Beyond Bray:
Obtaining Federal Jurisdiction
To Stop Anti-Abortion Violence
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PROLOGUE: THE STORY OF DR. DAVID GUNN

On Wednesday, March 10, 1993, Dr. David Gunn exited his car during a protest outside the clinic where he practiced medicine in Pensacola, Florida.¹ Before Dr. Gunn, a victim of polio who walked with a severe limp, could reach safety,² a man cried, “Don't kill any more babies!” and shot him three times in the back.³ When the police arrived, Michael Griffin, a thirty-one year old “pro-life” protester wearing a gray suit, admitted he had just shot the doctor with a .38 caliber snub-nosed revolver. The forty-seven year old Dr. Gunn died shortly thereafter during emergency surgery at a local hospital.⁴

Dr. Gunn's death was the tragic culmination of the threats, blockades, and personal attacks he had endured for years. During the summer of 1992, at a rally sponsored by Operation Rescue in Montgomery, Alabama, anti-abortion activists had distributed “Wanted” posters displaying his photograph, home address, telephone number, and daily work schedule.⁵ His actions had been closely monitored by John Burt, a former U.S. Marine and member of the Ku Klux Klan who had shown Michael Griffin “gory videos of aborted fetuses” and dined with Griffin the night before Gunn’s shooting.⁶ Dr. Gunn was one of the only doctors willing to provide abortion services in Pensacola, Florida, a town thrust into the national spotlight in 1984 when three clinics were bombed on Christmas Day as “a gift to Jesus on his birthday.”⁷ It seemed inevitable that sooner or later someone was going to get killed.

“Pro-life” activists expressed little remorse for the murder. Don Treshman, the Houston-based leader of Rescue America which had organized the Pensacola clinic protest, stated that although Dr. Gunn’s death was

². Eloise Salholz et al., The Death of Doctor Gunn, NEWSWEEK, Mar. 22, 1993, at 34.
⁴. Id.
⁶. Laura Griffin, Two Men, Two Views on Abortion, ST. PETERSBURG TIMES, Nov. 5, 1993, at 1A.
⁷. Id. John Burt allegedly supported the “two young couples” who were arrested for the Christmas bombings. See id.
unfortunate, “quite a number of babies’ lives will be saved.” Joseph Foreman, Operation Rescue’s former field director and current president of Milwaukee-based Missionaries to the Pre-born, agreed. After all, Foreman argued, Gunn was a “mass murderer. He was preparing to kill five to 10 babies. I’m genuinely happy these lives are spared.” Anti-choice groups even launched a legal defense fund for the accused murderer. Sporting bumper stickers proclaiming “Execute Murderers/Abortionists,” these militant anti-abortion activists explicitly equate abortion clinics with Nazi crematoriums and preach that the killing of abortion doctors is “justifiable force” and “a courageous act.” Nevertheless, U.S. leaders and others reacted to Dr. Gunn’s murder with outrage and disgust. President Clinton decried the murder. Newly appointed Attorney General Janet Reno vowed to instruct her staff to find—or else enact—a federal statute to halt clinic protesters. Congress suddenly revived the idea of federal legislation to protect women’s rights to reproductive autonomy. After twenty years of women being besieged by militant anti-abortion crusaders, and after centuries of women

10. Id.
dying from illegal and unsafe abortion practices, America took up arms only when the first man was killed in the bloody abortion war.

Although the popular media and public sentiment often describe abortion as an “emotionally impact[ing],” “highly private” and morally difficult undertaking, it is the most common surgical procedure undergone by women. An estimated 1.6 million surgical abortions are performed yearly in the United States. The practice of abortion is centuries old. Until the mid-1800s, U.S. common law permitted abortions prior to “quickening,” when the pregnant woman first feels fetal movement. Even Roman Catholic canon law decreed that the abortion of an “unformed fetus” (up to forty days for a male and eighty days for a female) was merely a sexual sin, not murder, since “ensoulment” did not occur until the embryo began to show human form.

Just as legal and religious prohibitions on abortion are relatively recent, so is the current organized anti-choice movement. Previous anti-abortion movements were generally fueled by anti-immigrant fear that too few white children were being born, by pressure from a medical profession trying to gain greater control of medical care and childbirth, or even by forces within the growing nineteenth century women’s movement that stressed abstinence or preventive birth control as the best means of achieving female self-ownership and “voluntary motherhood.”


In this country alone, in 1930, “abortion was the official cause of death for nearly 2,700 American women, representing 18 percent of all maternal deaths.” ANGELA BONA Voglia, THE CHOICES WE MADE xxii-xxiii (2d ed. 1992). This number is considered low, however, because it does not take into account unreported deaths from illegal abortions. See id. at xxii. The number of deaths from illegal abortions remained fairly constant in the decades before legalization. “In 1965, illegal abortion still accounted for almost 17 percent of all deaths related to pregnancy and childbirth, and 55 percent of those who died were women of color.” Id. In addition, it has been estimated that, during the 1950s alone, “about a million illegal abortions a year were performed in the United States, and over a thousand women died each year as a result.” Trude Bennett et al., Abortion History and Politics, in THE NEW OUR BODIES, OURSELVES 372 (1992) (The Boston Women’s Health Book Collective ed., 1992) [hereinafter OUR BODIES, OURSELVES]. That totals more than 10,000 deaths of women, all in the era of “Happy Days” and “June Cleaver.”

17. See, e.g., BONA Voglia, supra note 16, at xxx-xxvi.


19. See, e.g., OUR BODIES, OURSELVES, supra note 16, at 370-71; See generally, LINDA GORDON, WOMAN’S BODY/WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA (1977). Legal or illegal, women have always found ways to obtain abortions. Doctors estimate that in the 1890s there were two million abortions a year in the United States. OUR BODIES, OURSELVES, supra note 16, at 371.

20. The Catholic faith taught that males developed more quickly. See BONA Voglia, supra note 16, at xxvi-xxvii.

21. Id.


23. See id.

rights confront an opposition run by a small handful of national leaders capable of producing crowds in the thousands. Although numerically smaller than the pro-choice majority of citizens, both female and male, the anti-abortion movement has achieved devastating effects on the availability of safe and legal abortion in the United States and exerts a profound influence on the political and moral definitions of the abortion debate.

By 1987, eighty-five percent of the nation's counties had no abortion services. Between 1977 and 1980, the number of rural abortion providers dropped by more than fifty percent, with twenty percent of the decline occurring after 1985. The rural areas of the country were hardest hit; both North and South Dakota have one abortion provider each. Women under age eighteen have suffered particularly tragically from parental consent abortion laws. While it cannot be demonstrated that all of these restrictions on women's reproductive autonomy directly resulted from the actions of groups like Operation Rescue, the anti-abortion lobby's decade-long campaign of publicity and intimidation has had pronounced effects on American attitudes. A media bias is apparent; while "pro-life" advertisements are common on television, topics such as birth control and abortion are considered too "controversial" to be aired.

This article focuses on the force exerted by Operation Rescue and related groups as they place obstacles in the path of women trying to make their own reproductive decisions. It also explores legal and extra-legal means of stopping groups like Operation Rescue and of protecting reproductive rights.

Specifically, this article advocates the use of the federal courts in women's efforts to exercise their right to reproductive autonomy. Federal courts are traditionally reserved for issues of "national concern."


26. See generally FALUDI, supra note 25, at 412-21 (describing the anti-abortion movement's successes in reducing the number of doctors willing to perform abortion, as well its successes in defining the terms of the debate, using the word "pro-life," rather than "anti-choice" or even "anti-abortion.")

27. See FALUDI, supra note 25, at 415 (citations omitted).

28. Id.


30. See, for example, the case of Becky Bell, a seventeen-year-old woman from Indianapolis who died from an illegal abortion. She was refused a legal operation because she was afraid to ask her parents' permission. Ironically, young women in situations similar to Becky's are told they are too immature to make the decision to abort, yet are forced into the responsibilities of parenthood. FALUDI, supra note 25, at 419 and accompanying notes (citations omitted).

31. FALUDI, supra note 25, at 417-20 (examples of anti-abortion and anti-woman slant in the media).

vast harm that Operation Rescue and other anti-choice groups inflict on a national scale on women and on those men who support women's right to choose, I hope to demonstrate that the right of access to safe abortion and reproductive health care deserves recognition as a “federal issue.” After relating several women’s experiences with anti-choice violence, I propose potential avenues of access to the federal courts so that women’s voices might be heard by the federal judiciary—and so that women throughout the country might be offered real relief.

Part I discusses the organizational structure and tactics of anti-choice groups like Operation Rescue, demonstrates the national and international scale of their activities. Part II describes the harm inflicted by anti-abortion activists, and gives voice to several women who have been directly injured by their pseudo-terrorist tactics. Part III explains the necessity for obtaining federal jurisdiction to combat these groups, and describes the three causes of action most likely to gain acceptance in the federal courts. Part IV describes proposed federal legislation with the potential to protect women from anti-abortion violence. Part V discusses extralegal means of mitigating the problem. Part VI concludes that, although the war against anti-abortion violence needs to be waged on every front, federal jurisdiction is an essential weapon in the struggle to protect reproductive freedom.

I. THE RADICAL ANTI-ABORTION MOVEMENT

According to the National Organization for Women (NOW) and attorneys fighting to protect reproductive rights, the organized anti-choice forces are largely led at both the national and international levels by five men. Randall Terry (from Binghamton, N.Y.), John Ryan (from St. Louis), Joseph Scheidler (from Chicago), Peter Lennox (from Atlanta), and Andrew Burnett (from Portland, Oregon) constitute the top level of the Pro-Life Action Network, the leadership committee elected at the 1987 “Pro-Life Action Network Conference.” These well-known leaders travel across the country sabotaging clinics and instigating other kinds of harassment and violence in diverse locations.

Discovery conducted in the recent case NOW v. Scheidler35 revealed that the Pro-Life Action Network (“PLAN”) serves as the umbrella organization for the various anti-abortion groups led by PLAN’s “leadership council” or

33. See NATIONAL ORGANIZATION FOR WOMEN, PROJECT STAND UP FOR WOMEN NOW GUIDELINES FOR ACTIVISTS 4 (1990) [hereinafter NOW GUIDELINES].
34. See, e.g., Women’s Health Care Servs. v. Operation Rescue, Nat’l, 773 F. Supp. 258, 262 (D. Kan. 1991) (finding that “all of the leaders supervising the operations of the tortious and criminal actions appear to be national participants in Operation Rescue and are not from Wichita,” the location of the blockade at issue in that case, and that the “small group of leaders of the organization” travel from city to city in order to organize “teams,” which then dutifully march into place upon the instructions of a given leader”).
“steering committee.” According to NOW’s Supreme Court brief, PLAN is a highly organized enterprise and meets the requirements of the Racketeer Influenced and Corrupt Organizations Act (RICO). PLAN is said to be responsible for “direct action” against clinics, doctors, staff, and patients. NOW has submitted evidence that PLAN conducts its coordinated activities by means of “multi-city ‘blitzes,’ national organizing conferences and training sessions, and the adoption of national agendas.” Reflecting the largely fundamentalist religious background of its leaders, these organizations have highly hierarchical structures.

