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Federal Power to the Rescue: The Use of § 1985(3) Against Anti-Abortion Protestors

*Abortion is "baby-killing."*¹

—Randall Terry, Leader of Operation Rescue

*Opposition to abortion is "war against women."*²

—Molly Yard, former President,
National Organization for Women

I. INTRODUCTION

The visceral debate over the right to abortion has divided the nation since the Supreme Court's decision in *Roe v. Wade*.³ Over the past six years, the frustration felt by the pro-life movement over its failure to end abortion through the political process has led to the adoption of more aggressive tactics.⁴ Anti-abortion protestors have gone from carrying signs and chanting slogans to blockading the entrances to abortion clinics in an attempt to shut the clinics down and stop abortions. Motivated by their view of abortion as "baby-killing" and "child-murder," the protestors are physically attacking what they perceive to be the source of the problem. Violent confrontation and blockades have resulted from the idea that "if you think that abortion is murder, then act like it's murder."⁵ As a result of this new campaign, police nationwide have made over 50,000 arrests of clinic-blockading demonstrators.⁶

1 William W. Horne, *Defending the Disobedience*, AM. LAW., Nov. 1991, at 58.

2 *Ruling Moves Battle to New Arena, Foes Agree*, L.A. TIMES, July 3, 1989, at A1.

3 410 U.S. 113 (1973). In 1973, the Supreme Court established the right to abortion thereby striking down state laws across the country prohibiting or restricting the procedure.

4 This Note will refer to opposition to the right to abortion as "pro-life" or "anti-abortion." Supporters of the right to abortion will be referred to as "pro-choice," or "abortion rights supporters." Each of these terms (especially "pro-life" and "pro-choice") carry with them connotations associated with the various arguments of the participants in the debate about abortion. This Note takes no position in the debate over abortion, and any bias implicit in the use of these terms is unintended.

5 Judy L. Thomas, *Man with a Mission*, CHI. TRIB., Oct. 20, 1991, at 14 (quoting Randall Terry).

6 *Id.* The Rescue movement has been called "the largest civil-disobedience campaign in America ever" *Operation Rescue*, NAT'L REV., Oct. 7, 1991, at 13.

The protestors see themselves as the new civil rights movement, using civil disobedience to accomplish their goal of ending abortion.⁷ Pro-choice forces have struck back with federal lawsuits and injunctions, charging the protestors with violating the civil rights of women who seek abortions.⁸ The pro-choice forces have used section 1985(3)⁹ of the civil rights laws in an attempt to try to halt the activities of Operation Rescue¹⁰ and other groups that organize the blockades.¹¹ Congress intended this statute, originally part of the Ku Klux Klan Act of 1871,¹² to combat the attacks upon blacks and their Union supporters that occurred in the South following the Civil War.¹³

7 Randall Terry, one time leader of Operation Rescue, has made many comparisons between the "Rescue movement" and the civil rights movement of the 1960s. He compares the blockades of abortion clinics to sit-ins at segregated lunch counters. Richard Lacayo, *Crusading Against the Pro-Choice Movement*, TIME, Oct. 21, 1991, at 26.

See Charles E. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15 (1989) (comparing 'Rescue' movement to civil rights); Larry Fruhling, *Wichita Torn by Abortion Rights Battle*, Gannett News Serv., Aug. 3, 1991, available in LEXIS, Nexis Library, GNS File (examining parallels to civil rights movement of 1960s); Thomas, *supra* note 5, at 14 (same).

But pro-abortion advocates are enraged by the comparison of the abortion blockades to the civil rights movement of the 1960s. "Theirs is not civil disobedience because they are depriving rights rather than working to extend those rights." *Id.* at 14. (quoting Ann Baker, president of the 80 Percent Majority Campaign, a Pro-Abortion Group).

8 See cases cited *infra* notes 41-43. For an interesting reversal of roles, see *McMonagle v. Goode*, No. 87-7355, 1989 U.S. Dist. LEXIS 4661 (E.D. Pa. April 25, 1989), in which an anti-abortion protestor sued the police and the City of Philadelphia under § 1985(3) for his arrest during a demonstration.

9 42 U.S.C. § 1985(3) (1988).

10 Operation Rescue is an organization that was founded in Pensacola, Florida in November of 1986. Its founder, Randall Terry, has been the driving force behind the 'Rescue' movement. Since its founding, Operation Rescue has held 'Rescues' across the country, from Binghamton, New York to Seattle, Washington. The organization has since closed its national office and been forced to go underground because of court fines and attorney's fees of over \$550,000. Dawn W. Ceol, *Supreme Court to Hear Va. Abortion Clinic Case*, WASH. TIMES, Feb. 26, 1991, at A3. See Charles E. Shepard, *Operation Rescue's Mission to Save Itself*, WASH. POST, Nov. 24, 1991, at A1; see also Tamar Lewin, *With Thin Staff and Thick Debt, Anti-Abortion Group Faces Struggle*, N.Y. TIMES, June 11, 1990, at A16.

11 Some of the organizations that have led blockades of clinics are the following: The Abortion Abolition Society; Advocates for Life; Project Rescue; Veterans' Campaign for Life; and Operation Rescue-National, which is basically a front group for the now defunct Operation Rescue. Some ninety groups now operate at the local level as a replacement for the old Operation Rescue organization which was forced to go underground because of debt caused by its legal battles. See *infra* notes 177-80 for more information about the status of Operation Rescue.

12 Act of July 31, 1861, ch. 33, 12 Stat. 284 (1861); and Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13 (1871). The 1861 Act served as the basis for the subsequently enacted law of 1871. This latter statute is the one more popularly known as the Ku Klux Klan Act.

13 See Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and*

Section 1985(3) is a powerful legal weapon in the hands of pro-choice forces. With the heavy hand of federal judges and U.S. Marshals, as well as the prospect of large attorney's fees provided by the civil rights laws,¹⁴ pro-choice groups have bypassed state courts and gone directly to the federal judiciary. They have successfully utilized a Civil War Era statute to limit the effectiveness of the clinic blockades. As a result, the anti-abortion protestors have suffered much greater fines, damage claims, and tougher injunctions than they might otherwise have faced if the abortion clinics had simply sued them for trespass or disorderly conduct in state courts.¹⁵ Many federal courts, disregarding the original objectives of the Ku Klux Klan Act and stretching the provisions of section 1985(3) to cover the acts of civil disobedience committed by the demonstrators, have held that the statute applies to the anti-abortion blockades.¹⁶

The applicability of section 1985(3) to anti-abortion blockades is now before the Supreme Court. In *Bray v. Alexandria Women's Health Clinic*,¹⁷ the Court will decide whether women seeking abortions qualify as a class protected under the provisions of section 1985(3). If the Court holds that women seeking abortions constitute a protected class, the Court will then have to decide whether that class was deprived of the right to interstate travel because the anti-abortion protestors denied them access to the abortion clinics.

This Note will not only address the specific issues raised in *Bray*, but it will also consider the full range of questions presented by the application of section 1985(3) to anti-abortion protestors. Part II examines the statutory and factual background of the dis-

Misuse of History in Statutory Interpretation, 27 B.C. L. REV. 911 (1986); Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402 (1979).

14 Attorney's fees are awarded to the prevailing party in a Civil Rights action under 42 U.S.C. § 1988 (1988). See *infra* note 178.

15 See *infra* Part V.

16 See cases cited *infra* notes 41-43.

17 111 S. Ct. 1070 (1991), *granting cert.* National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990).

The Court is also directly addressing the right to abortion in *Planned Parenthood v. Casey*, No. 91-744, 1992 U.S. LEXIS 515 (1992) (*granting cert.*). This case could have very serious implications for several of the issues concerning the application of § 1985(3) to the anti-abortion protests. See *infra* note 75 and accompanying text for a discussion of the possible impact on women seeking abortions as a protected class. See *infra* Part IV(A) for a discussion of the possible impact of the Court's decision on the use of the right to abortion as a predicate right.

pute. Part III considers the issue of whether women seeking abortions are a protected class, and it will show that section 1985(3) does not apply to abortion patients. Part IV analyzes how plaintiffs have improperly invoked the right to abortion, the right to interstate travel, and the predicate rights of state statutory law to support their section 1985(3) claims. Finally, Part V examines the motivations behind the decision of plaintiffs to use section 1985(3) in a federal forum instead of suing the protestors in state court. Advocates of abortion rights have improperly invoked section 1985(3) in order to take advantage of the federal courts, utilize the beneficial provisions of the civil rights laws, and brand the anti-abortion protestors with the stigma of the Ku Klux Klan.

II. FACTUAL AND STATUTORY BACKGROUND

In order to provide some context for the dispute over the interpretation of section 1985(3), this Part will detail the factual background of an anti-abortion blockade and the response of the clinic and pro-choice advocates. This Part will also explain the ways pro-choice groups have used section 1985(3) against anti-abortion protestors, and the main issues in the dispute concerning the application of that statute to the situation.

Abortion rescues have occurred across the country.¹⁸ The most well-known of these protests included the demonstrations held in Atlanta during the Democratic National Convention of 1988, in New York City in 1989, and in Wichita during the summer of 1991.¹⁹ Rescues occurred before the founding of Operation Rescue in 1986,²⁰ but only after that organization was formed did the movement spread across the country.²¹

A typical rescue may involve anywhere from a handful of protestors to a crowd of several thousand. In some of the larger protests, hundreds of demonstrators lie down in front of the entrances to clinics, preventing anyone from entering the building.²² In some instances the protestors chain themselves to the

18 E.g., Michael C. Tipping, *Abortion Demonstrators Square off at Clinics*, UPI, April 30, 1989, available in LEXIS, Nexis Library, UPI File (detailing blockades staged across country during national day of protest; cities included Detroit, Denver, Portland, San Antonio, New Orleans, Atlanta, Washington, New York, Pasadena, Seattle, and Brookline).

19 Shepard, *supra* note 10, at A1.

20 *Id.*

21 Michael Abramovitz, *The War in Wichita*, WASH. POST, Aug. 9, 1991, at D1.

22 See *id.*; Barbara Brotman, *Operation Rescue: Behind an Abortion Protest is an Elaborate Battle Strategy*, CHI. TRIB., May 20, 1989, at C1.

doors of the clinic in order to hinder the police from arresting them.²³ Some protestors go limp when the police arrest them, or take only "baby-steps" when walking to the paddy wagon in order to block the clinic for as long as possible.²⁴ In a few cases, the police have responded with excessive force to the tactics of civil disobedience used by the protestors.²⁵ Anti-abortion demonstrators have also broken into clinics and destroyed property, rampaging through the offices and facilities.²⁶ Other anti-abortion protestors engage in "sidewalk-counseling," trying to convince women who come for an abortion not to go through with the procedure.²⁷

At first, abortion rights supporters and clinic operators were content with criminal charges against the protestors in state court.²⁸ In some cases, they sued the anti-abortion protestors for trespass, destruction of property, and other state law claims.²⁹ Plaintiffs first sued protestors for violations of the civil rights laws under section 1985(3) in 1980.³⁰ Since the founding of Opera-

23 Jerry Gray, *Bill Shields Abortion Clinics from Protests*, N.Y. TIMES, Dec. 23, 1991, at B6.

24 Judy L. Thomas, *'Summer of Mercy' Rally Escalates*, NEWSDAY, Aug. 11, 1991, at 17.

25 See Barbara Brotman, *Antiabortion Group, Police Have a Clash of Tactics*, CHI. TRIB., Oct. 29, 1989, at 8 (examining charges of "excessive force" by police in Los Angeles, San Diego, Pittsburgh, Brookline, Mass. and New Bedford, Mass.); John Leo, *The Abortion Protestors and the Police*, U.S. NEWS & WORLD REP., Aug. 6, 1990, at 13 (detailing "brutal" treatment of anti-abortion protestors by police in Pittsburgh, Los Angeles, and West Hartford, Ct.).

