat unlawful protests generally, it is difficult to avoid the impression that the bill is targeted at anti-abortion activity. The fact that the proposed bill applies to abortion protests (and only incidentally to anything else) suggests that its drafters disapprove more strongly of unlawful protests against some conduct than against other conduct, or feel greater sympathy with some political protestors than with others. How many of the bill's supporters would vote for federal legislation throwing any person in jail for an entire year who on one occasion "obstructs" a military recruitment office with the intention of "intimidating" potential recruits from exercising their right to sign up for military service? How many of the bill's supporters would vote for similar sanctions against pro-
testors who “obstruct” the South African embassy with the intention of “intimidating” anyone who wishes to do business with the apartheid regime?

It is said that this bill is needed to solve a great public problem, but as the Court noted in R.A.V., “[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect.” Indeed, to the extent that proponents of S. 636 assert that the interests justifying the bill are “important or substantial” ones unrelated to the suppression of free expression, the failure to pursue such “important” interests when they arise in other contexts tends to belie the assertion that they really are unrelated to the suppression of expression. As one respected First Amendment scholar has noted, such an “overnarrow” statute “may be said to create a conclusive presumption that in fact the state interest which the statute serves is an anti[speech] rather than a non-speech interest.”

The second question to ask in testing whether the bill selectively targets a particular viewpoint is whether the proposed bill protects the constitutional rights of both sides in the abortion controversy from violations by private persons. Lawful pro-life demonstrators often are assaulted by pro-choice activists and mistreated by local law enforcement authorities in violation of their civil rights. If the drafters of this legislation were concerned about constitutional violations in the abortion context, they would provide redress against these unlawful acts, no less than against the unlawful acts of anti-abortion protestors. The one-sidedness of the proposed bill strongly suggests that it is an instrument of partisanship—of strong preference for one side in this rancorous public debate. The cure for this constitutional defect is again to broaden the bill, to provide that whoever by force or threat of force injures or prevents the exercise of First Amendment rights of expression by persons engaged in lawful anti-abortion counseling or picket-

59 112 S. Ct. at 2550.


ing shall be subject to the same criminal and civil penalties as are provided for acts directed against the exercise of abortion rights.62

In sum, the constitutional problems presented by S. 636's selectivity could and should be remedied by broadening the scope of the prohibition to include unlawful acts committed in the course of protests that interfere with federally protected rights or interests other than abortion such as military installations or federally-funded animal research facilities (that is, regardless of the subject matter that is the focus of the protestor's unlawful conduct) and to include also unlawful acts committed by persons regardless of which side of the abortion controversy they are on (that is, regardless of the viewpoint with respect to abortion of the person engaged in the unlawful activity).

Such changes, in addition to those noted above with respect to the overbreadth of the bill's language, would go a long way toward resolving the difficult First Amendment issues presented by the bill as presently drafted. The point of broadening the prohibition is to ensure, and to establish, that Congress is not acting out of special hostility to anti-abortion demonstrations, but out of a legitimate regulatory concern that it is prepared to apply across the board to all forms of protest activity and all points of view. As Justice Robert Jackson so eloquently stated in his celebrated opinion in Railway Express Agency, Inc. v. New York:63

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply

62 The bill's ambiguous terms make it possible to construe the prohibitions of subsection (a)(1) to include acts of force that intimidate or interfere with anti-abortion counseling (including sidewalk counseling), since any "counseling or referral services relating to the termination of a pregnancy" falls within the definition of "abortion services" under subsection (g)(1). We doubt such a construction was intended. If it was, the point certainly should be made clear.

legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.\textsuperscript{64}

S. 636 is a classic illustration of Justice Jackson's point. We submit that if this bill applied to all forms of protest equally, it probably would never pass because Congress would then be forced to confront the concerted outrage of civil rights protestors, labor picketers, animal rights protestors, anti-nuclear protestors, gay rights protestors, and numerous others. It is only by confining the strictures of this bill to one particular movement that is currently detested by many in Congress that it could be seriously considered. That is precisely the reason the First Amendment insists Congress legislate in broader, more general terms: so that Congress is not able to single out particular causes and, through artful drafting, subject the protests of those causes to extreme and unpredictable sanctions not applicable to similar protests of less unpopular causes.

\textbf{CONCLUSION}

It may be said that the excesses and selective punishments imposed by S. 636 are necessary lest the illegal acts that sometimes occur in abortion protests be undeterred. But as the Supreme Court has wisely stated: "[I]f some constitutionally unprotected speech must go unpunished, this is a price worth paying to preserve the vitality of the First Amendment. '[I]f absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection.'\textsuperscript{65}

The right to choose abortion created by the Supreme Court in \textit{Roe v. Wade}\textsuperscript{66} is in its essence a decisional right—a right to be free from excessive governmental restriction on the \textit{choice} whether to have an abortion. It is not a right to be free from hearing the sometimes strident advocacy of private persons who believe that that choice should

\textsuperscript{64} Id. at 112-13 (Jackson, J., concurring in the judgment).


\textsuperscript{66} 410 U.S. 113 (1973).
be exercised in favor of the life of the unborn child. For as long as *Roe* remains the law, those who believe abortion is unjust have no recourse—no way of trying to stop abortions—except by trying to inform and persuade persons who are considering having an abortion. The sweeping and overbroad terms of S. 636 would impose severe punishments and create an enormous chilling effect on entirely lawful (as well as unlawful) public advocacy. S. 636 targets anti-abortion protests and civil disobedience for unique punishments.