Of the satellite organizations operating under the direction of PLAN, probably the most well-known and most militant is Operation Rescue. According to NOW, Operation Rescue is “no more than a business name for [Randall] Terry.” Terry, a former car salesman, founded Operation Rescue in 1986. Since then, it has expanded its operations to become a national and international network, with national headquarters and local chapters in the United States as well as affiliate organizations in other countries. Randall Terry founded his organization in upstate New York, but Operation Rescue has now moved its headquarters to Summerville, South Carolina, under the name “Operation Rescue National.” Operation Rescue’s local leaders and participants are virtually all male, in their early twenties to mid-thirties, and belong to the lower income brackets. This leads some to conclude that anti-abortion leaders are motivated by a desire to escape low-paying jobs or unemployment rather than by the moral values they espouse. A second satellite organization run by a member of PLAN’s national board of directors is the Pro-Life Action League, or PLAL, directed by Joseph Scheidler, the author of a handbook on illegal and extra-legal means of shutting down abortion clinics.
Although PLAN’s board of national directors is all male, a few members of PLAN’s second tier of leadership are female. Jayne Bray, (the plaintiff in Bray v. Alexandria Women’s Health Clinic) became more visible in the anti-abortion movement after her husband was sentenced to federal prison for ten bombings of women’s health clinics and offices of abortion rights organizations. Monica Migliorino, an activist from Milwaukee, Wisconsin, took part in the anti-abortion activities at issue in Scheidler, but is a “mere ‘volunteer’” rather than a paid leader of the anti-choice movement. Anti-abortion activists have also formed a few women’s groups such as Rachel’s Rescues and Women Exploited by Abortion, perhaps to convey the impression that women are active in the movement. At least one African-American “rescue” in the Detroit area has been reported. Nevertheless, the leadership of PLAN, Operation Rescue and other anti-abortion groups remains largely male and overwhelmingly white.

In their brief to the Supreme Court, the Scheidler plaintiffs drew connections between PLAN, local anti-abortion groups, and certain individual defendants. For example, John Burt, the regional director of Rescue America in Pensacola, Florida, led the protest at the Pensacola clinic at which Dr. David Gunn was murdered. Operation Rescue had circulated “Wanted” posters bearing Dr. Gunn’s portrait. Joseph Scheidler told the national press that “some good came out of” the murder.

Operation Rescue has recently formed an international anti-abortion group, Rescue Outreach. Led by anti-choice activists such as “Joan Andrews, who spent more than two years in prison in Florida for her part in a clinic invasion in which a clinic administrator and a pro-choice activist were injured,” Rescue Outreach has been organizing harassment and intimidation campaigns

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49. 113 S. Ct. 753 (1993), discussed infra part III.B.
51. NOW Brief, supra note 36, at Summary of the Argument.
52. See NOW GUIDELINES, supra note 33, at 4.
53. FALUDI, supra note 25, at 406.
54. See NOW GUIDELINES, supra note 33, at 4.
55. Operation Rescue leader Randall Terry admitted as much on National Public Radio, claiming that Operation Rescue is treated poorly by the legal system because it consists of “the dreaded white, middle-class male fundamentalist Christians.” Morning Edition: Anti-Choice Protestors Could be Made Liable for Damages (National Public Radio broadcast, Dec. 8, 1993). Terry failed to recognize or acknowledge that the current racial and gender makeup of the federal judiciary is similar to that of Operation Rescue’s leadership. See Women’s Health Care Servs. v. Operation Rescue, 773 F. Supp. 258, 262 (D. Kan. 1991) (observing that, in Wichita’s protest, “none of the site leaders [were] women”); NOW GUIDELINES, supra note 33, at 4.
56. Griffin, supra note 6.
57. NOW Brief, supra note 36, at Statement of the Case: The Parties.
58. Id. at n.3.
59. Id. at n.3 (citing CHI. TRIB., May 12, 1993, at 1).
60. NOW GUIDELINES, supra note 33, at 2.
61. Id.
targeting clients and care providers in South America, Canada, Europe, England, and Australia. 62

Recently, Don Treshman, head of Rescue America, was arrested in Great Britain before he could carry out his planned demonstration. 63 He broadcast on national radio and television his intent to damage the international headquarters of Planned Parenthood, and he indicated at least partial approval of the “direct action” anti-choice tactics which led to Dr. Gunn’s murder. 64 British authorities moved to deport him because his presence “was not conducive to the public good.” 65

PLAN, Operation Rescue, PLAL, and other organized anti-abortion groups aim to make it impossible for abortion clinics to operate, 66 and they seek to achieve this goal through any means possible—legal or illegal, nonviolent or violent. They also claim support for their cause is large and growing, and represent themselves as the civil rights crusade of the Eighties and Nineties. 67 Nonetheless, as the following section demonstrates, the radical anti-abortion movement is far from “civil” and respects few people’s “rights.”

II. ANTI-ABORTION STRATEGY AND TACTICS

It is difficult to avoid the flood of news coverage and editorializing about Operation Rescue and its companion groups. Television reports provide details of how “pro-lifers” have bombed and besieged clinics, chanted and prayed, held up signs that say “clinic closed,” and generally harassed any woman who looks as though she might be of reproductive age. Their lesser known activities, at least up to the murder of Dr. Gunn, include stealing aborted fetuses, threatening and assaulting women, as well as clinic staff and their families, and operating fake abortion clinics of their own. All too often women’s direct experiences with Operation Rescue and other groups are overshadowed by theoretical debates about free speech and fundamental rights. The following sections relate several personal stories of women who have had to face anti-abortion violence head on.

62. Id.
63. Robinson, supra note 8.
65. Robinson, supra note 8.
67. NOW GUIDELINES, supra note 33, at 3.
A. Vandalism and Violence

Asserting the defense of justification—the propriety of destroying property or committing other illegal acts in order to save lives—Operation Rescue and other anti-choice groups and individuals have resorted to extreme measures such as bombing clinics to shut them down. Between 1977 and 1993, abortion providers experienced more than 1000 acts of violence, according to the National Abortion Federation (NAF).69 "These acts included at least 36 bombings, 81 arsons [sic], 131 death threats, 84 assaults, two kidnappings, 327 clinic 'invasions,' and one murder. In addition, over 600 clinic blockades and other disruptions have been reported since 1977."70 These numbers reflect rates of clinic violence that have escalated in recent years. From January to March of 1991, two clinics were firebombed and another two were damaged or destroyed by arson.71 The number of reported acts of vandalism doubled between 1991 and 1992.72

Most notably, within one month of the election of President Clinton, the first pro-choice president in twelve years, fires caused 1.5 million dollars of damage to abortion providers.73 An arsonist in Corpus Christi, Texas, destroyed four businesses in addition to a women's health clinic, causing more than one million dollars in property damage.74 In Venice, Florida, a doctor's office was recently burned to the ground.75 In September 1993, three clinics were firebombed: in Peoria, Illinois; Lancaster, Pennsylvania; and Bakersfield, California.76 In Bakersfield, women can no longer obtain an abortion within city limits.77

The anti-choice forces are creating new terrorist techniques. For example, several clinics have been sprayed with foul-smelling butyric acid—subjecting women trying to exercise their rights to reproductive autonomy to chemical warfare. A controlled substance whose extremely noxious odor makes those
who inhale the fumes sick and dizzy, butyric acid is so concentrated that enough acid to cover one square foot of carpet, easily inserted with a hypodermic needle through holes drilled in the roofs or sides of clinic buildings, under doors, or through keyholes, can close a clinic for an entire week. According to the NAF, Operation Rescue and similar organizations conducted at least fifty-seven chemical attacks on clinics in 1992, and fourteen attacks from January 1 to May 5 of 1993 alone. Estimated clean-up costs in 1992 were almost half a million dollars and had already totalled more than $65,000 in the first part of 1993.

The number of doctors, clinic workers, and women injured by anti-abortion activists is frighteningly high. In August 1993, a few months after the murder of Dr. Gunn, Dr. George Tiller was shot and wounded in Wichita, Kansas because he performed abortions by anti-abortion activist Rachelle Shannon. Two days later, Dr. Patterson, another doctor who performed abortions was killed during a robbery in Alabama. "Regardless of who killed Dr. Patterson," said Reverend Paul Hill, a former Presbyterian minister and current director of Defensive Action, a militant anti-choice group based in Pensacola, Florida, "he definitely deserved to die because of all of the children he killed." These attitudes, and the conduct they inspire, are not new. A couple of years earlier, on December 28, 1991, an unidentified middle-aged man in a ski mask began firing a sawed-off shotgun at an abortion clinic in Springfield, Missouri, injuring the owner of the building and leaving the clinic's office manager paralyzed.

Although the numbers of violent attacks on individuals and on clinics illustrate the extent of the harm, personal experiences of women convey more vividly the terror that the clinic attacks inspire. The personnel director of one women's health center, for example, described her experience during an attack on the clinic:

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80. Id.
81. Id.
82. Id. at 7. It took the jury in the trial of Rachelle Shannon, who confessed to shooting Tiller, very little time to convict her of attempted murder. Abortion Foe Who Shot A Doctor Is Convicted Of Attempted Murder, N.Y. TIMES, Mar. 26, 1994, at A7. Shannon, 37, faces up to 13 years in prison for her conviction on charges of attempted murder and aggravated assault. Her sentencing is scheduled for April 29, 1994.
84. Dr. David Gunn had sometimes filled in for Dr. Patterson, who was the only doctor at the Family Planning clinic in Fort Walton Beach, about 90 miles east of Mobile, Alabama. Doctor's Death Not Linked to Abortion, ST. PETERSBURG TIMES, Sept. 5, 1993, at 10A.
The invasion into our building was a frightening escalation of tactics by the anti-abortion activists. Praying [sic] on our compassion, two women pretending to be harassed by the protesters on the sidewalk, sought refuge in our building. Once the locked door was open, 39 men and 13 women charged out of a moving van and stormed into the [clinic], knocking me to the waiting room floor.

While I was trying to reach the telephone, a man bodily trapped me while I watched hordes of people invade the building. I feared for the safety of the staff. I envisioned the damage and destruction to our property. Fortunately, some of the staff on the 2nd floor were alerted to the assault by the thunder of footsteps on the porch. . . .

A patient was trapped in the counseling room adjoining the occupied hallway. She had come to the Health Center that day for further screening of an abnormal pap smear to determine if she had cervical cancer. Staff was unable to reach her. . . .

It took 6 hours to remove the intruders who had bicycle locked their necks together. . . . Two policemen were injured in the process. . . . A man who called himself Father Baby John Doe kicked me. I felt violated and assaulted in my own building. . . .

These fanatics reveal their true agenda. They demonstrated their disregard of women's health and well-being. This becomes evident when they shout to a woman in the driveway “You should die, not your baby.”

Radical anti-abortion demonstrators regularly inflict violence not only on the clinic property, but also on human beings. One woman describes such an incident:

I was exiting a 14 story building which housed on it's [sic] third floor an abortion clinic. Outside were approximately 10 anti-choice demonstrators. As I walked out the door, one of the protesters threw a rock which hit me solidly on the neck. This single event pointed out to me the necessity of assisting women in getting into clinics without harassment.