26 See Peter Kendall, *Abortion Clinic Vandalism Fans Fears on Both Sides*, CHI. TRIB., Sept. 17, 1991, at 1 (describing destruction at one abortion clinic and tactics of some protestors).

27 Brotman, *supra* note 22.

28 See, e.g., *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981) (criminal trespass); *Commonwealth v. Wall*, 539 A.2d 1325 (Pa. Super. Ct.) (criminal trespass and defiant trespass), *appeal denied*, 555 A.2d 114 (Pa. 1988); *Erlandson v. Texas*, 763 S.W.2d 845 (Tex. Ct. App. 1988) (criminal trespass).

29 Although in most cases the anti-abortion protestors only faced criminal charges (mostly trespass), see *supra* note 28, in some instances they sued the demonstrators in state court solely on state or common law grounds. See e.g., *Planned Parenthood League, Inc. v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990) (suit based on trespass, false imprisonment, invasion of privacy, conspiracy, nuisance, intentional infliction of emotional distress, interference with contractual relations, and violations of the Massachusetts Civil Rights Act); *Chester Crozer Medical Ctr. v. May*, 506 A.2d 1377 (Pa. Super. Ct. 1986) (seeking injunction against trespass and aggressive picketing). The fact that awards of attorney's fees are available under § 1985(3), that many of the protestors are judgment proof, and that trespass damages are likely to be minimal, has resulted in plaintiffs opting to pursue legal action in federal courts. See *infra* Part V for a more detailed discussion.

30 *Northern Va. Women's Medical Ctr. v. Balch*, 617 F.2d 1045 (4th Cir. 1980).

tion Rescue six years ago, however, the use of section 1985(3) against anti-abortion protests has greatly expanded. As the Rescue movement grew in strength, abortion clinics and pro-choice groups responded with section 1985(3) suits in order to protect themselves. More importantly, section 1985(3) was a way to defeat, weaken, and demoralize the anti-abortion protestors.³¹ Anti-abortion activists raised strong objections to the use of the civil rights laws against what they thought were state law crimes and acts of civil disobedience.

The Supreme Court appeared to legitimize the use of section 1985(3) by pro-choice forces when it denied certiorari and allowed a federal injunction to stand against Operation Rescue in 1990.³² In 1991, however, the Supreme Court agreed to decide the issue when it granted certiorari in *Bray*.³³ In deciding *Bray*, the Court may take a powerful weapon away from the pro-choice forces.

In order for plaintiffs to bring a section 1985(3) action against the anti-abortion protestors, they must satisfy certain statutory requirements. The essential elements of an action under 42 U.S.C. section 1985(3) include: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.³⁴

31 See *infra* Part V and *supra* note 11.

32 New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir.), *cert. denied*, U.S., 110 S. Ct. 2206 (1990).

33 111 S. Ct. 1070 (1991), *granting cert.* National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990).

34 Section 1985(3) states:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1988).

III. DO WOMEN SEEKING ABORTIONS CONSTITUTE A PROTECTED CLASS UNDER § 1985(3)?

The main area of dispute in section 1985(3) actions against Operation Rescue protestors surrounds the second element of the action. Are women seeking abortions a protected class for purposes of section 1985(3)? If plaintiffs can establish that women seeking abortions are a protected class, they must then show that the anti-abortion protestors deprived this class of a specific constitutional or statutory right. Plaintiffs need to establish both of these elements in order to state a section 1985(3) action. If plaintiffs are unable to show either that women seeking abortions are a protected class, or that the protestors have deprived them of a right guaranteed by section 1985(3), then their cases fail to state a claim for which relief can be granted.

A. *The Protected Class Requirement and Discriminatory Animus*

In order to satisfy the protected class requirement of section 1985(3), the Supreme Court has required that the plaintiff show "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."³⁵ In the context of the Operation Rescue cases, the issue is whether the courts will consider those individuals who are denied access to the abortion clinics, no matter how that group of individuals is characterized,³⁶

35 *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Court held that "[t]he language [of § 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be" a class-based discriminatory animus. *Id.* Furthermore, the Court recognized the legislative history of the act as directed against the activities of the Ku Klux Klan, interpreting the statute to only reach certain classes suffering from discriminatory animus. The Court therefore did not want § 1985(3) to be construed as a "general federal tort law." *Id.* at 101-02. By limiting the statute to conspiracies directed at protected classes, the intent of the statute could be met.

See generally Janis L. McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471 (1987); Shatz, *supra* note 13; Daniel E. Durden, Note, *Republicans as a Protected Class?: Harrison v. KVAT Food Management, Inc. and the Scope of § 1985(3)*, 36 AM. U. L. REV. 193 (1986); Devin S. Schindler, Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88 (1985); Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 MINN. L. REV. 635 (1980).

36 See e.g., *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989) ("women of childbearing age who seek medical attention . . ."); *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir. 1987) (class is defined as those persons who disagree with the anti-abortion protestors), *cert. denied*, 484 U.S. 848 (1988); *Planned Par-*

as a class of persons whose members are the victims of a discriminatory animus.

The Supreme Court has specifically avoided expanding section 1985(3) to apply to animus against any group other than blacks or their supporters.³⁷ In *United Brotherhood of Joiners and Carpenters v. Scott*,³⁸ the Court held, however, that the statute did not cover animus based on the economic views or commercial interests of a class.³⁹ Nonetheless most circuit courts have not hesitated to expand the scope of section 1985(3) beyond blacks and their supporters. These courts have extended section 1985(3)'s coverage to animus based on the political beliefs of a class, and, more importantly for this discussion, to animus against women as a class.⁴⁰

enthod Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 622 (N.D. Cal. 1991) (women seeking abortions); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989) (same); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 712 F. Supp. 165, 169 (D. Or. 1988) (following amended complaint; "class of women who choose to exercise their constitutional right of privacy by having an abortion.") Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 681 F. Supp. 688, 689 (D. Or. 1988) (women seeking to terminate their pregnancies by abortion). *But cf.* McMonagle v. Goode, No. 87-7355, 1989 U.S. Dist. LEXIS 4661, at *9 (E.D. Pa. April 25, 1989) (anti-abortion protestors seek protection under § 1985(3), they define their class as "group characterized by similar religious or philosophical objections to abortion.").

37 *United Bhd. of Joiners and Carpenters of Am. v. Scott*, 463 U.S. 825, 836 (1983) ("close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause . . ."); *Griffin*, 403 U.S. at 102 n.9 ("We need not decide . . . whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us.").

Also consider the discussion of the scope of § 1985(3) in *Scott*, where the Court stated:

We realize that there is some legislative history to support the view that § 1985(3) has a broader reach. Senator Edmunds . . . said that if a conspiracy were formed against a man 'because he was a Democrat, . . . or because he was a Catholic, or because he a Methodist, or because he was a Vermonter, . . . then this section could reach it.' CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871).

Scott, 463 U.S. at 836. But the Court went on to say that Senator Edmunds speech is not dispositive of the issue because the narrowing amendment, § 1985(3) as it is today, was introduced in the House, while the Senate only made technical changes to the bill. This ambiguity in the legislative history somewhat explains the Court's hesitancy to finally decide the scope of § 1985(3).

See generally Taunya L. Banks, *The Scope of § 1985(3) in Light of Great American Federal Sav. & Loan Ass'n v. Novotny: Too Little Too Late?*, 9 HASTINGS CONST. L.Q. 579 (1982).

38 463 U.S. 825 (1983).

39 *Id.* at 838. (non-union workers were not a class that could receive protection under § 1985(3)).

40 See National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990) (women seeking abortions), *cert. granted sub. nom.*, *Bray v. Alexandria Women's Health*

*B. Are Women Who Seek Abortions Victims
of Discriminatory Animus?*

In the Operation Rescue cases, the courts have viewed the individuals denied access to abortion clinics in different ways. Three of the circuit courts that have addressed the issue have held that women, or women seeking abortions, were a protected class according to section 1985(3).⁴¹ Two other circuit courts have come to the opposite conclusion, however, that women seeking abortions do not constitute a protected class for purposes of section 1985(3).⁴²

Clinic, 110 S. Ct. 1070 (1991); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir.) (conspiracies "directed against women are inherently invidious and repugnant"), *cert. denied*, 110 S. Ct. 2206 (1990); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988) (sex, religion, ethnicity, and political loyalty); Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987) (political beliefs); Stathos v. Bowden, 728 F.2d 15, 20 (1st Cir. 1984) (sex); Life Ins. Co. of North Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (female purchasers of disability insurance); Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978) (sex and ethnicity); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978) (gender), *vacated on other grounds*, 442 U.S. 366 (1979); *cf.* Faucher v. Rodziewicz, 891 F.2d 864, 871 n.4 (11th Cir. 1990) (question of gender as protected class left open); Azar v. Conley, 456 F.2d 1382, 1386-87 n.5 (6th Cir. 1972) ("middle class white family" might constitute a protected class). *Contra* Deubert v. Gulf Fed. Sav. Bank, 820 F.2d 754, 757 (5th Cir. 1987) (only "those [conspiracies] motivated by racial animus" are actionable under § 1985(3)); Rayborn v. Mississippi State Bd. of Dental Examiners, 776 F.2d 530, 532 (5th Cir. 1985) (same); Knott v. Missouri P. R. Co., 389 F. Supp. 856 (E.D. Mo.) (statute only protects against discrimination on the basis of race), *aff'd*, 527 F.2d 1249 (8th Cir. 1975).

41 Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991) (gender is immutable characteristic making women protected class under § 1985(3)); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir.) (women are protected class), *cert. denied*, 110 S. Ct. 2206 (1990); National Org. for Women v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990) (women seeking abortions are protected class), *cert. granted sub. nom.*, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991); *see* Women's Health Care Services v. Operation Rescue-National, 773 F. Supp. 258 (D. Kan. 1991) (gender based animus protected against; women are semi-suspect class); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991) (women, as semi-suspect class, are protected class under § 1985(3)); Upper Hudson Planned Parenthood v. Doe, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *48 (N.D.N.Y. Sept. 16, 1991) (women are protected class); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989) (same), *aff'd on other grounds*, 919 F.2d 857 (3d Cir. 1990); Cousins v. Terry, 721 F. Supp. 426, 430 (N.D.N.Y. 1989) ("women seeking abortions constitute a class entitled to protection under § 1985(3) . . ."); Portland Feminist Women's Health Ctr. v. Advocates for Life, 712 F. Supp. 165, 169 (D. Or.) ("that particular class of women" is protected), *aff'd on other grounds*, 859 F.2d 681 (9th Cir. 1988); *see also* Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) (plaintiffs likely to prevail on merits).