In our view, the bill as currently drafted is plainly unconstitutional, and we have grave doubts that any bill solely directed at the activities of one political protest movement alone could be constitutional. We believe that those who commit acts of lawlessness, and especially acts of violence, against abortion clinics should be punished, but that they should be punished under laws applicable to all persons, and all viewpoints, without discrimination.

A POSTSCRIPT

As this Essay goes to press, FACE has been passed, in differing versions, by both the House and the Senate. A conference committee will meet soon, and the bill is expected to receive final passage shortly.

We note that FACE has undergone several important changes since we prepared the above testimony in May of 1993. We are gratified that the Senate apparently took seriously our constitutional objections, and made changes that mitigate, at least in part, the constitutional problems with the bill. While these changes are steps in the right direction, they do not remove entirely doubts about FACE's constitutionality. We would like to note briefly some of the most important changes in the bill, as of April 1994.

First, the bill as passed by both houses now contains a "definitions" section that attempts to respond to the concerns of vagueness and overbreadth we raised in our testimony by more narrowly defining the terms "physical obstruction," "intimidate," and "interfere with."67 The definitions are still constitutionally problematic.

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in certain respects, but the bill is unquestionably much improved over the earlier version. In addition, the bill has been amended to make clear that parents of a minor child are not subject to the bill’s prohibitions by virtue of “obstructing” or “interfering with” their child’s access to abortion.\(^\text{68}\)

Second, S. 636 has been changed in several ways that bear on the question of whether the bill selectively targets pro-life expressive activity. The bill as passed by the Senate (but not the House version) contains a noteworthy addition that broadens the bill to more than just anti-abortion protests. The Senate adopted a “religious liberty amendment” proposed by Senator Hatch, the effect of which is to extend the bill’s prohibitions and punishments to unlawful protest activities that impair religious exercise or prevent access to places of worship, on the same terms as those prohibitions and punishments apply to unlawful protest activity at abortion clinics.\(^\text{69}\) This is an important move in the direction of content-neutrality, as the bill no longer targets only pro-life protest. Without this broadening amendment, the bill would very likely not survive First Amendment scrutiny. It is therefore crucial that this provision not be deleted in conference.

While the religious liberty amendment is thus a welcome and desirable change, we are not persuaded that it is sufficient to overcome the objection that the bill selectively targets pro-life advocacy on the basis of the viewpoint being expressed. In the first place, the change does not make the bill truly general in terms of its treatment of unlawful conduct in association with protest activities. Rather, it simply singles out a second category of unpopular protest—gay rights protests that unlawfully interfere with worship services or access to houses of worship—for enhanced penalties and punishment. This does not cure the original constitutional problem. Indeed, it arguably broadens it.

Other changes in the bill clarify that it is not viewpoint neutral with respect to abortion. Rather, it is clear that pro-life and pro-choice activity are meant to be treated differently. We noted in our original testimony that demonstrations at or near abortion clinics often involve


unlawful activity by members of both sides of the abortion controversy. We expressed concern that S. 636 applied only to pro-life demonstrators, not to pro-choice demonstrators who might engage in unlawful conduct against pro-life protestors. In a footnote, we observed that ambiguity in the bill's definition of "abortion-related services" made it possible to construe S. 636 to prohibit interference with certain pro-life activity designed to persuade women not to abort their pregnancies, such as pro-life sidewalk counseling in front of abortion clinics. We suggested that the bill be clarified to explicitly adopt this position, which would make the bill more viewpoint-neutral. Instead, however, this provision was amended in a manner that unmistakably excludes sidewalk counseling from the same protected status as is given on-premises counseling by abortion providers. In addition, S. 636 was changed to clarify that the bill does not "create new remedies for interference with expressive activities protected by the First Amendment" that occur outside abortion clinics. Notwithstanding the religious liberty amendment, we believe that these two other changes continue to reveal a viewpoint-based discrimination in the bill's basic provisions. If anything, S. 636 as amended is even more problematic in this regard than it was before.

Finally, we wish to reiterate that the bill continues to make nonviolent civil disobedience an extremely serious federal crime, punishable by six months imprisonment and a $10,000 fine for a first offense, and by eighteen months imprisonment and a $25,000 fine for each subsequent offense. Bearing in mind that a single course of conduct that "interferes" with more than one clinic patron or employee might well constitute multiple offenses, a single act of trespass that blocks the entrance for one abortion patron being escorted by four clinic employees could result in up to six and one-half years imprisonment and $110,000 in fines. These draconian penalties are difficult to explain in any terms other than hostility to the anti-abortion views of those engaging in the trespass in question.

70 See supra text accompanying note 62.
71 See supra note 62.
73 Id.
In sum, despite some improvements, we continue to believe that the Freedom of Access to Clinic Entrances Bill is of highly doubtful constitutionality. The bill punishes unlawful activity in connection with the abortion debate only when engaged in by one side and does not uniformly apply to unlawful protest activity regardless of the subject matter of the protest. It is hard to avoid the conclusion that S. 636 is designed less to protect against unlawful protests than to punish specially those who protest against abortion.