Another woman describes a close call:

I was standing in front of Mr. G[ ]’s [of Operation Rescue] van. He knew that I was a pro-choice escort. Mr. G[ ] decided that it was time

88. Id. at Appendix B, letter C—13.
to leave and began driving. As the van approached me, in a panic, I pushed back against it. A nearby police officer ordered Mr. G[] to stop. Continuing forward, Mr. G[ ] screamed “No we have to go rescue babies.” Meanwhile, about 15 other pro-choice friends ran up and tried to lift the front of the van to prevent it from running me over. The police officer then slammed his hand on the top of the van and again ordered Mr. G[ ] to stop. This time Mr. G[ ] did stop. I was pregnant at the time this took place. This caused me to have some early pregnancy spotting.9

B. Fake Abortion Clinics

In the 1970s, a Missouri-based anti-abortion organization called the Pearson Foundation90 issued a ninety-three page manual for setting up “crisis pregnancy centers.” National groups such as the Christian Action Council and the National Institute of Family Life, began cooperating with individual operators to set up several thousand anti-abortion centers disguised as women’s health clinics.91 These non-profit organizations call themselves “abortion clinics” or “abortion alternatives” but have no medical staff and do not offer abortions. The staff members use deception and religious threats to convince women not to terminate their pregnancies.92 Estimates of the number of fake clinics presently in operation in the United States range from 1500 to over 3000.93 These clinics tend to be listed in the Yellow Pages under “clinics,” “abortion alternatives,” or “abortion services.”94 Because there are fewer than 600 actual abortion providers in the United States, a person calling a number listed in the Yellow Pages is more likely to reach an anti-abortion “clinic” than a genuine abortion provider.95

89. Id.
90. The Pearson Foundation and Institute are staunchly anti-abortion organizations; they provide materials and advice to anti-abortion groups and clinics throughout the country, and have over 200 affiliates nationwide. Pamela A. MacLean, Setback for Anti-Abortion Group, UPI, Dec. 7, 1988, available in LEXIS, News Library, Curnws File.
93. deMause, supra note 91.
94. Defao, supra note 92. Under new voluntary guidelines established by the Yellow Pages Publishers of America, however, fake clinics are supposed to be listed in a separate “Abortion Alternatives” section, with a disclaimer that these groups do not perform abortions or refer clients to doctors who do. See deMause, supra note 91. The Yellow Pages for the Santa Monica community, although it has such a disclaimer before the “abortion alternatives” section, also prints a warning before the advertisements listed under “abortion services:” “The following businesses have represented that they perform abortions. We strongly urge you to make your own investigation and evaluation of the business to determine if they offer the services you require.” GTE THE EVERYTHING PAGES, Santa Monica, Mar. 1993-1994, 20 (Yellow Pages Section).
95. See deMause, supra note 91, at 25.
In 1991, "Primetime Live" made a documentary exposing false abortion clinics. Diane Sawyer and Chris Wallace sent ABC staffers into the fake clinics; their investigation revealed that sometimes the anti-abortion counselors not only lie about abortion, but also employ hateful and bigoted analogies to convince women that abortion is evil. For example, one “counselor” compared abortion to an “Indian massacre during the Civil War”:

Then they just ripped open the white women's wombs and ate the babies, ate the fetuses because they were starving in the winter of 1865. But why are you cringing: Now, you tell me who's going to be judged more harshly in the end, those Indians who were starving, who ripped out the fetuses because they were starving, or we in our society who are so gluttonous that it's not the right time?

Racism appears to be a common theme at many of these centers. One woman was told: “You're a white girl, I suppose that the father of this child is white. It's in demand. You're going to make so many people happy with this new white baby.”

In addition to racist remarks, and invitations to engage in adoption brokering, women are also barraged with blatant falsehoods that can intimidate them. For example, Chris Wallace reported that fake clinic workers consistently claimed that one woman dies every day from abortion in the United States. Dr. Frank Chervenac, Director of Obstetrics at Cornell Medical Center countered these claims, stating that out of the 1.5 million legal abortions performed yearly in the United States, about six to seven women die—a risk to the individual woman less severe than receiving one shot of penicillin. Women are also given false facts about the nature of the abortion procedure. One woman was told that an abortion to terminate her eight-and-a-half week pregnancy would involve the following procedure:

At your stage, what they would have to do is they have to go in there and they have to cut the legs off and cut the arms off and then they crush the head so that it fits through the mouth of the cervix. Then they have to assemble the baby. I know this sounds gross, but it’s true. It’s the actual truth.

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97. Id.
98. Id.
99. deMause, supra note 91.
100. Primetime Live, supra note 96.
101. Id.
The truth is that almost all first-trimester abortions are by vacuum aspiration. No cutting, no re-assembly. Through a litany of lies, these false clinics frighten, demean, and traumatize their unsuspecting clients.

Fake abortion clinics can irreparably affect a woman's life. At one clinic, a North Dakota woman was repeatedly told that she was not pregnant. When she finally sought a second opinion, a doctor told her that she was nineteen weeks pregnant—too far along to obtain a legal abortion under North Dakota law. In San Francisco in 1985, counselors at another clinic persuaded a fourteen year old girl not to obtain an abortion and to move out of her parents' home without informing them that she was pregnant. The anti-abortion clinic tried to arrange a private adoption, although private adoptions are not licensed by California adoption officials. Although her parents discovered her pregnancy before she moved out, it had advanced too far for an abortion and the baby was put up for adoption. Although the California State Attorney General eventually won a judgment against that clinic, federal trade laws do not apply to the deceptive advertising and other fraudulent practices of these centers because most of them operate as non-profit corporations.

The following excerpt describes one woman's personal experience with a fake abortion clinic:

I went with a freelance journalist into a Crisis Pregnancy Clinic located immediately next door to a[n] abortion facility. As I was entering, a pro-choice escort said to me, "Ma'am, you are not entering a legitimate abortion clinic." A woman who had been holding open the door to the "clinic" since I had opened my car door said, "Yes we are. Come right on in." She asked my name and acted as if she was checking it off of an appointment book. She took the urine I brought; it belonged to a pregnant friend. She then had me fill out the equivalent of what one would normally expect in a medical office. After completing the form, she said I, with my friend, had to view a film before I would be allowed to proceed any further. The film began as if it was a simple educational film to make certain I, the alleged patient, was aware of the risks with abortion, etc. Suddenly, before my very eyes, I witnessed an abortion in which the patient on the procedure table is jerking, as if she was receiving electric shock therapy or having an epileptic seizure. Blood was spattering everywhere as the physician was repetitively inserting a long tube into the patient's vagina; quickly and each time his arm would extend about two feet into the air before

entering her vagina again. Then I viewed Dr. Wilke of National Right to Life fame speak of the “killing” I had just witnessed.107

The facts of the recent Eighth Circuit case, *Lewis v. Pearson Foundation, Inc.*108 further illustrate the traumatic effects of fake clinics on women. Warna Lewis was pregnant and decided that she wanted an abortion.109 She consulted the Southwestern Bell Yellow Pages under the category “Abortion Information and Services” and located the AAA Pregnancy Problem Center.110 After calling the center and explaining her desire to obtain an abortion, she agreed to schedule an appointment for a free pregnancy test.111 She appeared for her scheduled appointment, whereupon clinic employees instructed her to produce a urine specimen for a pregnancy test. While awaiting the test results, the clinic staff seated Lewis in a room by herself and activated a slide presentation.112 The color slides depicted dismembered fetuses and abortion procedures with crude instruments.113 Viewing these materials made Ms. Lewis break into tears because they dredged up traumatic memories of an abortion she had had at age eighteen after having been raped.114 Nevertheless, Ms. Lewis stated a desire to continue with her plans to obtain an abortion.115 The clinic employees then scheduled an appointment for her with a “respectable doctor.”116 When she arrived at the next scheduled appointment, she learned that the facility was run by a Catholic church and that its doctors did not perform abortions.117 She obtained an abortion elsewhere a week later.118 About a month later, an employee of the anti-abortion clinic called her to ask about the due date of her baby.119 Although she found the experience horrifying, she was ultimately denied recourse under federal law.120

107. Organizations Brief, supra note 87, at Appendix B.
108. 908 F.2d 318 (8th Cir. 1990), vacated 917 F.2d 1077 (8th Cir. 1990), cert. denied, 113 S. Ct. 1250 (1993).
109. Id. at 319.
110. Id.
111. Id.
112. Id.
113. Id.
115. See Lewis, 908 F.2d at 319.
116. Id.
117. Id.
118. Id.
119. Id.
Six years after Warna Lewis initially filed suit, the AAA Problem Pregnancy Center was still in operation. The counselors reported that they see up to 1800 women a year.

C. Harassment and Intimidation

Anti-choice crusaders harass and intimidate all women who enter a building where a clinic is located, no matter what their age or what their purposes for entering may be. One woman described her experience defending a building which also housed a dental clinic catering to low-income clients:

One Saturday, while the [dental] specialist was working at the office, a woman in the company of her two children approached the clinic. They were met by a frenzy of hostile picketers who shoved at them photographs of what they claimed were aborted fetuses and screamed at the mother, "Don't kill your baby!" The fact that the woman was there to see the children’s dentist did not phase [sic] the picketers and they continued to harass and block her entrance into the clinic. Members of the center's staff had to step outside to help her in.

However once inside, the children were hysterical, crying out, "Mommy, don't kill us!"

Children are often the victims of anti-choice intimidation. For example,

The O.R. people followed a young woman across the street to her car and surrounded it. They then shouted at her shoving gory pictures of "fetuses" and plastic fetus-like dolls at the windows. At the clinic they encircled several of the clinic escorts, myself included, and pushed us away from the door back into the parking lot. People vied for the building doors and several clinic escorts were shoved into the plate glass windows and received cuts from the confrontation. While the shoving and pushing was bad enough, the yelling and the taunts never stopped. They were an extremely persistent group and showed no respect even for small children. A mother with her two children were simply walking by the clinic and came up to find out what was going on when the O.R. people shouted at the woman and showed bloody pictures to her children who were horrified.

121. Freivogel, supra note 114.
122. See Primetime Live, supra note 96.
124. Id. at Appendix B, letter C-9.
Even if a woman indicates that she is not interested in the “advice” given by “sidewalk counselors,” they may persist in imposing on her their narrow and demeaning view of women and women’s societal role:

From a spring board of moral arrogance, Operation Rescue feels empowered to accost women as they approach clinics and further subject these women to an invasion of privacy and public humiliation. . . . Operation Rescue does not care why a woman is going into a clinic. They use the clinic location as a venue to berate women and to attack any woman who does not fit their profile of how women should behave.

Physical intimidation and verbal assault are the primary tools employed against women by anti-abortion groups. They refrain from accosting men on public streets to demand personal information on pregnancy states, marital status, religion, or his sex life. Instead they assail women. A woman approaching a clinic is first surrounded by anti choice demonstrators who shout at her to be heard over one another. If she tries to get away from them or says that she is not interested they persist in following, pressing themselves on her, and blocking her every step in order to continue their rebuke and deluge of contempt. Recently I witnessed a so called “pro-lifer” hiss at a woman who was trying to extricate herself from a group of the blockaders, “Murderer, Murderer, Murderer. Kill, Kill, Kill.”

PLAN and Operation Rescue have also launched a campaign called “No Place to Hide” to harass clinic doctors, staff, and their families. A PLAN affiliate recently established a training seminar in Florida, where it teaches techniques such as tracing home addresses through license plates, social security numbers, and property records, to identify clinic workers as “murderers” in front of their families and neighbors. Death threats, left at home phone numbers, have also become commonplace.

The following personal story documents how anti-abortion demonstrators harass even women who are not attempting to obtain abortions.

Picture this scenario: A young woman of 21 has cancer for which she receives chemotherapy. These harsh drugs make her hair fall out. Because she is at an age when her looks are important to her, she goes to a wig salon. The wig salon is in a medical building that houses a women’s health clinic on the first floor. When the young woman tries to enter the building, anti-abortionists block her way, waving pamphlets

125. Id. at Appendix B, letter C-14.
127. Barringer, supra note 72.
in her face with photos of dead fetuses. She is targeted as a young woman about to have an abortion. Her life is already full of life-and-death issues and she doesn’t need people blocking her way.

Is this a nightmare? No, it is a true story that can be verified with medical records, receipts, and a death certificate.