42 Lucero v. Operation Rescue, No. 91-7685, 1992 U.S. App. LEXIS 1502 (11th Cir. Feb. 5, 1992); Mississippi Women's Medical Ctr. v. McMillan, 866 F.2d 788 (5th Cir.

Some pro-choice and feminist groups, as well as some courts, argue that actions taken against women seeking abortions reflect animus against women as a class.⁴³ They argue that to anti-abortion protestors, women seeking abortions represent the ability of all women to secure their own rights. This suggests that the animus is based on sexual and political grounds. The Sixth Circuit strongly stated this position in *Volunteer Medical Clinic, Inc. v. Operation Rescue*,⁴⁴ where it said:

One of the primary purposes of § 1985(3) . . . is not simply to accord an intangible, abstract protection to the targeted class, but to protect members of the class in the concrete exercise of their individual rights. The fact that only women who "choose" to become pregnant (no doubt a dubious characterization in many cases) may actively exercise the right to an abortion free from governmental interference in no way entails that the class is undeserving of § 1985(3) protection To the extent that the defendant's conduct limits the ability of women to secure an abortion, it trenches upon the rights of all women.⁴⁵

The court compared the blockades to discrimination against minorities, arguing that blacks seeking to vote are merely a sub-class

1989); *Birmingham Women's Medical Ctr. v. Operation Rescue*, No. CV-89-P-1261-S, 1991 U.S. Dist. LEXIS 11653, at *60 (N.D. Ala. Aug. 2, 1991); *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Ca. 1989); see *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir. 1987) (class defined as those persons who disagree with anti-abortion protestors not protected).

The Eighth Circuit affirmed the decision of a district court in Missouri that denied that women seeking abortions constituted a protected class under § 1985(3). In *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 319 (8th Cir. 1990), the circuit court cited the unreported opinion of the Eastern District of Missouri which held that the plaintiffs "had not sufficiently alleged that the defendants possessed the class-based, invidiously discriminatory animus required by § 1985(3)." Although the circuit court initially reversed this holding of the district court, *Id.* at 323, the opinion of the circuit was later vacated by No. 88-1293EM, 1990 U.S. App. LEXIS 15937 (8th Cir. Sept. 7, 1990). After rehearing, however, the holding of the district court was affirmed by a divided vote of the Eighth Circuit, 917 F.2d 1077 (8th Cir. 1990).

43 *E.g.*, *Women's Health Care Servs. v. Operation Rescue-National*, 773 F. Supp. 258, 265 (D. Kan. 1991) (Defendant's "goal is the elimination of the right to abortion. Necessarily, that goal infringes the rights of women, and the rights of women only.").

Faye Wattleton, the former president of Planned Parenthood, expressed the view that "there is no greater tyranny than the power to control childbearing." UPI, May 5, 1981, available in LEXIS, Nexis Library, UPI File. Without the right to an abortion, women's equality in society is restricted by the ever-present danger that pregnancy will end a woman's freedom to participate in the workplace and in society generally.

44 948 F.2d 218 (6th Cir. 1991).

45 *Id.* at 225.

of blacks in general.⁴⁶ The court said that women seeking abortions should be treated the same as blacks seeking to vote.⁴⁷ Prejudice and discrimination against groups manifests itself in the form of opposition to a group participating or undertaking a certain activity. This activity may be voting, attending school, eating at a lunch counter, riding in the front of the bus, or seeking abortion services.

This position fails to realize that opposition to blacks riding the bus or attending school has nothing to do with those particular activities, but everything to do with hostility and prejudice against blacks as a group. The activity—riding the bus or attending school—is incidental to the object of the animus, which is against blacks because of their race. In contrast, anti-abortion groups aim the blockading of clinics at the activity itself and not against the particular group that engages in that activity. The animus of abortion rescuers is not directed against women who seek abortions. Rather, the animus is directed against what those women seek: abortions.

Pro-choice advocates argue, however, that opposition to abortion manifests itself because of a desire to oppress women.⁴⁸ Since abortion allows women greater choice and freedom in their lives, if the procedure is no longer available, then women can be contained within a traditional societal framework.

The fact that women play such an important role in the anti-abortion movement is another significant indication that blockading abortion clinics is not animus directed at women, but rather animus and opposition to the procedure of abortion. It is highly unlikely that one would find blacks manning the blockade of a polling place or a university in order to deny other blacks the right to attend college or to vote.⁴⁹ By contrast, women are a

46 *Id.*

47 *Id.*

48 *See supra* note 43.

49 *But see* *Castaneda v. Partida*, 430 U.S. 482 (1977) (Marshall, J., concurring). In a case involving discrimination against Hispanics on juries, Justice Marshall pointed out that members of minority groups often discriminate, or aid discrimination by the majority, against other members of their own group. For support, he asserted that "[s]ocial scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority." *Id.* at 503. The level of involvement of women in the anti-abortion movement is so great, however, *see infra* note 50, as not to be easily explained by the sociological arguments cited by Justice Marshall. His argument may explain more limited examples of discrimination of minorities against

very strong presence in Operation Rescue and other anti-abortion organizations.⁵⁰ It seems obvious that blacks would not participate in a blockade of a polling place because it is clear that the blockade is really directed at blacks as a class. Thus, the participation of women in Operation Rescue, as members as well as leaders, indicates that sexism is not the animating force behind the blockades.

Some feminists argue, however, that animus directed against women, in contrast to prejudice against blacks, has sometimes manifested itself among women even though they are the victims of that discrimination.⁵¹ One oft-cited example of this phenomenon is the strong opposition that many women felt toward the passage of the Equal Rights Amendment (ERA).⁵² This may not be the best example, however, because of the many real political and policy disputes over the efficacy of the ERA for women.⁵³ The leadership role women play in the anti-abortion movement, as well as their dedicated and active participation, is a significant indication that the abortion procedure is the motivating factor

their own groups.

50 In the American Life League, an anti-abortion group, 140,000 of its 278,000 members, including its president, are women. In Concerned Women for America, another anti-abortion group, 646,000 of its 755,000 members are women. On the National Right to Life Committee, 65% of the board of directors are female and 61% of its senior management executives are women. Although the National Right to Life Committee does not keep general membership data, 60% of the delegates to the National Right to Life convention were women. Some Rescues are exclusively planned and led by women, in which hundreds of women participate and are arrested. Brief for Feminists for Life of Am. as amicus curiae of petitioners at n.5, *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991) (No. 90-985) (*granting cert.*). See *Police Arrest 40 in Clinic Blockade*, UPI, May 12, 1990, available in LEXIS, Nexis Library, UPI File. (Mother's Day blockade by exclusively female protestors); Margaret Stafford, *Feminist Group Marches to Its Own Drum*, L.A. TIMES, Feb. 10, 1991, at E12 (detailing leadership and participation of women in anti-abortion movement; pro-life feminist group claims "abortion oppresses rather than liberates women . . .").

51 For example, the wives and female family members of male truckers may participate in a demonstration against opening up the trucking industry to women. Navy wives have also evidenced hostility to allowing women to serve on combat ships with their husbands. These cases are different from female participation in the anti-abortion movement, however, because that participation and leadership is so much greater than in the navy and trucking examples. In those instances, female participation is based on family connections rather than philosophical agreement with the cause.

52 See Melinda Beck, *Last Hurrah for the ERA?*, NEWSWEEK, July 13, 1981, at 24 (discussing polling data: "men consistently favor the amendment in greater numbers than women . . ."); Nadine Brozan, *Politics and Prayer: Women on a Crusade*, N.Y. TIMES, June 15, 1987, at C18 (detailing female opposition to the Equal Rights Amendment; discussing such groups as Concerned Women for America and the Eagle Forum led by Phyllis Schlafly).

53 See *supra* note 52.

behind the blockades of clinics, rather than bigotry against women.⁵⁴

Pro-life defendants in the Rescue cases contend that women seeking abortions are not a protected class for purposes of section 1985(3). Their arguments against granting class status include: (1) the protestors display no animus toward the women seeking abortions;⁵⁵ (2) women seeking abortions or pregnant women are merely a sub-class of women undeserving of protection;⁵⁶ (3) the blockades of clinics prevent everyone, not just women, from entering the clinics;⁵⁷ (4) the Supreme Court has held that pregnant women should not receive as much protection as other suspect groups;⁵⁸ (5) the blockades represent a commercial or economic animus that section 1985(3) does not protect;⁵⁹ and (6) women seeking abortions are not a class because pregnancy is not an immutable characteristic.⁶⁰

The Fifth Circuit denies that women seeking abortions constitute a protected class.⁶¹ In *Mississippi Women's Medical Center v.*

⁵⁴ See *supra* note 50.

⁵⁵ See *infra* notes 61-68 and accompanying text. But see *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, 765 F. Supp. 617, 623-24 (N.D. Cal. 1991) (court rejects argument that no animus is directed against women; cites harassment and deprivation of rights).

⁵⁶ See *Birmingham Women's Medical Ctr. v. Operation Rescue*, No. CV-89-P-1261-S, 1991 U.S. Dist. LEXIS 11653 (N.D. Ala. Aug. 2, 1991); *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989). See *infra* notes 76-82 and accompanying text.

⁵⁷ E.g., *Birmingham*, 1991 U.S. Dist. LEXIS at *57. (blockade stops everyone from entering clinic). See *infra* notes 64, 83-86 and accompanying text.

⁵⁸ *Geduldig v. Aiello*, 417 U.S. 484 (1974). But cf. *International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (Court upholds an equal protection challenge to employment practice prohibiting fertile women from working around dangerous materials). See *infra* notes 87-90.

⁵⁹ The defendants in *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989) tried to take advantage of the *Scott* decision, which said that commercial animus would not support a § 1985(3) claim, by characterizing their opposition to abortion as opposition to the profit-making abortion clinics. The court responded to this argument by saying that "the notion that defendants' motive was 'economic' is simply not believable in light of the record evidence." *Id.* at 581 n.3. Furthermore, the court noted that one of the clinics under blockade was a nonprofit organization, thereby undermining the defendant's claim that economic interests motivated the demonstrations. *Id.*

⁶⁰ But see *Roe v. Operation Rescue*, 710 F. Supp. 577, 581 n.3 (E.D. Pa. 1989) (court rejects argument that because women made conscious choice to become pregnant, they are not protected class).

⁶¹ Although the text will concentrate on the *MacMillan* and *Lucero* decisions, discussed *infra* notes 65-68, the Fifth Circuit also refused to hold that the plaintiffs in another "Rescue" case constituted a protected class under § 1985(3). *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir.), cert. denied, 484 U.S. 848 (1987). In that case, the

McMillan,⁶² the court discounted gender as the motivating force behind the blockades of abortion clinics.⁶³ The court found that the protestors directed their animus at anyone trying to enter the clinic or supporting abortion, rather than just at women.⁶⁴ Whatever the impact of the protests may have been, the protestors were motivated against abortion, not against the members of a particular class, no matter how the plaintiffs delineate that class.⁶⁵ For the Fifth Circuit, the important distinction was that the motivation of the protestors was not class-based, but rather an animus directed against abortion.