This young woman, my daughter, died of cancer six months later.128

D. Abuse of Aborted Fetuses

Ironically, PLAN and Operation Rescue, which call themselves “pro-life” organizations, display a callous disregard for the “corpses” of the “people” they claim to be trying to save. Anti-abortion protesters have brandished stolen fetuses in the faces of women entering health clinics. Randall Terry and another member of Operation Rescue attempted to hand a fetus to Presidential candidate Clinton during the 1992 Democratic National Convention in New York City.129

The most vivid example of this lack of respect for fetal remains is a scheme to steal fetuses, documented in the recent decision of the Seventh Circuit Court of Appeals in NOW v. Scheidler.130 The plaintiffs alleged that Vital-Med Laboratories, which provided women’s health clinics with pathology testing and medical waste disposal services, conspired with Operation Rescue to steal fetal remains from an Illinois laboratory.131 In a ten month period, certain Operation Rescue leaders, aided by Vital-Med employees, stole approximately 4000 aborted fetuses from the laboratory.132 The Operation Rescue members entered the Illinois laboratory, opened sealed storage drums containing a variety of medical waste, and picked out fetal specimens.133 They stole an entire drum of medical wastes on at least one occasion.134 The defendants Scheidler, Murphy, Migliorino, and Wojnar stored the drums at their homes.135 For several weeks, Joseph Scheidler kept a storage drum in a playhouse in his back yard.136 After removing the fetuses, his partner, defendant Murphy, dumped the drum in a dumpster in Chicago.137 The defendants then distributed fetal remains to anti-abortion activists in Indiana, North Carolina, North Dakota, Delaware, and Florida.138 Operation Rescue

130. 968 F.2d 612 (7th Cir. 1992), rev’d 114 S. Ct. 798 (1994).
131. 968 F.2d at 616.
132. Id.
133. Id.
134. Id.
135. Id.
136. Id.
137. Id.
138. Id.
has held mass burial services for stolen fetuses in different states.\textsuperscript{139} Scheidler announced to the news media that the fetuses had been found at a Chicago laboratory and that they were “individually packaged and labeled . . . with the names of the mothers, doctors, dates and places the abortions were performed.”\textsuperscript{140}

These actions are pathological and cruel. Anti-abortion groups harass, assault, batter, bomb, kidnap and kill. They espouse narrow and derogatory views of women\textsuperscript{141} and attempt to deny women the choices rightfully theirs to make. The radical anti-abortion movement acts nationwide, inflicting harassment and fear on women attempting to exercise their constitutionally secured rights. Their grand-scale crimes deserve grand-scale remedies. The next two parts explore some possible federal responses.

III. Obtaining Federal Jurisdiction Against Anti-Abortion Violence

A. The Need for Federal Jurisdiction

Several of the actions of PLAN and Operation Rescue described above are illegal under state laws. “Rescues” violate state laws against trespass, tortious interference with contractual relations (both existing and prospective), public and private nuisance, intentional infliction of emotional distress, and false imprisonment.\textsuperscript{142} To bolster existing laws, several states have enacted anti-stalking statutes, designed primarily to protect women who are being pursued by harassing or abusive ex-boyfriends or ex-spouses. Clinics have recently begun to use these statutes to protect employees and staff who have been followed home by anti-abortion protesters.\textsuperscript{143} Nonetheless, state laws have proven inadequate in ensuring women’s rights to obtaining safe, harassment-free abortions.

Federal jurisdiction is necessary to enforce state laws for several reasons. First, it usually allows individual women and reproductive rights organizations to sue to protect all of the clinics in a given area, rather than requiring each individual clinic to sue to request protection. This saves a tremendous amount of time and resources. Under existing state laws, if a particular clinic does

\textsuperscript{139} Id.

\textsuperscript{140} Id. (quoting the Second Amended Complaint, R. 236 at 24). The court reported that Vital-Med no longer accepts fetal remains for the purpose of testing.

\textsuperscript{141} The anti-women hostility of many anti-abortion demonstrators is clear. At one clinic defense rally I attended in Boston, Massachusetts, I approached an anti-choice activist to ask him why he was there. He told me that “all feminists are bitches.”

\textsuperscript{142} For recent federal cases accepting several of these state law claims, see Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990); New York State NOW v. Terry, 886 F.2d 1339, 1361-62 (2d Cir. 1989); Town of West Hartford v. Operation Rescue, 792 F. Supp. 161, 169 (D. Conn. 1992); Women’s Health Care Servs. v. Operation Rescue-Nat’l, 773 F. Supp. 258, 268-69 (D. Kan. 1991).

secure protection from anti-choice protestors, other unprotected clinics may become more greatly burdened when anti-abortion protestors target the clinics who did not or could not sue.\textsuperscript{144} 

The protection of federal law is often essential to protect women’s rights in situations where city and state governments are overwhelmed by anti-choice forces or flatly refuse to enforce protective orders. Anti-abortion groups have previously sought and obtained agreements with law enforcement officials that protesters would not be arrested.\textsuperscript{145} In \textit{Bray v. Alexandria Women’s Health Clinic},\textsuperscript{146} the recent Supreme Court case evaluating the use of the federal courts in adjudicating disputes involving clinic blockades, the State Attorneys General of New York, Virginia, and other states filed an amicus brief urging the application of federal law to anti-abortion protestors because their state resources were inadequate to cope with the burdens created by anti-abortion activities.\textsuperscript{147} The City of Falls Church, Virginia also filed an amicus brief, stating that its local police force of thirty officers is totally unable to face the national force of Operation Rescue and other anti-choice activists.\textsuperscript{148} In \textit{NOW v. Scheidler},\textsuperscript{149} several states filed briefs in support of the National Organization for Women, arguing that the use of federal law is necessary to combat the violence inflicted upon the citizens of their states and as citizens of the United States.\textsuperscript{150} 

Attorney General Janet Reno has also argued that federal jurisdiction is necessary to combat the interstate campaign of violence and harassment waged against abortion clinics and women trying to obtain an abortion.\textsuperscript{151} Testifying before the Senate Labor Committee, Reno stated that federal jurisdiction is needed to “coordinate intelligence activities” among states and to enable state law enforcement agencies to protect the federal constitutional rights of their citizens.\textsuperscript{152} 

Federal laws generally provide remedies that prove far more effective than state remedies. While state laws such as trespass typically apply only to clinic property owners and give no rights to patients, several federal causes of action described below provide private causes of action for all injured parties. Federal

\begin{footnotes}
\item[144.] See Brief for Falls Church, Virginia, \textit{Amicus Curiae} in Support of Respondents, \textit{Bray} (No. 90-985) [hereinafter Falls Church Brief].
\item[145.] New York NOW v. Terry, 886 F.2d 1339, 1361 (2d Cir. 1989).
\item[146.] 113 S. Ct. 753 (1993).
\item[147.] See Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as \textit{Amici Curiae} in Support of Respondents, \textit{Bray} (No. 90-985) [hereinafter Attorneys General Brief].
\item[148.] See Falls Church Brief, supra note 144.
\item[149.] 114 S. Ct. 798 (1994) (holding that federal anti-racketeering laws apply to ideologically based enterprises).
\item[152.] Id.
\end{footnotes}
law can also impose steep fines and penalties including federal imprisonment. Some federal laws, such as civil RICO, provide for national service of process, allowing plaintiffs to reach offenders who travel from state to state.\textsuperscript{153}

Finally, federal courts have greater resources to protect women's rights than do the state courts. Jurisdiction in the federal courts for "women's issues" has great symbolic value; it is a means of devoting our nation's resources to an issue that matters to women, as women. Federal courts are the forum where national interests predominate.\textsuperscript{154} Women's right to violence-free, harassment-free reproductive health care must become a federal issue.

B. The Ku Klux Klan Act of 1871

1. The History of the Challenge

Until January 13, 1993, the day the Supreme Court issued its decision in Bray, a federal statute had provided a judicial remedy against Operation Rescue and other anti-abortion groups.\textsuperscript{155} The "Ku Klux Klan Act of 1871," 42 U.S.C. § 1985(3), prohibits conspiracies motivated by class-based animus which deprive any person or class of persons of equal protection of the laws or equal privileges and immunities under the laws.\textsuperscript{156}

The case reviewed by the Supreme Court began in 1989. In NOW v. Operation Rescue,\textsuperscript{157} NOW sought to circumvent an announced attack on women's health centers in Northern Virginia by obtaining a federal injunction against Operation Rescue as an organization, and against Randall Terry, Patrick Mahoney, Clifford Gannett, Michael McMonagle, Michael Bray, and Jayne Bray individually.\textsuperscript{158} The U.S. District Court of the Eastern District

\textsuperscript{153} All of these advantages are discussed infra part III.C.
\textsuperscript{154} See generally Resnik, supra note 32, at 1688.
\textsuperscript{155} 113 S. Ct. 753 (1993).
\textsuperscript{156} Section 1985(3) provides:
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.

\textsuperscript{158} 726 F. Supp. at 1488-91. The District Court described Terry as the "National Director and Founder of Operation Rescue" and stated that he "has played, and continued to play, a leading role in organizing and coordinating 'rescues' and disruptions of abortions and family planning facilities in the Washington Metropolitan area." Id. Patrick Mahoney was described as the "Consultant to Operation Rescue." Id. Clifford Gannett and Michael McMonagle were described as organizers and coordinators of
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of Virginia granted the injunction\textsuperscript{159} which was subsequently affirmed by the Fourth Circuit Court of Appeals.\textsuperscript{160}

2. Previous § 1985(3) Claims

Section 1985(3) was initially designed to redress civil rights violations inflicted by private citizens (including individual members of the Ku Klux Klan organization) on newly emancipated slaves and their supporters.\textsuperscript{161} The Act created, in broad language, a federal cause of action for those people effectively prevented by the threat of mob violence from exercising their civil rights.\textsuperscript{162} The statute consists of two distinct clauses. The “deprivation” clause prohibits conspiracies aimed at preventing a person from exercising her constitutional rights. The “hindrance” or “prevention” clause prohibits conspiracies aimed at undermining a state’s ability to protect the constitutional rights of its citizens. Although the Supreme Court has construed the meaning of the first clause of § 1985(3), it has never ruled on the meaning of the second clause.\textsuperscript{163}

Prior to Bray, two primary Supreme Court decisions provided the analytic framework for the examination of § 1985(3) claims.\textsuperscript{164} In Griffin v. Breckenridge,\textsuperscript{165} the only case in which the Court has upheld a claim under § 1985(3), the Supreme Court set out four requirements for establishing a claim. According to Griffin, the plaintiffs must demonstrate: (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; and (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.\textsuperscript{166}

\textsuperscript{159} Id. at 1493 (holding that the plaintiffs had established a violation of § 1985(3) and were thereby entitled to relief under that statute).

\textsuperscript{160} 914 F.2d at 585-86.


\textsuperscript{162} See Bray v. Alexandria Women’s Clinic, 113 S. Ct. 753, 780 (Stevens, J., dissenting); id. at 782-83 (discussing the “broad” language) (Stevens, J., dissenting); id. at 799 (stating that “the language of the Act, like that of many Reconstruction statutes, is more expansive than the historical circumstances that inspired it”) (O’Connor, J., dissenting).

\textsuperscript{163} See id.

\textsuperscript{164} Actually, this framework pertained only to the analysis of claims made under the first prong of § 1985(3). See id.

\textsuperscript{165} 403 U.S. 88 (1971).

\textsuperscript{166} Id. at 102-03.
The *Griffin* Court also held that the plaintiffs must demonstrate the existence of "some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." The Supreme Court had never held whether a gender-based animus satisfies the conspiracy requirement of § 1985(3).

Twelve years after *Griffin* was handed down, the Supreme Court, in *Carpenters v. Scott*, further limited the scope of the first clause of § 1985(3) to conspiracies motivated by discriminatory intent to deprive the plaintiffs of rights that are constitutionally protected from private, as well as state, encroachment. To date, the Supreme Court has recognized only two types of rights as protected against private deprivation and thus covered by § 1985(3)—rights granted by the Thirteenth Amendment and the constitutional right of interstate travel.

3. The Bray Decision

In *NOW v. Operation Rescue* the district court held that the conspiratorial actions of Operation Rescue satisfied the requirements of both *Griffin* and *Carpenters*. The court reasoned, first, that a gender-based animus satisfied the "class-based discriminatory animus" requirement of *Griffin*. It also held that the conspiracy served the purpose of either directly or indirectly depriving women of the right to travel, citing *Doe v. Bolton* for the proposition that the right to travel includes the right to unobstructed interstate movement to obtain abortions and other medical services. The court found it sufficient that sometimes only a minority (albeit a substantial one) of the patients served by clinics in Northern Virginia had traveled from out of the state to seek medical treatment. Because the court found that the actions of Operation Rescue unlawfully encroached on a woman's right to travel, it did not reach the question of whether the conspiracy violated § 1985(3) by interfering with women's privacy right to obtain abortion. Although the court described in detail the many ways in which the anti-abortion protesters succeeded in overwhelming the local and state police forces.

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167. Id. at 102.
169. Id. at 833.
170. Bray, 113 S. Ct. at 783 (Stevens, J., dissenting).
172. Id. at 1492.
173. 410 U.S. 179 (1973) (holding that an in-state residence requirement as a prerequisite to abortion services violates the right to travel).
174. 726 F. Supp. at 1483.
175. Id. at 1489, 1493.
176. Id. at 1494.
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protecting the clinics and the women seeking their services, it declined to rule on the question of whether the plaintiffs had demonstrated a cause of action against Operation Rescue under the second clause of § 1985(3). The court entered an injunction, and the Fourth Circuit Court of Appeals affirmed.

The Supreme Court granted certiorari in Bray v. Alexandria Women's Health Clinic on February 25, 1991. Oral argument was originally held on October 15, 1991.181 On June 8, 1992, nine months after the original oral argument, the Court, providing no justification, declined to decide Bray and instead ordered reargument. The Court heard the reargument on October 6, 1992, and three months later overturned the decision of the Fourth Circuit, holding that the statute did not apply.

In a 5-1-3 opinion written by Justice Scalia, the Supreme Court concluded that neither the "invidiously discriminatory animus" test of Griffin nor the "protected against private, as well as official, encroachment" test of Carpenters had been satisfied in the instant case. The majority interpreted the statute more narrowly than any court had in the past.

Justice Scalia concluded that the anti-abortion protesters were not operating with a discriminatory animus because their demonstrations at clinics did not

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177. Id. at 1489 n.4 (noting that the police force of Falls Church, Virginia, consisting of only 30 deputized officers, was unable to prevent Operation Rescue from closing the local clinic for more than six hours, even though 240 abortion protesters were arrested).
178. But cf. id. at 1493-94 n.11 (suggesting that "the state action requirement is satisfied when 'rescuers' refuse to notify the police of their next 'rescue' target, thereby rendering police officials incapable of securing equal access to medical treatment for women who choose abortion," but noting that this argument, while accepted by other courts, was not offered by the plaintiffs in this case).
179. NOW v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990).
182. 112 S. Ct. 2935 (1992). It is possible to speculate about the court's motives for ordering reargument. First, the status of women's right to abortion was precarious at the time. In fact, in the 1992 case of Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), four of the nine Justices—Justices White, Scalia, Thomas, and Chief Justice Rehnquist—would have voted to overturn Roe v. Wade and consequently terminate women's right to choose altogether. Further, Justice Clarence Thomas had not yet been appointed to the High Court at the time that Bray was originally argued. Some Court-watchers have speculated that the Court ordered reargument because it had split on the issues four to four, and needed the deciding vote of Justice Thomas to break the deadlock. Others think it probable the Court wanted more time to consider the implications of Planned Parenthood v. Casey, in which states were given broad discretion to place restrictions on abortion. See Nancy E. Roman, Lawyer Uses KKK Act in Abortion-Rights Case, WASH. TIMES, Oct. 7, 1992, at A3.
183. Linda Greenhouse, Abortion Protest Case Resumes in High Court, N.Y. TIMES, Oct. 7, 1992, at A14. Greenhouse noted that the Court as a whole was "notably passive" during the reargument. Justice Thomas did not ask any questions, nor did Justices O'Connor and Souter, usually two of the Court's most active questioners. Only four Justices—Justices Stevens, White, Kennedy, and Scalia—asked any questions at all. Id.
184. Chief Justice Rehnquist, as well as Justices White, Kennedy, and Thomas joined Justice Scalia's opinion. Justice Souter filed an opinion concurring in part and dissenting in part. Justices Stevens and O'Connor filed dissenting opinions, both of which were joined by Justice Blackmun. Bray, 113 S. Ct. at 760.
185. See supra text accompanying notes 165-67.
186. See supra text accompanying notes 168-69.
evince a gender-based intent.\textsuperscript{187} Suggesting that "ill will" is an element of the "invidiously discriminatory animus" standard,\textsuperscript{188} Justice Scalia reasoned that the opposition to abortion was not motivated by a desire to discriminate against women, but only to protect "the innocent victims" of abortion—the fetuses.\textsuperscript{189} Justice Scalia distinguished opposition to a woman's right to choose from opposition to an African-American's right to be free from racial discrimination, arguing that anti-abortion activity "does not remotely qualify for such harsh description, and for such derogatory association with racism" because it could be based on legitimate concerns.\textsuperscript{190} He stated that this was not a case in which an activity targeted an "irrational object of disfavor," as would be a "tax on wearing yarmulkes" which would be a "tax on Jews."\textsuperscript{191} The majority concluded that opposition to women's right to choose abortion is not opposition to women's rights.\textsuperscript{192}

The majority also rejected NOW's claim on the grounds that Operation Rescue's actions did not have the purpose of depriving the plaintiffs of a constitutional right protected against both private and state infringement (the requirement set out in \textit{Carpenters}).\textsuperscript{193} The Court reasoned that the conspiracy did not violate the plaintiffs' right to travel because this was not the "predominant purpose" of their actions.\textsuperscript{194} Furthermore, the conspirators did not treat interstate travelers differently from intrastate travelers.\textsuperscript{195} Finally, the Court ruled that the direct infringement of women's rights to obtain abortion was an inadequate basis for the § 1985(3) claim because the right to

\textsuperscript{187} Bray, 113 S. Ct. at 760.

\textsuperscript{188} This "ill will" or intent requirement had not been an explicit element of § 1985(3) prior to Bray. In fact, as Justice Stevens pointed out in his dissent, the Griffin Court explicitly stated that the "motivation requirement" of § 1985(3) "must not be confused with the test of 'specific intent to deprive a person of a federal right made definite by decision or other rule of law.'" Bray, 113 S. Ct. at 794 n. 33 (Stevens, J., dissenting) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 n. 10 (1971)). The words of § 1985(3), applying to conspiracies that seek "either directly or indirectly" to deprive a person of a right also seem to make Justice Scalia's strict intent requirement logically impossible. Furthermore, the fact that Justice Scalia read an intent requirement into the statute seems ironic in light of his recent holding in \textit{R.A.V. v. City of St. Paul}, in which he wrote that symbolic speech statutes that criminalize behavior which target only racial and ethnic groups on the basis of their group affiliation are unconstitutional view point discrimination under the First Amendment. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

\textsuperscript{189} 113 S. Ct. at 759 (quoting NOW v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989)).

\textsuperscript{190} Id. at 762. Apparently, the epidemic of violence waged by anti-abortion protesters against women seeking abortions did not have much effect on Justice Scalia's sympathetic portrait of those who, in his opinion, merely oppose abortion.

\textsuperscript{191} Id. at 760. Actually, a tax on yarmulkes would be a tax on Jewish men, just as an impediment to obtaining abortion is an infringement on the rights of women. Justice Scalia failed to see the fallacy in his reasoning. Abortion is an activity unique to women even more than yarmulke-wearing is an activity unique to Jews (since a non-Jew has the ability to wear a yarmulke, but a man cannot obtain an abortion).

\textsuperscript{192} Id. at 760-62 (citing \textit{inter alia} Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Geduldig v. Aiello, 417 U.S. 484 (1974)).

\textsuperscript{193} Id. at 762-64.

\textsuperscript{194} Id. at 762 (quoting United States v. Guest, 383 U.S. 745, 760 (1966)).

\textsuperscript{195} Id. at 763 (citing Zobel v. Williams, 457 U.S. 55, 60 n. 6 (1982)).
abortion is not protected against purely private encroachment—a claim on which the lower courts had stated no opinion.\(^{197}\)

The Court refused to rule on NOW's claim under the second clause of § 1985(3) (the "hindrance" clause), concluding that this claim was not subject to review.\(^{198}\) Nevertheless, the Court suggested that such a claim, even if ripe for review, would fail.\(^{199}\)

Justice Kennedy joined the majority opinion, but wrote a separate concurrence in which he described an alternative cause of action available to the plaintiffs.\(^{200}\) Justice Kennedy noted that "[i]n the event of a law enforcement emergency as to which 'State and local resources are inadequate to protect the lives and property of citizens or to enforce the criminal law,'" state and local authority may call upon the Attorney General to utilize the "full range of federal law enforcement resources," including the U.S. Marshals Service.\(^{201}\)

Justice Souter concurred in part and dissented in part. Although he agreed with the Court that the first clause of § 1985(3) does not apply to anti-abortion protesters, he concluded that the plaintiffs had stated a cause of action under the second clause of the statute.\(^{202}\)

Both of the dissenting opinions, written by Justices Stevens and O'Connor, concluded that NOW had stated a valid cause of action under both clauses of § 1985(3). Justice Stevens chided the majority for disregarding the "history, intent, and plain language" of the statute in its "misplaced reliance on prior precedent."\(^{203}\) He reasoned that the concerns motivating the Court's narrow constructions of § 1985(3) in Griffin and Carpenters—the constitutional need to avoid the creation of a "general federal tort law"—did not apply in the instant case.\(^{204}\) According to his dissent, the conspiracy of Operation Rescue is covered by the plain language of the statute:

Their concerted activities took place on both the public highway and the private premises of another. The women targeted by their blockade fit comfortably within the statutory category described as "any person or class of persons." [Operation Rescue's] interference with police protection of women seeking access to abortion clinics "directly or indirectly" deprived them of equal protection of the laws and of their privilege of engaging in lawful travel. Moreover, a literal reading of

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196. Id. at 764.
199. Id.
200. Id. at 769 (Kennedy, J., concurring).
201. Id. (quoting 42 U.S.C. §§ 10501-10502).
202. Id. at 770 (Souter, J., concurring in part and dissenting in part).
203. Id. at 783 (Stevens, J., dissenting).
204. Id. at 783-85.
the second clause of the statute describes petitioners' proven "purpose of preventing or hindering the constituted authorities of any State or Territory" from securing "to all persons within such State or Territory the equal protection of the laws."205

The dissent stated that it would have found Operation Rescue's activities to have evinced a discriminatory animus against women. Justice Stevens disagreed with Justice Scalia's characterization of the conspiracy of Operation Rescue as being motivated by "opposition to abortion."206 Rather, Justice Stevens wrote, the conspiracy involved the use of force to prevent women from exercising their rights, which may "reasonably be presumed to reflect a sex-based intent."207 According to Justice Stevens, "the petitioners target women because of their sex, specifically, because of their ability to become pregnant and to have an abortion."208 The Justice criticizes the majority for its "newly crafted suggestion" that the deliberate encroachment on an activity performed exclusively by women is not class-based discrimination unless opposition to that activity is also wholly irrational.209 Justice Stevens reminded the Court that § 1985(3) was designed to address all discrimination—no matter how "rational" the motives for the discrimination might appear.210 Because the capacity to become pregnant is the primary characteristic that differentiates females from males, "rules that place special burdens on pregnant women discriminate on the basis of sex" no matter what the reasoning behind such rules may be.211 Justice Stevens determined that Operation Rescue's activities, designed to prevent pregnant women from seeking abortions, unquestionably satisfied Griffin's class-based invidiously discriminatory motive.212

Justice Stevens concluded that Operation Rescue's conspiracy satisfied the requirement set out in Carpenters by encroaching on women's constitutional right to travel to obtain abortions.213 He wrote, "[m]aking their destination inaccessible to women who have engaged in interstate travel for a single purpose is unquestionably a burden on that travel."214 Just as § 1985(3) applied to Ku Klux Klan members who targeted African-Americans and

205. Id. at 782-83 (quoting 42 U.S.C. §1985(3)).
206. Id. at 785-89.
207. Id. at 787 (quoting Bray, 113 S. Ct. at 760).
208. Id. at 787 (citing Cass Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 COLUM. L. REV. 1, 32-33 (1992) ("[R]estrictions on abortion should be seen as a form of sex discrimination. . . . If a law said that 'no woman' may obtain an abortion, it should readily be seen as a sex-based classification. A law saying that 'no person' may obtain an abortion has the same meaning.").)
209. Id. at 788.
210. Id. at 788-789.
211. Id. at 791.
212. Id. at 787, 792.
213. Id. at 792 (citing Doe v. Bolton, 410 U.S. 179, 200 (1973)).
214. Id.
abolitionists who traveled both locally and interstate, it should not matter that some of the women served by the abortion clinics did not travel from out of state to obtain services.\footnote{215}