The Eleventh Circuit echoed this argument in another clinic-blockade case: *Lucero v. Operation Rescue*.⁶⁶ The court said:

[D]efendants' actions were motivated by a disapproval of a certain activity, namely the abortion of a fetus, and therefore were designed to prevent individuals, women and men alike, from engaging in that activity. Nothing in the record suggests that defendants' efforts . . . sprang from an animus directed at women qua members of the female gender.⁶⁷

While the court admitted that the participation of women in abortion was "hardly incidental" and that it was obviously related to the fact that only women can get pregnant, the animus of the clinic-blockaders was directed at the practice of abortion and not at that class of women who seek abortions.⁶⁸

court denied § 1985(3) protection to a group characterized by its disagreement with the religiously influenced, anti-abortion views of the protestors.

62 866 F.2d 788 (5th Cir. 1989).

63 *Id.* at 795.

64 The court stated:

[T]he record indicates that the protestors do not target their pro-life advocacy at any particular group. The protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc.

Id. at 794.

65 The Fifth Circuit was reiterating the stance it had already taken in *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1988). In that case the court had rejected a § 1985(3) in which the class was defined as those "people who do not agree with the [anti-abortion protestor's] point of view." *Id.* at 932. To the Fifth Circuit, it did not matter how the class was defined, the important thing was that the motivation of the protestors was not class-based, but instead was based on an animus directed against abortion.

66 No. 91-7685, 1992 U.S. App. LEXIS 1502 (11th Cir. Feb. 5, 1992).

67 *Id.* at *12-13.

68 *Id.* at *13.

The Supreme Court's discussion of the discriminatory animus requirement in *Griffin v. Breckenridge*⁶⁹ adds support to the Fifth and Eleventh Circuits' interpretation of section 1985(3) in *McMillan* and *Lucero*. The Court stated that the purposeful requirement of section 1985(3) does not focus "on [the] scienter in relation to the deprivation of rights but on invidiously discriminatory animus."⁷⁰ In the Court's mind, Congress meant to address discriminatory animus with section 1985(3): Congress did not seek to protect any particular substantive right. In the same way, courts must examine the actions of anti-abortion protestors based on the fact that they are motivated by a desire to halt the right to abortion. The protestors are not motivated by any particular immutable characteristic of the people they stop from entering the clinics. Discriminatory animus is the key element, not discriminatory impact.⁷¹

Women seeking abortions is a class defined by a right, abortion, and not by any immutable characteristic of that class.⁷² As in *United Brotherhood of Joiners and Carpenters v. Scott* where the Court refused to recognize a class defined as those workers opposed to union membership,⁷³ section 1985(3) should protect groups based on their class membership, not based on any particular activity. The Justice Department argues that section 1985(3) could protect animal rights protestors as a class because they are a group of "individuals who seek to prevent animal cruelty."⁷⁴ This analogy is not as strong, however, because animal rights activists are simply advocates of the rights of the animals involved and have no personal stake in the protection of those rights. The facts of *Scott* present a more helpful comparison because those workers not wishing to join a union have a much higher personal stake in the rights being advocated than does an advocate of animal rights. The workers faced physical danger because of their decision not to join a union. In a similar way, women seeking abortions face harassment and abuse because of the right they choose to exercise. Because the "right" to abortion is losing some of its legiti-

69 403 U.S. 88 (1971).

70 *Id.* at 102 n.10.

71 *United Bhd. of Joiners and Carpenters v. Scott*, 463 U.S. 825, 834-35 (1983).

72 Plaintiffs would likely dispute this point, arguing that pregnancy is an immutable characteristic that only disappears after abortion or birth.

73 463 U.S. 825 (1983).

74 Brief for United States as amicus curiae for petitioners, *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991) (No. 90-985) (*granting cert.*).

macy according to the Supreme Court,⁷⁵ the protection given to a class of women seeking abortion may equal that given the workers in *Scott*. As the right to abortion loses its place among the fundamental rights, a class seeking to exercise that right may only receive the limited scrutiny given economic rights.

If the Court holds in *Bray* that "women seeking abortions" constitute a protected class, then any group could receive similar protection merely by defining themselves as a group that has been deprived of a particular constitutional right. This type of analysis would eviscerate section 1985(3) of its discriminatory, class-based animus requirement.

Two district courts have expanded on this analysis by holding that women seeking abortions are merely a sub-class of women and, thus, are undeserving of protection under section 1985(3).⁷⁶ In *National Abortion Federation v. Operation Rescue*,⁷⁷ the court denied section 1985(3) protection to a class of women seeking abortion. The court found it significant that women were not the complaining class, but rather a group of women distinguished by the characteristic that they were seeking an abortion. In this way, they differentiated themselves from the general class of women.⁷⁸ The court said:

[I]f the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than gender. The inquiry, thus, must be made without respect to gender, *i.e.*, it is the "seeking abortion" trait which animates the defendant's actions and must be the basis for making the § 1985(3) analysis.⁷⁹

Under the court's analysis, women seeking abortions fails to constitute a protected class not only because the animus is directed against abortions and not women, but also because the plaintiffs are merely a sub-class of women.⁸⁰ The court also recognized that

⁷⁵ See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

⁷⁶ *Birmingham Women's Medical Ctr. v. Operation Rescue*, No. CV-89-P-1261-S, 1991 U.S. Dist. LEXIS 11653 (N.D. Ala. Aug. 2, 1991); *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989).

⁷⁷ 721 F. Supp. 1168 (C.D. Cal. 1989).

⁷⁸ See *infra* notes 87-90 for a very similar position taken by the Supreme Court.

⁷⁹ *National Abortion Fed'n*, 721 F. Supp. at 1171.

⁸⁰ In *Birmingham Women's Medical Clinic v. Operation Rescue*, No. CV-89-P-1261-S,

because of the Supreme Court's paring back of the right to abortion,⁸¹ it becomes increasingly unlikely that any class defined by its relationship to the abortion right will be a "suspect class subject to exacting scrutiny."⁸²

Another factor which argues against women seeking abortions being a protected class is that the anti-abortion blockades prevent men as well as women from entering the clinics.⁸³ In *Birmingham Women's Medical Center v. Operation Rescue*,⁸⁴ the blockades were "directed not only at women seeking abortions, but also at men and women, apparently, who are employees of the clinic, as well as to women and perhaps men who might desire other services such as family counseling and related services at the clinic."⁸⁵ The fact that the blockades stop everyone from entering seems to indicate that the protestors take action against the abortions performed at the clinic, rather than a particular class of people.⁸⁶

The Supreme Court has rejected granting pregnant women heightened protection, suggesting that women seeking abortions are likewise not a protected class under section 1985(3). In *Geduldig v. Aiello*,⁸⁷ the Court ruled that a state law that denied pregnant women state disability insurance coverage was not a violation of the equal protection clause of the Fourteenth Amendment.⁸⁸ The Court stated:

1991 U.S. Dist. LEXIS 11653 (N.D. Ala. Aug. 2, 1991), the court took a very similar position to the court in *National Abortion Federation*. The court said that although women may be a protected class, "[i]n this particular case, it is not, however, women but only a certain group or sub-class of women which is the object of this concerted action" *Id.* at *60.

81 See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). *Cf.* *Planned Parenthood v. Casey*, No. 91-744, 1992 U.S. LEXIS 515 (1992) (*granting cert.*) (Court agrees to decide constitutionality of Pennsylvania abortion law).

82 *National Abortion Fed'n*, 721 F. Supp. at 1171.

83 *But see Women's Health Care Servs. v. Operation Rescue-National*, 773 F. Supp. 258, 264 (D. Kan. 1991) (court makes factual finding that "Operation Rescue has allowed male, but not female patients, to enter the various clinics.").

Although everyone is prevented from entering the clinics, only women are denied a right, abortion, as a result of the blockade. The anti-abortion protestors, however, attack the doctors performing abortions just as much, indeed more, than the women trying to get an abortion. Thus, even though women are denied a right, the animus of the demonstrators is consumed by a desire to end abortion.

84 No. CV-89-P-1261-S, 1991 U.S. Dist. LEXIS 11653 (N.D. Ala. Aug. 2, 1991).

85 *Id.* at *57.

86 This is further supported by the fact that many doctors that perform abortions face harassment and hostility, even more than the female patients seeking an abortion. See *Clinic Owner Supports Abortion Restrictions*, WASH. POST, Sept. 9, 1991, at A16.

87 417 U.S. 484 (1974).

88 See also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976) (stating that dis-

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition.⁸⁹

In a similar way, the class of women who may consider having an abortion is defined based on "objectively identifiable physical condition." As a result, courts should analyze discrimination against women seeking abortions on a rational basis, and not on a heightened basis that may entail treatment as a protected class. Abortion, not gender is the determining factor in the anti-abortion blockades. Similarly, the disability insurance program addressed in *Aiello* was based on pregnancy and not gender.⁹⁰ In both cases, the particular sub-class of women under consideration is undeserving of greater protection, either through the equal protection clause with *Aiello*, or with section 1985(3) and the anti-abortion protests.

Women seeking abortions do not constitute a protected class for purposes of section 1985(3). The anti-abortion protestors held no class-based discriminatory animus. They acted against abortion—an action, or procedure—and not against a class of people who share an immutable characteristic. Opposition to abortion drives the motivation of the protestors, not class-based animus. Furthermore, the blockades prevent everyone from entering the clinics, not just women or women seeking abortions. Plaintiffs engage in an activity that defines them as a mere sub-group of women. Section 1985(3) provides no protection for such a class.

crimination based on pregnancy is not the same as sex discrimination).

89 *Aiello*, 417 U.S. at 496-97 n.20 (citations omitted).

90 Both *Aiello* and *Gilbert* have been heavily criticized because of their failure to acknowledge the fact that only women get pregnant. Because of this fact, the Court's critics argue that what is really at stake are the rights of women, not some sub-group of women. See John D. Gibson, *Childbearing and Childrearing: Feminists and Reform*, 73 VA. L. REV. 1145, 1155-60 (1988); Stephen Karst, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 244 (1977); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1295 n.66 (1991).

IV. DO ANTI-ABORTION BLOCKADES DEPRIVE RESCUE PLAINTIFFS OF A CONSTITUTIONAL RIGHT?

To state a section 1985(3) cause of action, plaintiffs must not only establish that they represent a protected class under section 1985(3), they must also demonstrate that the anti-abortion demonstrators deprived them of a constitutional right.⁹¹ Plaintiffs in abortion-blockade cases assert that the protestors have deprived them of the following three rights in establishing their section 1985(3) claims: (1) the right to abortion;⁹² (2) the right to travel interstate;⁹³ and (3) state laws protecting against gender discrimination or in favor of abortion.⁹⁴ This Part considers each of these in turn, and discusses the validity of using them as a basis for a section 1985(3) action against anti-abortion demonstrators.