Justice Stevens also acknowledged that the plaintiffs had stated a valid claim under the second prong of § 1985(3). Even though the right to seek abortion is protected against official, and not private, encroachment, the conspiracy waged by Operation Rescue evinced a deprivation addressable by § 1985(3) in that the organization planned and implemented activities that prevented state and local government officials from safeguarding the exercise of women's right to choose.\footnote{216} Describing Operation Rescue's activities as "a large-scale conspiracy that violates the victims' constitutional rights by overwhelming the local authorities and that, by its nature, victimizes predominantly members of a particular class," Justice Stevens concluded that he "doub[ed] whether it would be possible to describe conduct closer to the core of § 1985(3)'s coverage."\footnote{217}

Justice O'Connor reached similar conclusions. She also would have held the activities of Operation Rescue actionable under both clauses of § 1985(3),\footnote{218} and chided the majority for restricting the reach of this civil rights statute "to the point where it cannot be applied to a modern-day paradigm of the situation the statute was meant to address."\footnote{219}

4. What the Court Should Have Decided

The dissenters had the better of the arguments in Bray. Justice Stevens correctly noted that the actions of anti-choice protestors are an infringement upon women's right to travel, a right protected against both private and state infringement.\footnote{220} He also noted that ample support existed for the district court's conclusion that Operation Rescue intended to interfere with women's right to engage in interstate travel. This support was found in the fact that Operation Rescue conducts "multi-state 'rescue' operations" and openly works towards the goal of eliminating the availability of abortion throughout the nation.\footnote{221}

\begin{itemize}
\item \footnote{215} Id. at 795.
\item \footnote{216} Id. at 796.
\item \footnote{217} Id. at 797. Justice Stevens concluded his opinion:
\begin{quote}
[It is] irrelevant whether the Court is correct in its assumption that "opposition to abortion" does not necessarily evidence an intent to disfavor women . . . . Petitioners . . . are not mere opponents of abortion; they are defiant lawbreakers who have engaged in massive concerted conduct that is designed to prevent all women from making up their own minds about not only the issue of abortion in general, but also whether they should (or will) exercise a right that all women—and only women—possess.
\end{quote}
\item \footnote{218} Id. at 800 (O'Connor, J., dissenting).
\item \footnote{219} Id. at 805.
\item \footnote{220} Id. at 790-91 n.28.
\item \footnote{221} Id. at 792.
\end{itemize}
The effects of the anti-abortion movement's actions on interstate travelers in any given location can be substantial. As the district court found in Bray, between twenty and thirty percent of the patients at a targeted Virginia clinic and over half of the patients at a targeted Maryland clinic were from out of state. Justice Stevens reasonably concluded that Operation Rescue intended to burden women's rights to travel. The fact that not all of the patients had traveled from another state did not negate the fact that Operation Rescue's actions illegally burdened travel for those patients who did travel from out of state.

On a more theoretical level, had Bray been decided correctly, it would have given authority to what many women know from experience, and what many legal scholars have persuasively argued—that opposition to abortion is opposition to women's reproductive autonomy, self-possession, and economic and social opportunity, and is thus opposition to women's equality. Any restriction on a woman's right to make her own medical decisions is an imposition on a woman's right to control her own body. The Supreme Court, in the past, has refused to recognize laws governing pregnancy as sex-based; Bray was the ideal opportunity for the Court to recast its previous holdings.

The majority in Bray missed the mark by declining to recognize that a conspiracy against the practice of abortion is a gender-based conspiracy against the exercise of reproductive rights held uniquely by women as a class. In 1978, Congress made it clear that discrimination against pregnancy is the equivalent of discrimination against women based on sex. The Supreme Court applied that law in the context of fetal protection policies to conclude that a policy which discriminates against women based upon their reproductive capacity discriminates against women on the basis of sex. As the dissent in the

222. Id. (citing 726 F. Supp. at 1489).
223. Id. at 795.
224. Id.
recent Eleventh Circuit decision in Lucero v. Operation Rescue of Birmingham poignantly stated:

The majority's insistence that Operation Rescue opposes a “practice” that has nothing to do with women brings abstraction to a new level of absurdity. It is impossible to sever the link between abortion and gender. Only women become pregnant and only women have abortions. For too long women have been invisible in much of the law. The majority now erases women from pregnancy, childbirth, and abortions as well.\(^\text{229}\)

It should be legally irrelevant that Operation Rescue and other anti-choice protestors target both men and women in determining that their actions are motivated by a gender-based animus. In *Carpenters* the Supreme Court emphasized that “animus against Negroes [included] those who championed their cause.”\(^\text{230}\) Similarly, the fact that the actions of groups like Operation Rescue burden the rights of some, but not all women, should be irrelevant; the group clearly aims to eliminate a right that women uniquely possess.

Had the Supreme Court affirmed the Fourth Circuit decision in *Bray*, it would have been a significant stride in civil rights law for women. Abortion and other forms of women's reproductive health care are constitutional rights possessed uniquely by women, the deprivation of which denigrates women’s equality rights. In the twenty years since women won the right to abortion, they have faced bitter and hateful opposition to their attempts to exercise their new rights. This resonates with the terror inflicted on African-Americans trying to exercise their newly won rights after emancipation. To recognize that a campaign aimed at restricting the rights of women is illegitimate discrimination based on sex is a necessary first step toward locating the right to abortion within a larger framework of women’s newly emerging rights to bodily integrity and equality.

Because the *Bray* Court ruled that opposition to women’s rights to abortion did not constitute a gender-based animus, the Court failed to hold that a gender-based animus would be sufficient to satisfy *Griffin*’s class-based animus requirement, leaving that question unanswered.\(^\text{231}\) The same question remained after *Griffin*.\(^\text{232}\) The majority in *Carpenters* decided only that the Act was not meant to protect conspiracies based on economic bias, and stated that it was “a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who

\(^{229}\) Lucero v. Operation Rescue of Birmingham, 954 F.2d 624, 632 (11th Cir. 1992) (Kravitch, J., dissenting).


\(^{231}\) Bray, 113 S. Ct. at 759.

\(^{232}\) 403 U.S. 88, 102 n.9 (1971).
championed their cause, most notably Republicans.” Still, all hope is not lost. Seven circuit courts of appeal have held that women are included within the purview of § 1985(3), and it is by no means certain that this specific holding was overturned by Bray.

There are many sound reasons why women should be considered a protected class under § 1985(3)—reasons that, it is hoped, will gain acceptance in the Supreme Court. These arguments are not necessarily based on statutory history, since Congress apparently did not manifest much explicit concern for the well-being of women as a class a century ago. Nevertheless, the fact that women were not citizens with full rights at the time of the Ku Klux Klan Act’s enactment should augment, not detract from, the argument that women as a class should be protected under § 1985(3). The failure of Congress to recognize the right of women to equality evidences historically severe discrimination against women. One representative’s statement illustrates the reluctance of Congress to afford rights to women in a statement made on the floor during the Congressional debates on the Act: “[t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women . . . .” This comment implies that the rights of women were an afterthought; indicating that women were a group subjected to the worst kind of discrimination—lack of concern.

The Supreme Court eventually acknowledged that women are deemed to be a protected class under the Fourteenth Amendment’s Equal Protection Clause. Although that amendment was not drafted with women specifically in mind (and, in fact, granted rights to African-American men without extending these rights to African-American women), this only supports further the argument that women should be considered a protected class under § 1985(3). Section 1985(3) is tied by language and history to the Equal Protection Clause, so women should be included under the former as well

233. 463 U.S. at 836.
234. See NOW v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990) (per curiam), rev’d on other grounds, sub nom., Bray v. Alexandria Women’s Health Clinic, 113 S. Ct. 753 (1993); New York NOW v. Terry, 886 F.2d 1339, 1358-59 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988); Statzos v. Bowden, 728 F.2d 15, 20 (1st Cir. 1984); Life Ins. Co. Of N. Am. V. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979); Novotny v. Great Am. Fed. Sav. & Loan Ass’n, 584 F.2d 1235, 1241-44 (3d Cir. 1978) (en banc), vacated on other grounds, 442 U.S. 366 (1979); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978). But see Mississippi Women’s Medical Clinic v. McMillan, 866 F.2d 788, 794 (5th Cir. 1989) (rejecting coverage under § 1985(3) of a class defined as “women of childbearing age who seek medical attention from MWMC,” a description the court considered “so underinclusive as to mischaracterize the dispute”).
236. Justice O’Connor quoted this remark in her dissent. See Bray, 113 S. Ct. at 800-01 (O’Connor, J., dissenting) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (remarks of Sen. Edmunds)).
as under the latter. Sex, like race, is an "obvious badge;"\textsuperscript{239} it is hard to deny "the pervasiveness of the historic legal and political discrimination against women."\textsuperscript{240}

On a more practical level, a ruling that § 1985(3) protects women's rights to travel to reach abortion clinics would have helped to ensure women's access to abortion services. Although a ruling that the Ku Klux Klan Act applies to halt anti-choice activists would not impede the ability of states to regulate abortion, it would help make abortion more accessible under current laws by removing a private obstruction to abortion access. The recent holding in \textit{Planned Parenthood v. Casey} gives states more latitude to impose such restrictions.\textsuperscript{241}

State law has proven inadequate to protect abortion rights. Federal injunctions and contempt fines are needed to ensure that women are able to cross state lines when necessary to obtain abortions and to ensure that women can enter clinics within their own states.

5. The Consequences of Bray

Contrary to the suggestion made by Justice Kennedy in his concurring opinion, the Bray decision may restrict the ability of the federal government to take action against anti-abortion activists. For example, in March of 1993, members of the U.S. Senate requested that the F.B.I. conduct a federal investigation of clinic violence.\textsuperscript{242} The Justice Department responded that such an investigation was precluded by Bray.\textsuperscript{243} The Clinton administration has pledged to fight anti-abortion violence,\textsuperscript{244} but Attorney General Reno has testified before the Senate that the process described by Justice Kennedy is cumbersome and the Justice Department considers it inadequate.\textsuperscript{245} According to the Attorney General, this provision does not enable the federal government to bring effective assistance to the clinics and women largely because it can be invoked only in a "clear ongoing emergency" and does not allow the federal forces to share information with the states or to plan to avoid these emergencies—two prerequisites for combating anti-choice violence effectively.\textsuperscript{246} Other solutions are still necessary.

\textsuperscript{238} As originally enacted, the Ku Klux Klan Act of 1871 was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1985(3) (1988)).
\textsuperscript{240} Id.
\textsuperscript{241} 112 S. Ct. 2791 (1992).
\textsuperscript{243} Id.
\textsuperscript{244} See, \textit{e.g.}, Abortion Clinic Access: Hearing of the Senate Labor Comm., \textit{FED. NEWS SERVICE}, May 12, 1993 (testimony of Attorney General Janet Reno) (hereinafter Abortion Clinic Access).
\textsuperscript{245} Id.
\textsuperscript{246} Attorney General Janet Reno testified that, without federal jurisdiction:
I could not use the U.S. Attorney's [forces]—except in certain situations, and there would be certain situations if federal marshals or other were involved in emergency situations where the
The Bray Court did not mandate that all federal courts that had granted federal jurisdiction under § 1985(3) prior to its ruling be automatically deprived of federal jurisdiction thereafter. Rather, the Court stated:

[Petitioners] contend that respondents' § 1985(3) claims were so insubstantial that the District Court lacked subject-matter jurisdiction over the action, including the pendent state claims; and that the injunction should therefore be vacated and the entire action dismissed. We do not agree. While respondents' § 1985(3) causes of action fail, they were not, prior to our deciding of this case, "wholly insubstantial and frivolous," [citations omitted] so as to deprive the District Court of jurisdiction.

It may be, of course, that even though the District Court had jurisdiction over the state-law claims, judgment on those claims alone cannot support the injunction that was entered. We leave that question for consideration on remand.247

Thus, Bray allows district courts to retain jurisdiction over the injunctions they issued and sustains courts' authority and obligation to enforce their orders under the principle of pendent jurisdiction.248 If the district court finds that state law claims provide a sufficient basis for retaining federal jurisdiction independent of the § 1985(3) claim, courts that had issued injunctions prior to Bray—even under the first clause of the statute rather than the second—may effectively proceed as if Bray had not been decided.

Every district court that had issued an injunction based on § 1985(3) prior to Bray has held that the state law claims alleged along with the federal claims were not "wholly insubstantial and frivolous," and has upheld its federal jurisdiction. On March 16, 1993, the U.S. District Court for the District of Columbia held that the District of Columbia law claims raised by NOW were sufficient to support the federal injunction entered without reliance upon the federal claims.249 Consequently, it ordered judgments totaling almost

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$200,000 against Operation Rescue and several of its leaders for violations of the injunction, failure to appear, and compensation for property damages.\textsuperscript{250} Similarly, on April 1, 1993, the Northern District of Alabama held that the court shall maintain jurisdiction after \textit{Bray}, citing concerns of judicial economy.\textsuperscript{251}

The cases originating in the Second Circuit district courts have been the most durable. On March 10, 1993, the United States District Court for the Southern District of New York upheld its pre-\textit{Bray} injunction on two grounds.\textsuperscript{252} First, the court reasoned that it was not divested of subject-matter jurisdiction because the injunction was issued prior to the \textit{Bray} decision, and “was not, therefore, based on claims that were, at the time, ‘wholly insubstantial and frivolous.’”\textsuperscript{253} Second, the plaintiff in the case had sought relief under the second clause of § 1985(3) (the “hindrance” clause), whereas the \textit{Bray} Court ruled specifically only on the inapplicability of the first clause of § 1985(3) (the “deprivation” clause).\textsuperscript{254} This difference in legal claims, the court reasoned, provided an independent basis for the court’s conclusion that the underlying civil claims were not so “insubstantial and frivolous” so as to deprive the court of jurisdiction.

The Second Circuit Court of Appeals, in two recent decisions, read \textit{Bray} in what seems the narrowest light possible. In \textit{New York State NOW v. Terry},\textsuperscript{255} the Appellate Court upheld federal injunctions that had been granted

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\item nuisances, and tortious interference with professional and business relations provided “a sufficient basis for retaining federal jurisdiction, enforcing the Injunction, protecting the previously established rights of plaintiffs, and vindicating the vital authority of a United States District Court”).
\item \textsuperscript{250} \textit{Id.} at 735-36. Specifically, the court entered the following judgments: against Keith Tucci for knowingly and deliberately violating the injunction, $15,000 ($5000 for the first violation and $10,000 for the second); against Keith Tucci for failure to appear, $41,600 ($100 a day for each day between January 24, 1992 and March 16, 1993); against Operation Rescue National and Operation Rescue, for deliberate violations of the injunction, $100,000; against Clifford Gannett for knowing and deliberate violations of the injunction, $15,000; against Patrick Mahoney for knowing and deliberate violations of the injunction, $10,000; and against Operation Rescue and Operation Rescue National, $1010 to compensate the Hillcrest Women’s Surgi-center for property damages resulting from the blockades. \textit{Id.}
\item The court also modified the Revised Permanent Injunction to include Randall Terry, Michael Bray, Jeff White, Michael King, Mark Dubioski, and Robert Jewitt as named parties. \textit{Id.} at 737. The injunction enjoined and restrained these parties from “inducing, encouraging, directing, aiding, or abetting others in any manner, or by any means, to trespass on, to blockade, or to impede or obstruct access to or egress from any facility at which abortions, family planning services, or gynecological services are performed in the District of Columbia.” \textit{Id.} The consequences of violating the injunction included a $5000 sanction, to double upon succeeding violations. \textit{Id.} All awards were to be distributed to the clinics at which blockades occurred in January and April, 1992 (after the injunction was issued). See \textit{id.} at 736.
\item \textsuperscript{252} See United States v. Terry, 815 F. Supp. 728, 730 n.4 (S.D.N.Y. 1993); see also People of N.Y. v. Operation Rescue Nat’l, No. 92 CIV. 4884 (RJW), 1993 WL 405433 at *3 (S.D.N.Y., Oct. 1, 1993) (affirming its prior holding on this particular issue and denying defendants’ motion to dismiss based on lack of subject-matter jurisdiction).
\item \textsuperscript{253} Terry, 815 F. Supp. at 730 n.4.
\item \textsuperscript{254} See \textit{id.}
\item \textsuperscript{255} See 961 F.2d 390, 396 (2d Cir. 1992); \textit{cert. granted sub. nom.} Pearson v. Planned Parenthood Margaret Sanger Clinic, 113 S. Ct. 1233 (1993), \textit{reinstated}, New York State NOW v. Terry, 996 F.2d 1351, 1352 (2d Cir. 1993), petition for certiorari filed November 22, 1993.
\end{itemize}
against Operation Rescue and other anti-choice activists by a District Court in the Southern District of New York on independent state law grounds. In Terry, the court acknowledged that Bray was currently pending before the Supreme Court. Nonetheless, the court reasoned, the federal injunctions should only be vacated if the Supreme Court ruled that, as a matter of law, the § 1985(3) claim is so insubstantial and frivolous so as to deprive the federal court of jurisdiction—an unlikely occurrence given the considerable appellate precedent affirming § 1985(3) actions against groups such as Operation Rescue. When the Supreme Court granted certiorari and remanded the case to the Second Circuit for reconsideration in light of Bray, the Second Circuit merely reinstated its original opinion.

In Town of West Hartford v. Operation Rescue, the Second Circuit explicitly limited the holding of Bray to the facts of that particular case, and concluded that a plaintiff could still state a viable prevention-clause claim post-Bray, as long as the plaintiff can prove the existence of a discriminatory animus. The Second Circuit then remanded the case to the District of Connecticut, providing the Town of West Hartford an opportunity to prove that Operation Rescue and other anti-choice demonstrators were, in fact, motivated by a discriminatory animus sufficient to satisfy the requirements of Bray.

Following the ruling of the Second Circuit Court of Appeals in Town of West Hartford, Judge Arcara of the Western District of New York refused to vacate a pre-Bray preliminary injunction, and granted the plaintiffs leave to file an amended complaint that conformed to the requirements of Bray. Citing Town of West Hartford for the proposition that Bray must be limited to its particular facts, the court concluded that it still may be possible for the plaintiffs to allege a viable claim under the first prong of § 1985(3).

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256. See Terry, 961 F.2d at 396.
257. See Terry, 996 F.2d at 1352.
259. 991 F.2d at 1048.
260. Id. at 1049. Specifically, the West Hartford Court instructed that:
   A determination of whether appellants intended to and did inhibit a right protected by § 1985(3)—either the Fourteenth Amendment abortion right, protected against the state; or the citizenship right to travel without public or private impediment—calls for scrutiny of the instant record through the prism of the Bray Court’s pronouncement that ‘impairment [of the right] must be a conscious objective of the enterprise.’ [citation omitted]

Id.

262. Id. One court, however, was not as generous to its pro-choice plaintiffs in its interpretation of Town of West Hartford. See Upper Hudson Planned Parenthood v. Doe, No. 90-CV-1084, 1993 WL 437008 (N.D.N.Y. Oct. 18, 1993) (denying sua sponte plaintiff’s opportunity to amend its complaint in light of Bray, and denying plaintiff’s motion for a preliminary injunction, as well as granting defendants’ motion to dismiss).
b. Future Claims under § 1985(3)

Four of the Justices in Bray—Justices Souter, O'Connor, Stevens, and Blackmun—stated a willingness to uphold NOW's claim under the second clause of § 1985(3), the "hindrance clause." Now that Justice White, who was in the Bray majority, has been replaced by Justice Ginsburg, who has a strong track record on reproductive rights issues, it seems inevitable that the new Supreme Court would uphold a "hindrance clause" challenge. The Ninth Circuit Court of Appeals recently held in National Abortion Federation v. Operation Rescue that the hindrance clause of § 1985(3) provides a cause of action for women against groups such as Operation Rescue, the decision of the Supreme Court in Bray notwithstanding.

In this case, decided on October 29, 1993, the Court of Appeals concluded that "a conspiracy to prevent or hinder state law enforcement officers from securing the constitutional right to an abortion for women, a class exclusively seeking to exercise that right, is actionable under the hindrance clause of § 1985(3)." The court reached its decision by examining the opinions of the four Justices who would have allowed the plaintiffs in Bray to allege a cause of action under the hindrance clause and concluded that while these Justices disagreed on several details, the four agreed that women constitute a protected class for hindrance clause purposes. Thus, allegations of interference with the state government's protection of the constitutional right to abortion can constitute a class-based animus against women. The court held that the primary impetus behind the Supreme Court's restriction of § 1985(3) actions to conspiracies aimed at the deprivation of a constitutional right protected against both state and private infringement (the concern to prevent § 1985(3) from turning into a federal tort law) does not apply to hindrance clause actions, where state action is necessarily asserted by means of the

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263. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 778 (Souter, J., concurring in part and dissenting in part); id. at 798-99 (Stevens, J., dissenting); id. at 805 (O'Connor, J., dissenting). Justice Blackmun joined the dissenting opinions of both Justice Stevens and Justice O'Connor.


265. While some commentators are skeptical about Justice Ginsburg's track record on reproductive rights issues, based mainly on her criticism of Roe v. Wade, their skepticism is ill-informed. Justice Ginsburg has written that abortion should be viewed from a "constitutionally based sex equality perspective" rather than as an issue of women's privacy, as under Roe v. Wade. See Ginsburg, supra note 225. This argument is more similar to those made by critical feminist theorists like Catharine MacKinnon and Fran Olsen than it is to those made by Justice Scalia and Chief Justice Rehnquist in arguing for the abandonment of Roe. The Equal Protection analysis of abortion rights is precisely the kind of reasoning necessary to hold that women are a protected class under § 1985(3), and that opposition to abortion is opposition to the equality of women and discriminatory, class-based animus within the meaning of Griffin and Bray.

266. 8 F.3d 680 (9th Cir. 1993).
267. Id. at 687.
268. Id.
269. Id. at 684.
interference with state law enforcement officials.\textsuperscript{270} Thus, it accepted the views of the four dissenters in \textit{Bray} as the more persuasive ones.\textsuperscript{271}

When the \textit{National Abortion Federation} court applied its actionable hindrance clause claims to the facts of the case at bar, it found that the plaintiff's complaint stated a cause of action.\textsuperscript{272} For example, the court noted the plaintiffs' allegations that Operation Rescue had negotiated with the police to obtain agreements on the timing and conditions of their arrest, crawled under and in front of police vans to hinder arrests, and chained themselves to immobile objects or gone limp, making it impossible for the police to remove them.\textsuperscript{273} The Ninth Circuit\textsuperscript{274} recognized that Operation Rescue's actions thwarting the attempts of state law enforcement to protect women's opportunities to exercise their constitutional rights are directly analogous to the types of behavior that led to the original enactment of the hindrance clause.\textsuperscript{275}

The Ninth Circuit opinion suggests, and individual commentators predict, that the Supreme Court will grant certiorari in \textit{National Abortion Federation}.\textsuperscript{276} If it does, it seems likely that the United States will join in as amicus curiae on the side of women and the clinics, in stark contrast to \textit{Bray}, where the Solicitor General argued on the side of Operation Rescue.\textsuperscript{277} With the addition of Justice Ginsburg, success for the plaintiffs seems likely.