A. *The Right to Abortion*

1. The State Action Requirement

Rescue plaintiffs assert that blockading the entrances to abortion clinics denies women the right to an abortion. Because abortion is a constitutional right, depriving the protected class of women of this right satisfies the requirements of section 1985(3). The difficulty with this position is that the right to abortion is a right against *state* infringement; the right to abortion is not held against private individuals.⁹⁵ As a result, courts require that plaintiffs establish some kind of state action, with which anti-abortion protestors were affiliated, in order for the abortion protestors to violate the plaintiff's right to abortion.⁹⁶

91 "Section 1985(3) does not create any substantive rights of its own. Plaintiffs must look elsewhere to find a right, the deprivation of which can serve as the basis for a Sec. 1985(3) claim." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979).

92 See *infra* Part IV(A).

93 See *infra* Part IV(B).

94 See *infra* Part IV(C).

95 *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2936 (1990) ("A women's decision to beget or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution.").

96 See *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 681 F. Supp. 688, 691 (D. Or. 1988):

The federal constitutional right to choose abortion is derived directly from the right to personal privacy and is rooted in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. This right to personal privacy is founded upon the Fourteenth Amendment's concept of personal liberty and its restriction upon

The Supreme Court has repeatedly held that a section 1985(3) claim requires state action when the Constitution protects the right in question from interference or deprivation by state or federal authorities. In *United Brotherhood of Joiners and Carpenters v. Scott*,⁹⁷ the Court held that a conspiracy to violate First Amendment rights requires state action.⁹⁸ In *Griffin v. Breckenridge*,⁹⁹ by contrast, the Court held that it was proper to bring suit against private individuals because the right to travel was derived from the Thirteenth Amendment and is therefore protected from private conspiracies.¹⁰⁰ Because the Supreme Court has derived the right to abortion from the Fourteenth Amendment, plaintiffs must show state action in order to make a section 1985(3) claim. Plaintiffs face two problems: anti-abortion protestors are private actors and state authorities have arrested those protestors and carted them off to jail.¹⁰¹

In response to these problems, some plaintiffs deny that they need to show state action in order to demonstrate a deprivation of the right to abortion. Instead, they assert that the right to abortion is based in another part of the Constitution that does not require state action.¹⁰² Others contend that abortion is such a fundamental right that it is protected from both private and state actors.¹⁰³ Courts have not been receptive to either argument,

state action. The recognition of a constitutional right to privacy guarantees to women the right to make certain fundamental intimate choices without governmental interference. It does not, however, protect that right from private interference.

Id. at 691 (citations omitted).

See also *supra* note 95. See generally Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331 (1966); Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527 (1985); Stephanie M. Wildman, *42 U.S.C. § 1985(3)-A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 SAN DIEGO L. REV. 317 (1980); Mark Fockele, Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402 (1979); John F. Shoosmith, Note, *State Action no Longer a Requisite under 42 U.S.C. § 1985(3)*, 3 SETON HALL L. REV. 168 (1971); Comment, *Private Conspiracies to Violate Civil Rights*, 90 HARV. L. REV. 1721 (1977).

97 463 U.S. 825 (1983).

98 *Id.* at 830.

99 403 U.S. 88 (1971).

100 *Id.* at 105.

101 But see *infra* note 111 and accompanying text.

102 See *Roe v. Operation Rescue*, No. 88-5157, 1988 U.S. Dist. LEXIS 14484, at *3 (E.D. Or. Dec. 21, 1988) (plaintiff claiming that right to abortion is protected from private action through Thirteenth Amendment); see also *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 681 F. Supp. 688, 691 (D. Or. 1988) (Oregon state constitution). See *infra* note 103 and accompanying text.

103 E.g., *National Org. for Women*, 726 F. Supp. 1483 (E.D. Va. 1989) (plaintiff

however, and have continued to require a showing of state action in order to establish a deprivation of an individual's abortion right.¹⁰⁴

2. Is State Action Present in the Abortion Blockades?

The Supreme Court, in *Lugar v. Edmondson Oil Co.*,¹⁰⁵ set forth the test for demonstrating the existence of state action. The Court described a two-part test: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule or conduct imposed by the State or by a person for whom the State is responsible,"¹⁰⁶ and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor."¹⁰⁷ This test is difficult to overcome in the context of the anti-abortion protests.¹⁰⁸ Abortion protestors, who the police have arrested and dragged off to jail, cannot readily be characterized as state actors. Furthermore, the state has neither

claiming that abortion is so fundamental as to be protected from private action).

Also consider the argument of *Lewis v. Pearson Found., Inc.*, 908 F.2d 318 (8th Cir. 1990). In this case the court argued that Congress could reach private violations of Fourteenth Amendment rights through § 5 of that amendment. Thus § 1985(3) can be used in suits against anti-abortion protestors for a deprivation of the abortion right. Furthermore, the court asserted that the First, Fourth, Fifth, Ninth, and Fourteenth Amendments "[b]y their very nature, these interests would be meaningless were they to be protected only from interference from the state. We therefore hold that 42 U.S.C. § 1985(3) does not contain a state action requirement" *Id.* at 322. As a result, the court simply read the state action requirement out of those provisions of the Constitution. This case was later vacated. *Lewis v. Pearson Found., Inc.*, No. 88-1293EM, 1990 U.S. App. LEXIS 15937 (8th Cir. Sept. 7, 1990). After a rehearing en banc, an evenly divided Eighth Circuit reversed itself and upheld the decision of the district court that held that class-based, discriminatory animus on the part of the defendants had not been shown. *Lewis v. Pearson Found., Inc.*, 917 F.2d 1077 (8th Cir. 1990) (affirming the unreported opinion of the Eastern District of Missouri).

104 See *Lucero v. Operation Rescue*, 772 F. Supp. 1193, 1205 n.36 (N.D. Ala. 1991) ("[T]his court cannot square with logic that something so fundamental as the First Amendment privileges of speech and association are protected only against state interference, but that a hazy right to privacy is more broadly protected."), *aff'd on other grounds*, No. 91-7685, 1992 U.S. App. LEXIS (11th Cir. Feb. 5, 1992); see also *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493-94 (E.D. Va. 1989) (Court refuses to address claim that abortion right is so fundamental as to be protected against both private and state interference; claim is "problematic, both because it is novel and because Webster v. Reproductive Health Servs. suggests that the law concerning a putative abortion right is in a state of flux." (citations omitted)).

105 457 U.S. 922 (1982).

106 *Id.* at 937.

107 *Id.* at 937.

108 *E.g.*, *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 227 (6th Cir. 1991) (directly applying *Lugar* test to an anti-abortion blockade).

sponsored nor encouraged the rescue protests through some state policy or custom.¹⁰⁹

Plaintiffs have responded to the challenge of showing state action in three ways: (1) the anti-abortion protesters interfered with the ability of the police to control the demonstrations;¹¹⁰ (2) the police or state authorities assisted the protestors or failed to show adequate zeal in their arrests;¹¹¹ and (3) the demonstrators tried to influence the state not to provide equal protection of the laws.¹¹²

The courts have had mixed reactions to attempts to invoke the right to abortion in section 1985(3) cases. The majority of courts have held that not enough state action was present to maintain a section 1985(3) claim on the basis of the right to an abortion.¹¹³ Most of these courts ruled that in instances where the

109 *But see infra* note 114 and accompanying text.

110 *See Women's Health Care Servs. v. Operation Rescue-National*, 773 F. Supp. 258, 265 (D. Kan. 1991) (protestors failed to keep police informed of their activities); *Upper Hudson Planned Parenthood, Inc. v. Doe*, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *57 (N.D.N.Y. Sept. 16, 1991) (protestors failed to notify police of location of future demonstrations); *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (protestors used overwhelming numbers of demonstrators and failed to notify police of location of protests); *see also Planned Parenthood Ass'n v. Holy Angels Catholic Church*, 765 F. Supp. 617, 624-25 (N.D. Cal. 1991) (court refused to rule on existence of state action based on failure to notify police; relied instead on right to travel). *But see* cases cited *infra* note 113 and accompanying text.

111 *See Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991) (police agreed not to arrest protestors if they dispersed); *Northern Virginia Women's Medical Ctr. v. Balch*, 617 F.2d 1045 (4th Cir. 1980) (plaintiffs alleged that dismissals awarded by state court judges based on necessity defense of saving unborn children constituted collusion with protestors); *Women's Health Care Servs. v. Operation Rescue-National*, 773 F. Supp. 258 (D. Kan. 1991) (City of Wichita and its police showed lack of zeal defending abortion right); *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (police agreed not to arrest protestors if they agreed to disperse).

112 *See, e.g., Portland Feminist Women's Health Ctr. v. Advocates for Life*, 712 F. Supp. 165, 168 (D. Or. 1988) (plaintiffs alleged that the protestors intended to influence state and local officials to deprive individuals of constitutional rights).

113 *See Volunteer Medical Clinic*, 948 F.2d at 227 ("Although presumably the intent of the defendant's action was . . . to overwhelm the ability of the police to protect the ability of patients to enter the clinic, this fact alone is insufficient to show a nexus between the state and the defendants, nor does it suggest joint or concerted action between the defendants and the police."); *Lucero v. Operation Rescue*, 772 F. Supp. 1193, 1198 (N.D. Ala. 1991) ("no evidence of forbidden state action"), *aff'd on other grounds*, No. 91-7685, 1992 U.S. App. LEXIS 1502 (11th Cir. Feb. 5, 1992); *Upper Hudson Planned Parenthood*, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *57 (failure to notify police of location of demonstration was not sufficient state action); *National Abortion Fed'n v. Operation Rescue*, No. CV 89-1181 AWT, 1990 U.S. Dist. LEXIS 1805 (C.D. Cal. Jan. 31, 1990) (no state action); *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493 n.11 (E.D. Va. 1989) (failure to notify police of location of future protest was

anti-abortion protestors act without any active involvement or assistance by the police or other authorities, state action was not likely to ever be found.¹¹⁴ Several courts indicated, however, that plaintiffs could use the right to an abortion as the predicate right of a section 1985(3) action against protestors even without outright involvement by the police, but that in the individual cases, plaintiffs did not plead enough facts to establish state action.¹¹⁵ In several instances, including the *Bray* case, only the right to interstate travel is used as the basis for the section 1985(3) claim.¹¹⁶ Plaintiffs realize the state action requirement is difficult to meet, and that courts may find it far-fetched to claim that a failure to tell the police of the location of a demonstration amounts to state action.

A number of courts, however, have been sympathetic to predicated a section 1985(3) action on the right to an abortion.¹¹⁷ They have cited the language of *Great American Federal Savings & Loan Association v. Novotny* and *United Brotherhood of Joiners and Carpenters v. Scott* to support that position.¹¹⁸ The three courts that have held that plaintiffs met the state action requirement, based their holdings on activity that was essentially private in nature.¹¹⁹

not enough state action); *Roe v. Operation Rescue*, 710 F. Supp. 577, 583 (E.D. Pa. 1989) (state involvement was too limited to constitute state action, defendants not trying to influence legislators); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 681 F. Supp. 688, 691 (D. Or. 1988) (no allegation of state action; fails to state claim).

114 *E.g.*, *Volunteer Medical Clinic*, 948 F.2d at 227 ("[W]e hold that the district court erred in its conclusion that the fact that the defendants 'interfered and hindered the local police authority's ability to secure equal access to medical treatment for women who choose abortion' was in itself sufficient to support a finding of state action." The court seemed to indicate that some participation by a state actor would be required before they would find that state action was present.).

115 See *supra* note 113.

116 *E.g.*, *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (plaintiffs drop right to privacy claim on appeal).

117 See *Women's Health Care Servs. v. Operation Rescue-National*, 773 F. Supp. 258, 266 (D. Kan. 1991) (lack of zeal by city, failure to inform police of location of future protests, and use of overwhelming numbers to overcome authorities constituted sufficient state action); *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (failure of anti-abortion protestors to notify police of location of future demonstrations, overwhelming numbers of protestors, and agreement with police to end demonstration after certain time in exchange for pledge not to make arrests); *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 712 F. Supp. 165 (D. Or. 1988) (evidence sufficient to state claim that protestors attempted to influence government to restrict abortion right).

118 See *infra* notes 124, 128 and accompanying text.

119 See *supra* note 117.

They all fail to meet the Supreme Court's test established in *Lugar*.

One position often taken by plaintiffs is that the failure of anti-abortion protestors to notify the police of the location of future demonstrations or rescues constitutes the needed state action.¹²⁰ According to this argument, two muggers conspiring to deprive a passerby of her right to property, without informing the local beat cop of the location of their intended robbery would amount to state action.

In some cases, courts cite the fact that the police agreed not to arrest any protestors if they promised to disperse after a certain time as fulfilling the state action requirement.¹²¹ Rather than a law enforcement tactic to avoid unnecessary arrests or confrontation, these agreements by the police are characterized as a conspiracy to deprive women of their right to abortion.

A stronger argument for state action is that abortion protestors have acted in such overwhelming numbers or with such frequency as to make it impossible for the state to provide the equal protection of the laws.¹²² This position has a strong foundation in the legislative history and intent of section 1985(3). The Court in *Great American Federal Savings & Loan Association v. Novotny*¹²³ addressed this consideration when it said:

If private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or secure equal treatment, the private persons would cause those authorities to violate the 14th Amendment; the private persons would then have violated Sec. 1985(3).¹²⁴

Thus, plaintiffs can argue that if a rescue demonstration reached such a point that the state authorities were unable to enforce the

120 See *supra* note 110.

121 *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1260-61 (S.D.N.Y.), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

122 *E.g.*, *Women's Health Care Servs. v. Operation Rescue-Nat'l*, 773 F. Supp. 258, 265-66 (D. Kan. 1991) ("Operation Rescue has virtually overwhelmed the resources of the city's relatively small police forces to respond with dispatch and effectiveness."). *But see* *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 227 (6th Cir. 1991) ("Although presumably the intent of the defendant's action was . . . to overwhelm the ability of the police to protect the ability of patients to enter the clinic, this fact alone is insufficient to show a nexus between the state and the defendants, nor does it suggest joint or concerted action between the defendants and the police.").

123 442 U.S. 366 (1979).

124 *Id.* at 384. (Stevens, J., concurring).

laws, then at that point, calling in the federal authorities under section 1985(3) would be appropriate. In this way, plaintiffs could meet the state action requirement for the deprivation of the right to abortion. The mere fact that 50,000 arrests have been made, and that abortions clinics have remained open across the country, would seem to indicate, however, that the protestors have not prevented the state authorities from enforcing the equal protection of the laws.¹²⁵

This approach to state action is strengthened by the legislative history of section 1985(3). One of the harms that Congress meant to address by the passage of the Ku Klux Klan Act in 1871 was the rampant lawlessness that was occurring in the South. The activities of the Klan and other groups either overwhelmed the local authorities because of a lack of resources or because of the tacit support of the authorities for Klan activities.¹²⁶ But in that context, plaintiffs would not have to show state action because they could use the Thirteenth Amendment as the predicate right against private actors in a section 1985(3) action.

Another way plaintiffs allege state action is through a showing that the anti-abortion protestors try to affect the state's position toward abortion. The Supreme Court in *United Brotherhood of Joiners and Carpenters v. Scott*¹²⁷ said that a section 1985(3) claim is stated where the "aim of [the] conspiracy is to influence the activity of the state."¹²⁸ By hindering the police from maintaining order and by making it difficult for them to keep the abortion clinics open, plaintiffs allege that the protestors have met the state action requirement for the right to an abortion under section 1985(3). But as discussed earlier, this attempt to demonstrate state action, fails to meet the standards required by *Lugar*.

The issue of whether plaintiffs can properly use the right to abortion as the basis for a section 1985(3) action may become moot if the Supreme Court overturns *Roe v. Wade*.¹²⁹ If the right to abortion loses its constitutional foundation, then plaintiffs could not use it regardless of the participation of state authorities in the anti-abortion blockades. Plaintiffs could then only rely on the right

125 See *supra* notes 6, 18.

126 See Shatz, *supra* note 13; Fockele, *supra* note 96.

127 463 U.S. 825 (1983).

128 463 U.S. at 830. See *supra* note 126.

129 410 U.S. 113 (1973). Cf. *Planned Parenthood v. Casey*, No. 91-744, 1992 U.S. LEXIS 515 (1992) (*granting cert.*) (Court agrees to decide constitutionality of Pennsylvania abortion law).

to interstate travel to bring a section 1985(3) action.¹³⁰ This situation makes the Court's consideration of the right to interstate travel in the *Bray* case even more important.

B. *Right to Interstate Travel*

Plaintiffs have successfully used the right to interstate travel as the predicate right of a section 1985(3) action in most of the cases involving anti-abortion blockades.¹³¹ They simply plead the existence of out-of-state patients coming to the clinic for abortions or related medical care. In one case, the fact that a single out-of-state patient was denied access to a clinic by a blockade constituted sufficient violation of the right to interstate travel.¹³² Because the anti-abortion protestors block entrance into the clinics, the out-of-state patients have therefore suffered an interference with their right to interstate travel.¹³³

130 But see *infra* Part IV(C) for a discussion of the use of state statutory law as a predicate right for § 1985(3).

131 See *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir. 1989); *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, 765 F. Supp. 617, 624 (N.D. Cal. 1991) (right to travel violated; did not matter that protestors harassed resident and nonresident patients alike, some individuals still were deprived of travel); *Upper Hudson Planned Parenthood v. Doe*, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *53 (N.D.N.Y. Sept. 16, 1991) (right to travel claim stated; patients traveled from Vermont and Massachusetts); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989) (right to travel violated; 15% to 20% of patients were from out-of-state); *Roe v. Operation Rescue*, 710 F. Supp. 577, 581-82 (E.D. Pa. 1989) (single out-of-state patient denied access violates right to travel), *aff'd on other grounds*, 919 F.2d 857 (3d Cir. 1990); *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989) (20-30% of patients of one clinic came from out-of-state; over 50% of patients of second clinic were non-residents), *aff'd*, 914 F.2d 582, 584 (4th Cir. 1990), *cert. granted sub. nom. Bray v. Alexandria Women's Health Clinic, U.S.*, 111 S. Ct. 2006 (1991); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 712 F. Supp. 165, 168 (D. Or. 1988) (defendants conspired to deter women from out-of-state from coming to the clinic for abortion). But see *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 222 (6th Cir. 1991) (district court dismissed right to travel because of failure to allege patients crossed state lines); *Lucero v. Operation Rescue*, 772 F. Supp. 1193 (N.D. Ala. 1991) (1.5% of abortion patients were nonresidents; not sufficient to allege violation of right to travel), *aff'd on other grounds*, No. 91-7685, 1992 U.S. App. LEXIS 1502 (11th Cir. Feb. 5, 1992).

132 *Roe v. Operation Rescue*, 710 F. Supp. 577, 581-82 (E.D. Pa. 1989) (patient forced to go to Pennsylvania in order to finish two-day procedure began in New Jersey; constituted deprivation of right to travel), *aff'd on other grounds*, 919 F.2d 857 (3d Cir. 1990).

133 The Second Circuit has gone so far as to assert a constitutional right to *intrastate* travel. In that case, even if none of the clinic's patients come from out-of-state, the simple interference with travel implicates the Constitution. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971).

The Supreme Court held that private individuals can act to deprive others of their right to travel in *Griffin v. Breckenridge*.¹³⁴ In *Griffin*, plaintiffs used the right to interstate travel to support a section 1985(3) claim. The Court said: "the right to interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment and is assertable against private as well as governmental interference."¹³⁵ With this as a basis, it is clear that plaintiffs do not need to show state action on the part of anti-abortion protestors to make out a claim under section 1985(3).

The Supreme Court outlined the scope of the right to interstate travel in *United States v. Guest*.¹³⁶ The case involved an assault upon blacks who the attackers thought were civil rights workers from out-of-state. The Court recognized an action against private individuals for the deprivation of the right to travel. The defendants in the case had denied plaintiffs the "right to travel freely to and from the State of Georgia"¹³⁷ The Court limited the scope of the right to travel by noting that:

[A] conspiracy to rob an interstate traveler would not . . . violate § 241.¹³⁸ But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then . . . the conspiracy becomes a proper object of the federal law.¹³⁹

In this way, the Court added a "predominant purpose" requirement to show a deprivation of the right to travel. Without that purposeful intention to discriminate against out-of-staters by hindering their ability to freely cross state boundaries, no federal remedy was available.

In *Griffin*, although the Court did not directly address the issue of intent and the deprivation of the right to travel, it does appear to have given some support to the predominant purpose

134 403 U.S. 88 (1971).

135 *Id.* at 105.

136 383 U.S. 745 (1966).

137 383 U.S. at 757.

138 18 U.S.C. § 241 (1988) is the criminal equivalent of § 1985(3). The *Guest* case involved a § 241 action, but the elements are approximately the same. The only difference is that because *Guest* was a criminal case, intent was a more important question than in a civil case under § 1985(3). The Court seems to have resolved this question in *Griffin* by seemingly adopting the purpose requirement of *Guest*. See *infra* note 140 and accompanying text.

139 *Guest*, 383 U.S. at 760.

requirement of *Guest*. The Court assumed that at trial, plaintiffs would prove "that the federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy."¹⁴⁰ This statement further strengthens the position that plaintiffs must show an intent to interfere with the right to interstate travel, and not simply that travel was in some way affected by the actions of a defendant.

Even though many courts simply rubberstamp the right to interstate travel in section 1985(3) abortion cases,¹⁴¹ their use of that right in these cases appears problematic. The right to interstate travel is not properly invoked in the context of the blockading of abortion clinics. When the predominant purpose test of *Guest* is applied to the Operation Rescue cases, it is clear that the right to interstate travel is not implicated. The predominant purpose of the Operation Rescue blockades was not to interfere with travel, but to stop abortions. Any interference with travel was merely an incidental effect. The intent of the abortion blockaders was to stop the abortions.¹⁴²

The purpose of the anti-abortion blockades is not to discriminate against out-of-state residents. The blockades take no notice of the residency or travel status of the individuals attempting to gain entrance to the abortion clinics.¹⁴³ The district court in *Lucero v. Operation Rescue*¹⁴⁴ made the intent requirement clear for deprivation of travel claims in Rescue cases. The district court held there was no evidence of "any motive specifically directed at out-of-state travelers or any specific intent to drive them out of the state or

140 *Griffin*, 403 U.S. at 106.

141 See cases cited *supra* note 131.

142 But see *infra* notes 155-59 and accompanying text concerning the Wichita situation. In some cases, however, the special factual circumstances may validate a claim of a deprivation of the right to travel.

143 See *Birmingham Women's Medical Ctr. v. Operation Rescue*, No. CV-89-P-1261-S, 1991 U.S. Dist. LEXIS 11653, at *58 (N.D. Ala. Aug. 2, 1991) ("impairment . . . affects travel or traveling of persons traveling interstate no differently than it affects people who have not traveled from one state to another."); *Lucero v. Operation Rescue*, 772 F. Supp. 1193, 1200 n.19 (N.D. Ala. 1991) (no evidence "that there was any motive specifically directed at out-of-state travelers or any specific intent to drive them out of the state or any animus directed at such travelers . . . because they were travelers."), *aff'd on other grounds*, No. 91-7685, 1992 U.S. App. LEXIS 1502 (11th Cir. Feb. 5, 1992). But see *Upper Hudson Planned Parenthood v. Doe*, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, *53 (N.D.N.Y. Sept. 16, 1991) (holding that plaintiff does not have to show that defendants knew that patients traveled from out-of-state in order to show deprivation).

144 772 F. Supp. 1193, n.19 (N.D. Ala. 1991), *aff'd on other grounds*, No. 91-7685, 1992 U.S. App. LEXIS 1502 (11th Cir. Feb. 5, 1992).

any animus directed at such travelers . . . because they were travelers."¹⁴⁵

It seems disingenuous for plaintiffs and many courts to argue that because the blockade prevents individuals from passing from the street through the clinic doors, that therefore the protestors interfered with plaintiff's right to interstate travel.¹⁴⁶ In an Alabama district court case, the court noted "it appears that there is little, if any, impairment of travel itself. What impairment occurs appears to occur after travel, in effect, has been completed"¹⁴⁷ Could it be claimed that a sit-in at a segregated lunch counter deprived white customers of the right to travel because they could not sit in their favorite seats? Thus, not only do anti-abortion protestors lack the specific intent necessary to deprive patients of their right to travel, they in fact do not stop them from traveling interstate at all.

Courts have cited *Doe v. Bolton*¹⁴⁸ to support the existence of the right to interstate travel in order to procure abortion services in the Operation Rescue protests.¹⁴⁹ At issue in *Doe* was a Georgia law that prohibited out-of-state residents from traveling to Georgia and getting an abortion. The Court struck down the law because it discriminated against out-of-state residents. In the Operation Rescue context, however, the blockades do not differentiate between in-state and out-of-state residents. Rather, the blockades prevent everyone from entering a clinic during a demonstration. Furthermore, unlike *Doe*, the rescue cases do not involve the state

145 *Id.* at 1200 n.19.

146 Cases holding that hotel and restaurant discrimination constitutes interference with the right to travel may seem to put into question this analysis of the right to travel. Blacks denied a hotel room or a place at a restaurant, are not really physically prevented from moving or going from place to place, yet the courts have recognized that their right to interstate travel was violated. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) ("discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes.").

The abortion blockade cases are different, however, in that abortion clinics are not important to the maintenance of the ability to travel. Hotels and restaurants, on the other hand, are instrumental in traveling across state lines. If they are unavailable, then the ability of blacks to travel is restricted in a real sense. In contrast, a "sit-in" or blockade at an abortion clinic does not interfere with the ability of patients or doctors to travel across statelines.

147 *Birmingham Women's Medical Ctr. v. Operation Rescue*, No. CV-89-P-1261-S, 1991 U.S. Dist. LEXIS at *57-58.

148 410 U.S. 170 (1973).

149 See, e.g., *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990); *Cousins v. Terry*, 721 F. Supp. 426, 429 (N.D.N.Y. 1989); *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989).

infringing upon the abortion right. Only private actors interfere with access into the abortion clinics.

Without some element of intentional discrimination against out-of-staters, a plaintiff could construe any conduct as interfering with interstate travel so long as she could show a nonresident participated in the activity subject to attack.¹⁵⁰ A victim of a mugging on the subway between New Jersey and New York could sue the robbers in federal court under section 1985(3) because the muggers interfered with the victim's right to interstate travel.¹⁵¹ The right to interstate travel could thus become the basis for a general federal tort remedy so long as nonresidents are involved. The right of interstate travel could expand to such proportions as to be equivalent in reach to the commerce clause. Anyone moving in interstate travel could claim a violation of their constitutional rights if their travel is interfered with, regardless of the intent of the defendants. They could then sue in federal court with all the advantages of the civil rights laws.¹⁵²

Plaintiffs argue that because the abortion blockades interfere with the *purpose* of travel, seeking an abortion, then the right to travel is violated. If this is the test applied to any section 1985(3) case based on the travel right, then the right could expand even further, well beyond the muggers on the subway mentioned earlier. With the purpose test, if Nevada were to abolish gambling in Las Vegas, out-of-state travelers could sue the state for a violation of their right to interstate travel. The state denied the gamblers their right to travel by interfering with the purpose of their trip. Simply because women seeking abortions sometimes cross state lines does not mean that plaintiffs can use that fact to claim a violation of the civil rights laws. The civil rights laws have a more

150 *But see* New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989), where the court found that a constitutional right to *intrastate* travel exists. This widens the scope even further. In this instance, they would not even have the requirement of pleading the existence of nonresidents. All that would need to be shown was that movement from place to place was somehow restricted. *Also see infra* note 151 for a Second Circuit case recognizing the right to intrastate travel.

151 Compare this hypothetical with the case of Spencer v. Casavilla, 903 F.2d 171 (2d Cir. 1990), where the court held that a black man who was attacked and murdered while walking on the street was deprived of his right to *intrastate* travel in a § 1985(3) action. *See supra* note 133.

152 Plaintiffs suing under § 1985(3) can recover attorney's fees if they prevail in the suit based on 42 U.S.C. § 1988 (1988). This is especially important in the context of the abortion blockades. In all of these cases plaintiffs are seeking injunctive relief and the prospect of the recovery of damages is slight. *See infra* Part V.

limited and important goal than providing an open federal tort remedy based on travel.

The strongest argument that abortion clinics have for using interstate travel as a predicate right is that in some cases the anti-abortion protestors blockade specific clinics because they perform late term abortions.¹⁵³ Because very few clinics are willing to perform late term abortions,¹⁵⁴ the clinics that do perform them take patients from across the country. Courts could construe the targeting of such clinics as a form of intentional action against the ability of patients to travel to other states in order to secure late abortions.

In *Women's Health Care Services v. Operation Rescue-National*,¹⁵⁵ one of the abortion clinics blockaded in Wichita performed late term abortions.¹⁵⁶ Some 44% of the patients at the blockaded clinic came from out-of-state.¹⁵⁷ The court made a specific finding that:

[I]nfringement of interstate travel has played an essential role in the motivation for Operation Rescue's activities in Wichita. The court takes note of the public statements of Operation Rescue leaders which emphasize the 'national' role played by plaintiff Wichita Health Care Services in allegedly supplying late-term abortions.¹⁵⁸

In this way, the court avoided any "predominant purpose" analysis. The court made a factual finding that Operation Rescue blockaded the clinic in Wichita with the intent of interfering with the access of interstate travel to late-term abortions. This case presents the strongest example of an appropriate use of the right to interstate travel, but only to the extent that it finally recognizes the fact that the plaintiff, in order to state a deprivation of the right

153 In Wichita, Kansas, site of over 2,700 arrests over the summer of 1991, the anti-abortion forces hoped to raise awareness that late term abortions are performed and to bring out a greater number of supporters to oppose such abortions. Since there are so few clinics which perform late term abortions, to have a greater impact on abortion when one of these clinics is blockaded. For an indication of intent behind targeting Wichita's late-term abortion clinic, see *Pro-Life Leaders Leaving Wichita*, WASH. TIMES, Aug. 12, 1991, at A2.

154 Only seven clinics in the nation perform third-trimester abortions, including Women's Health Care Services in Wichita. *Clinic Owner Supports Abortion Restrictions*, WASH. POST, Sept. 9, 1991, at A16.

155 773 F. Supp. 258 (D. Kan. 1991).

156 See *supra* note 154.

157 *Women's Health Care*, 773 F. Supp. at 266-67.

158 *Id.* at 267 n.5.

to travel, must show some kind of discriminatory purpose or intent that is directed against out-of-state patients.

This case, however, is limited to its facts. Most Rescues involve blockades of clinics that only service local residents.¹⁵⁹ Also, the Wichita case was special because Operation Rescue specifically targeted one of the few clinics in the country that performed late-term abortions. In most other cases, these special circumstances would not apply, and plaintiffs could not use interstate travel as the predicate right to a section 1985(3) action.

*C. Can State Law Supply a Predicate
Right under § 1985(3)?*

While plaintiffs have generally used the constitutional rights to abortion and interstate travel as a basis for their section 1985(3) actions, they have also asserted that the deprivation of a state statutory right constitutes a violation of section 1985(3). They base this on the language of the statute itself, asserting that "equal protection of the laws," means that section 1985(3) covers statutory law as well as rights derived from the Constitution. Plaintiffs broadly define "laws" to include state statutes.¹⁶⁰

The Supreme Court indirectly addressed the question of whether section 1985(3) protects against federal and state statutory deprivations in *Great American Federal Savings & Loan Association v. Novotny*.¹⁶¹ The Court said that section 1985(3) "is a purely remedial statute, providing a civil cause of action when some otherwise defined *federal* right . . . is breached by a conspiracy" ¹⁶² In separate concurring opinions, Justices Powell and Stevens emphasized that section 1985(3) was only meant to protect

159 See *supra* notes 131-32. Furthermore, in the Wichita case itself, another one of the clinics targeted in the city only had 8-10% of its patients from out-of-state. *Women's Health Care*, 773 F. Supp. at 266.

160 Plaintiffs also draw support from the Supreme Court's decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980). In *Thiboutot*, the Court held that 42 U.S.C. § 1983 (1988) could reach violations of constitutional and *federal* statutory rights. 448 U.S. at 5-6. The language of § 1983 is similar to that of § 1985(3); § 1983 protects against "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" See *supra* note 34 for the similar use of the word laws in § 1985(3). Thus, the Court's decision in *Thiboutot* could be analogized to cases involving § 1985(3), thereby allowing for suits based on deprivations of federal statutory law. This conclusion, however, does not provide any support for the use of violations of state statutory law as a predicate right in a § 1985(3) case. So far, plaintiffs have only relied on state statutory law, therefore *Thiboutot* would be of only limited support.

161 442 U.S. 366 (1979).

162 *Id.* at 376. (emphasis added).

those rights found in the Constitution.¹⁶³ Although it appears that the Court is leaning towards denying recognition to state statutory rights as predicates, it refused to decide the issue in *United Brotherhood of Joiners and Carpenters v. Scott*.¹⁶⁴ The reaction of circuit courts has been mixed, with some courts avoiding the issue,¹⁶⁵ others endorsing the use of statutory law,¹⁶⁶ and others limiting it to deprivations of federal rights.¹⁶⁷

Courts have not been very receptive to the practice of using statutory law for section 1985(3) actions in the Operation Rescue cases. In *Upper Hudson Planned Parenthood v. Doe*,¹⁶⁸ the plaintiff abortion clinic tried to use New York state law as a predicate right for its section 1985(3) action.¹⁶⁹ The court responded that "the scope of § 1985(3) should not be broadened to include violations of rights protected by state law."¹⁷⁰ Furthermore, "§ 1985(3) should properly be interpreted to reach only federal constitutional and statutory rights."¹⁷¹ In another case involving abortion protests, the court refused to rule on the question of whether or not state law can serve as the predicate right, relying instead on the right to travel and the right to privacy.¹⁷²

163 Section 1985(3) "is limited to conspiracies to violate those fundamental rights derived from the Constitution." 442 U.S. at 376 (Powell, J., concurring); Congress "was concerned with providing federal remedies for the deprivations of rights protected by the Constitution" *Id.* at 383. (Stevens, J., concurring). Furthermore, § 1985(3) was "not intended to provide a remedy for the violation of statutory rights." *Id.* at 385.

164 463 U.S. 825 (1983).

165 See *Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 587 (2d Cir. 1988) (unclear whether § 1985(3) reaches federal or state statutory law; court decides case on other grounds).

166 See *Life Ins. Co. of North Am. v. Reichhardt*, 591 F.2d 499, 505 (9th Cir. 1979) ("Violations of state conferred rights and privileges are sufficient to constitute a deprivation of 'equal protection of the laws.'"); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 930 (5th Cir. 1977) (en banc).

167 See *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 828 (7th Cir. 1975) (only federally protected rights covered by § 1985(3)), *cert. denied*, 425 U.S. 943 (1976); *Birnbaum v. Trussell*, 371 F.2d 672, 676 (2d Cir. 1966) ("Sec. 1985(3) does not protect rights guaranteed by state law."); *Shaare Tefila Congregation v. Cobb*, 606 F. Supp. 1504, 1509-10 (D. Md. 1985) (same), *aff'd*, 785 F.2d 523, 525 (4th Cir. 1986), *rev'd on other grounds*, 481 U.S. 615 (1987).

168 No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063 (N.D.N.Y. Sept. 16, 1991).

169 Plaintiffs premised their action using: 1) "New York State Executive Law, @ 296(2)" and (6); 2) "New York Civil Rights Law, @ 40-c"; and 3) "the laws of New York City." *Id.* at *51 n.38.

170 *Id.* at *59.

171 *Id.*

172 *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1259 n.14 (S.D.N.Y. 1989) (court refuses to consider whether violation of New York Civil Rights Law

It appears likely that plaintiffs will continue to rely on the right to interstate travel, rather than trying to use statutory law. This could change, however, if the Supreme Court in *Bray* limits or restricts the use of interstate travel as a predicate right in section 1985(3) actions. In that case, plaintiffs will become more aggressive (assuming of course that women seeking abortions are still a protected class) in using state law in support of their civil rights claims.¹⁷³

V. WHY SUE UNDER § 1985(3) RATHER THAN STATE LAW?

In each of the cases brought against anti-abortion protestors, the plaintiffs have attached multiple state law actions as pendent claims to the civil rights action.¹⁷⁴ The protestors could be liable under an action for trespass, intentional infliction of emotional distress, assault, destruction of property, interference with contractual relations, and nuisance.¹⁷⁵ Pro-choice groups like the National Organization for Women, who sue on behalf of women seeking abortions, claim that these women do not have adequate redress under state law.¹⁷⁶ They argue that only the clinics can sue under state law, and that women seeking abortions need a federal action to protect their right to abortion and the right to travel freely across statelines to procure the procedure.

satisfies requirements of § 1985(3)).

173 Furthermore, the fact that a deprivation of the right to abortion requires state action and that the abortion right may be in danger indicate that state or federal law may become more important in the context of § 1985(3) actions in the future.

174 Plaintiffs have also sued protestors using RICO and the anti-trust laws. *E.g.*, *North-east Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d. Cir.) (court upholds RICO conviction of protestors), *cert. denied*, 110 S. Ct. 261 (1989); *National Org. for Women v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991) (protestors sued under Sherman Act § 1 for anti-competitive acts and RICO).

175 *E.g.*, *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 681 F. Supp. 688, 689 (D. Or. 1988) (plaintiff brought state RICO, intentional interference with business relations, intentional infliction of emotional distress, assault, and defamation claims).

176 A spokeswoman for the National Organization for Women stated:

'You can only bring a trespass action if you own some property. We're not talking about women alleging property rights. We're talking about women whose fundamental rights to body integrity are being infringed. That is not something that a trespass action could ever address.'

Alison Weatherfield, Legal Director of NOW Legal Defense and Education Fund during a press conference after the completion of oral arguments before the Supreme Court for the *Bray* case. *FED. NEWS SERV.*, Oct. 16, 1991, available in LEXIS, Nexis Library, FEDNEW File.

Plaintiffs suing under section 1985(3) can recover attorney's fees if they prevail in the suit based on 42 U.S.C. section 1988 (1988). This is especially important in the context of the abortion blockades. In all of these cases, the plaintiffs are seeking injunctive relief and the amount of damages recoverable is small.¹⁷⁷ Successful plaintiffs have received substantial awards of attorney's fees.¹⁷⁸ Plaintiffs also have the perception that federal judges will have greater sympathy for their cause than will state court judges. In *Northern Virginia Women's Medical Center v. Balch*,¹⁷⁹ the plaintiffs sued two state court judges for their participation in a section 1985(3) conspiracy because of their rulings in favor of anti-abortion protestors defending against a trespass suit.¹⁸⁰ One judge held that the protestors were justified in occupying an abortion clinic because of their belief that the lives of unborn children were in danger, while the other claimed that the Virginia law that allowed first trimester abortions was unconstitutional.¹⁸¹ Federal courts, on the other hand, have not accepted the justification defense argued by defendants.¹⁸²

Another reason plaintiffs try to gain access to the federal courts through section 1985(3) is that federal judges have been very aggressive in enforcing their injunctions.¹⁸³ Once the injunc-

177 See, e.g., *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990) (plaintiff abortion clinic awarded \$2,308.03 in damages for payroll costs on day of anti-abortion protest); *Nat'l Org. for Women v. Operation Rescue*, 747 F. Supp. 772, 777 (D.D.C. 1990) (\$6,013.00 in damages from three abortion clinics); *Portland Feminist Women's Health Ctr., Inc. v. Advocates for Life, Inc.*, No. 86-559-FR, 1989 U.S. Dist. LEXIS 13778, at *20 (D. Or. Nov. 1, 1989) (\$2,727.76 in damages).

178 E.g., *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, No. 86-559-FR, 1991 U.S. Dist. LEXIS 10865, at *6 (D. Or. July, 31, 1991) (\$328,057.70 in attorney's fees); *New York State Nat'l Org. for Women v. Terry*, 737 F. Supp. 1350 (S.D.N.Y. 1990) (plaintiffs awarded \$153,211.50 in attorney's fees); *Roe v. Operation Rescue*, No. 88-5157, 1989 U.S. Dist. LEXIS 4688 (E.D. Pa. May 1, 1989) (\$70,758.37 in attorney's fees), *aff'd*, 919 F.2d 857 (3d Cir. 1990).

179 617 F.2d 1045 (4th Cir. 1980).

180 *Id.* at 1047. See *infra* note 182.

181 *Balch*, 617 F.2d at 1048 (citing to unreported state court decisions).

182 E.g., *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350-52 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989); *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990).

For further discussion of the necessity defense in the context of the rescue movement, see generally Susan B. Apel, *Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction*, 48 WASH. & LEE L. REV. 41 (1991); Rice, *supra* note 7; John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991); Patrick G. Senftle, Note, *The Necessity Defense in Abortion Clinic Trespass Cases*, 32 ST. LOUIS U. L.J. 523 (1987).

183 In the summer of 1991, Judge Thomas Kelly of the Federal District of Kansas was

tion is in place, and the anti-abortion demonstrators have violated the order, the judges have imposed high civil contempt fines.¹⁸⁴ In *New York State National Organization for Women v. Terry*, the judge assessed \$425,000 in fines against the defendants when they failed to obey his injunction.¹⁸⁵ The contempt fines, along with a sizable award of attorney's fees, succeeded in driving Operation Rescue underground.¹⁸⁶ Thus, through their use of section 1985(3), pro-choice groups have severely weakened the ability of anti-abortion protestors to engage in civil disobedience.

VI. CONCLUSION

The circuit courts are split over the propriety of the use of section 1985(3) against anti-abortion protestors.¹⁸⁷ In *Bray v. Alexandria Women's Health Clinic*,¹⁸⁸ the Supreme Court has the opportunity to resolve this dispute. The Court is only addressing two issues in *Bray*: (1) whether women seeking abortions constitute a protected class under section 1985(3); and (2) whether a blockade of an abortion clinic amounts to a deprivation of the right to interstate travel. The Court should hold that women seeking abortions are not a protected class. Abortion protestors do not target women who seek abortions; rather, they target the activity itself. The plaintiffs have thus failed to show an invidiously discriminatory animus.

If the Court reaches the interstate travel issue, it should hold that the clinic patients were not deprived of any constitutional rights. A sit-in at an abortion clinic that stops both residents and nonresidents alike does not deprive those patients of their right to travel. The predominate purpose of the protestors is not to pre-

especially aggressive in enforcing his injunction against anti-abortion blockaders. During the demonstrations he warned the protestors that "[t]hey should say farewell to their family and bring their toothbrush, and I mean it, because they are going to jail." John Elson, *Abortion*, TIME, Aug. 19, 1991, at 22. Judge Kelly was emphasizing the fact that the protestors faced real jail time, and not just a minimal fine accompanied by a night in jail.

184 See, e.g., *New York State Nat'l Org. for Women v. Terry*, 737 F. Supp. 1350, 1355 (S.D.N.Y. 1990) (\$425,000 in civil contempt fines assessed against the defendants); *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990) (\$5,000 per violation, per defendant) *National Org. for Women v. Operation Rescue*, 747 F. Supp. 772, 778 (D.D.C. 1990) (\$5,000 per defendant, doubling after each offense).

185 *Terry*, 737 F. Supp. at 1357.

186 See *supra* note 10.

187 See *supra* notes 41-42.

188 111 S. Ct. 1070 (1991), *granting cert.* *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

vent the clinic patients from traveling interstate in order to receive abortion services. Instead, the protestors intended to stop the procedure of abortion from being performed. Furthermore, no state action is present in an anti-abortion blockade that would implicate the right to privacy.

Regardless of how one stands on the abortion issue, the judicial system cannot allow the super-heated passions of the abortion debate to cloud the application and interpretation of an important civil rights statute. Anti-abortion protestors violate state law. State courts, not federal, should punish them accordingly. Plaintiffs should not be able to manipulate federal law in order to get a favorable forum or to receive an award of attorney fees. The rule of law requires the evenhanded application of the laws no matter how emotional or controversial the dispute.

David A. Gardey