If the Ninth Circuit's arguments are rejected by the Supreme Court, the plaintiffs may attempt to base a § 1985(3) claim on the Thirteenth Amendment—the right to be free from involuntary servitude, "irrespective of the manner or authority by which it is created."\textsuperscript{278} Considering the large amount of energy women expend in the process of carrying children and giving birth, involuntary pregnancy and childbirth can reasonably be considered acts of involuntary servitude.\textsuperscript{279} Finally, there is a strong argument that § 1985(3)

\begin{footnotesize}
\begin{enumerate}
\item Id. at 684-85.
\item Id.
\item Id. at 687.
\item Id. at 686.
\item A prior Ninth Circuit opinion, which reached a contrary result was withdrawn pending the court's outcome in Nat'l Abortion Fed'n v. Operation Rescue. \textit{Id. See} Portland Feminist Women's Health Ctr. v. Advocates For Life, No. 91-3551, 1993 WL 359417 (9th Cir. Sept. 20, 1993), recalled and withdrawn, 8 F.3d 15 (9th Cir. 1993).
\item 8 F.3d 680, 687 (9th Cir. 1993).
\item See, e.g., Egelko, \textit{supra} note 264.
\item See Aaron Epstein, \textit{Long Odds of "Rescue" for Clinics}, \textit{Hous. CHRON.}, July 8, 1993, at A11 (reporting Justice Department claims that federal jurisdiction exists when there is proof that protestors interfered with interstate travel or so overwhelmed local police authorities that women were deprived of the equal protection of the laws).
\item Clyatt \textit{v. United States}, 197 U.S. 207, 216 (1905); \textit{see also} Bailey \textit{v. Alabama}, 219 U.S. 219, 240-41 (1911) ("While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons . . . ").
\item See, e.g., Rhonda Copelon, \textit{The Applicability of Section 241 of the Ku Klux Klan Acts to Private Conspiracies to Obstruct or Preclude Access to Abortion}, 10 NAT'L BLACK L.J. 183, 198 (1987). Copelon writes:
\end{enumerate}
\end{footnotesize}
may be invoked to protect federal statutory as well as constitutional rights. Although this use of the statute has little benefit without any federal legislative codification of women's right to abortion, if the Freedom of Choice Act, currently pending before Congress, is enacted, it may provide the necessary federal right to make a § 1985(3) claim viable under this theory.

If § 1985(3) claims are successful, plaintiffs can and should accompany all such claims with a claim under 42 U.S.C. § 1986 against the individual leaders and organizers of anti-abortion groups. This section provides a separate and distinct cause of action against "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in § 1985 of this title, are about to be committed, and having power to prevent or aid in preventing commission of the same, neglects or refuses to do so." Although § 1986 does not provide plaintiffs with rights beyond those in § 1985, and a § 1986 claim can only succeed when associated with a successful § 1985 claim, pro-choice advocates can use this section to seek enhanced penalties against anti-abortion leaders like Randall Terry and Joseph Scheidler.

If, as may be the case, it is difficult to succeed with § 1985(3) claims after Bray, several other potential federal causes of action against radical anti-abortion activists are available.

C. Civil RICO and Scheidler

On January 24, 1994, the Supreme Court removed one impediment blocking the use of a second federal statute against anti-abortion extremists—the Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO. In NOW v. Scheidler, a unanimous opinion authored by Chief Justice Rehnquist decided that the federal racketeering laws may be applied against conspiracies of lawbreakers motivated by non-economic (ideological or political) causes, such as anti-abortion sentiment.

This Supreme Court decision arose from suits filed by NOW and several health centers under the civil provisions of RICO against the Pro-Life Action Network (PLAN) and other anti-abortion groups alleging that PLAN

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Pregnancy and the labor of childbirth are . . . work of the most intimate, continuous kind . . . . Pregnancy and childbirth involve vast physical changes in a woman's body and potentially severe pain and discomfort. They involve degrees of risk to life and health from the grave to the minor . . . . Women undertake voluntary pregnancies cognizant of these risks and burdens. When chosen, when a child is desired, pregnancy may be hard but nonetheless a labor of love. When forced, pregnancy is an intolerable, dehumanizing form of servitude.

284. 18 U.S.C. §§ 1962(a), (c), (d).
as an enterprise has conspired nationally to close medical clinics that provide abortion services. Although prior to Scheidler the Supreme Court had allowed one such case to stand upon appeal,287 some lower courts dismissed these complaints on the grounds that RICO requires either an economically motivated enterprise or economically motivated predicate acts. NOW v. Scheidler established, however, that a conspiracy need not be driven by economic motives to qualify as a RICO violation.288

Civil RICO is a complicated statute; a full discussion of its implications is beyond the scope of this paper. Nonetheless, it is possible to set out the basic requirements that must be fulfilled to succeed with a civil RICO claim against anti-choice protestors. Enacted by Congress in 1970 as part of the Organized Crime Control Act,289 RICO generally targets “racketeering activity.”290 The statute describes five types of such prohibited conduct, including, inter alia, any act chargeable under any state’s criminal law and punishable by imprisonment for more than one year,291 any act indictable under several specific federal statutes,292 including mail fraud293 and wire fraud,294 or any offense involving securities fraud or drug-related activity punishable under federal law.295 “Racketeering activity” is defined broadly, describing an act or threat involving one of thirty-two predicate offenses.

Section 1962 of the Act prohibits four types of conspiracies involving racketeering activity. First, the Act prohibits using income derived from a pattern of racketeering activity to acquire, establish, or operate an enterprise engaged in interstate commerce.296 Second, it forbids the acquisition or maintenance of an interest in, or control of an enterprise engaged in interstate commerce through a pattern of racketeering activity.297 Third, it proscribes the use of such an enterprise for the purpose of racketeering activity.298 Finally, it prohibits conspiring to violate any of the above three prohibitions.299

RICO provides for formidable damages. Criminal RICO establishes penalties of imprisonment, fines, and forfeitures.300 Under civil RICO, a private plaintiff may receive costs, attorneys’ fees, and mandatory treble

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290. Id. § 1961(1).
291. Id. § 1961(1)(A).
292. Id. § 1961(1)(B).
294. Id. § 1343.
295. 18 US.C. §1961(1)(D).
296. Id. § 1962(a).
297. Id. § 1962(b).
298. Id. § 1962(c).
299. Id. § 1962(d).
300. Id. § 1963.
Beyond Bray

Some federal courts have also held that civil RICO offers injunctive relief. RICO also provides two other benefits for private plaintiffs: the choice between state and federal jurisdiction and the possibility of national service of process, as long as the suit is brought in a jurisdiction proper for at least one of the defendants. The latter is a crucial tool against groups such as Operation Rescue because their leaders tend to travel from state to state.

To receive damages under a civil RICO claim, a plaintiff must prove by the preponderance of the evidence that: "(1) the defendant (2) through the commission of two or more acts (3) constituting a pattern (4) of racketeering activity (5) directly or indirectly invested in, or maintain[ed] an interest in or participated in (6) an enterprise (7) the activities of which affect[ed] interstate or foreign commerce." In addition, the plaintiffs must prove that they suffered injury to their business or property as a result of the proscribed conduct of the defendant.

All four causes of action under § 1962 require the RICO plaintiff to prove four separate elements: the existence of an "enterprise," a "pattern of racketeering activity," a nexus between the defendant, the pattern of racketeering activity, and the enterprise, and consequent harm to the plaintiff, in her "business or property."

First, it is possible to demonstrate that PLAN (or Operation Rescue) is an "enterprise." The statute defines "enterprise" broadly, to include any "group of individuals associated in fact although not a legal entity." The Supreme Court has held that this definition includes "a group of persons associated together for a common purpose of engaging in a course of conduct," which can be proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Both PLAN and Operation Rescue easily satisfy this definition, since, as the Supreme Court itself has stated, both are unincorporated associations of individuals who "oppose abortion" and who engage in "anti-abortion demonstrations in which participants trespass on, and obstruct general

301. Id. § 1964(c).
303. 18 U.S.C. § 1965(a) (1990) (providing that any civil action or proceeding under the chapter may be instituted in a U.S. district court); see also Tafflin v. Levitt, 110 S. Ct. 792 (1990) (holding that Congress has not divested state courts of jurisdiction to hear civil RICO claims).
310. Id.
access to, the premises of abortion clinics."\textsuperscript{311} In fact, courts have made detailed findings about Operation Rescue's headquarters, its leaders, and its salaried executives:\textsuperscript{312} evidence not only of a "ongoing organization," but also of a business-like structure. NOW has discovered similar organizational structures for PLAN, and the other "satellite" organizations operating under PLAN's auspices.\textsuperscript{313}

It should not matter that anti-choice activists do not fit the conventional definition of "racketeers." The Supreme Court has noted that "although [RICO] had organized crime as its focus, [it] was not limited in application to organized crime."\textsuperscript{314} As a result, courts have held RICO applicable to defendants as diverse as attorneys,\textsuperscript{315} banks,\textsuperscript{316} toy manufacturers,\textsuperscript{317} and international government officials.\textsuperscript{318} Furthermore, civil RICO claims have involved disputes as varied as tax shelters,\textsuperscript{319} securities fraud,\textsuperscript{320} family disputes,\textsuperscript{321} religious disputes,\textsuperscript{322} and sexual harassment.\textsuperscript{323} The Supreme Court has acknowledged that RICO is being applied in contexts far removed from those originally intended, but has explained that "this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action where Congress has provided it."\textsuperscript{324} Consequently, courts are constrained from reading additional limits into the statute.\textsuperscript{325}

In addition to proving that PLAN or Operation Rescue is a valid RICO enterprise, the plaintiffs must demonstrate that the anti-abortion group has engaged in a "pattern of racketeering activity." The statute defines a "pattern" as the commission of at least two of the statutorily-defined predicate acts (described above) within a ten-year period.\textsuperscript{326} The Supreme Court has held

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\item \textsuperscript{311} Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 758 (1993).
\item \textsuperscript{312} See, e.g., NOW v. Operation Rescue, 816 F. Supp. 729 (D.D.C., 1993); Northeast Women's Ctr. v. McMonagle, 868 F.2d 1342, 1349 n.7 (3d Cir. 1989).
\item \textsuperscript{313} See Joint Appendix at 100-02, NOW Brief, supra note 36.
\item \textsuperscript{315} See, e.g., Beth Israel Medical Ctr. v. Smith, 576 F. Supp. 1061 (S.D.N.Y. 1983).
\item \textsuperscript{316} See, e.g., Haroco, Inc., v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985).
\item \textsuperscript{318} See Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988) (alleging RICO violations against Ferdinand Marcos for his conduct as Philippine President).
\item \textsuperscript{319} In re Energy Sys. Equip. Leasing Sec. Litig., 642 F. Supp. 718 (E.D.N.Y. 1986).
\item \textsuperscript{320} Winer v. Patterson, 644 F. Supp. 898 (D.N.H. 1986).
\item \textsuperscript{321} Condict v. Condict, 815 F.2d 579 (10th Cir. 1987); Von Bulow v. Von Bulow, 634 F. Supp. 1284 (S.D.N.Y. 1986).
\item \textsuperscript{322} Religious Technology Ctr. v. Wollersheim, 796 F.2d. 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1986).
\item \textsuperscript{323} Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986).
\item \textsuperscript{325} See Northeast Women’s Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir. 1989), cert. denied, 493 U.S. 901 (1989). But see NOW v. Scheidler, 968 F.2d 612, 628-29 (7th Cir. 1992) (acknowledging the Sedima court’s command not to limit the scope of RICO, but nonetheless construing the limitations "undue"), cert. granted, 113 S. Ct. 2958 (1993).
\end{itemize}
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that to demonstrate such a pattern, the plaintiff must show that there is a relationship between the predicate acts, and that either these predicate acts are continuous or that there is a threat that the acts will continue in the future. Supra. The plaintiff may establish continuity in a number of ways: by showing the existence of a series of related predicate acts over a substantial period of time, by showing that the defendant regularly commits the predicate acts in the course of its business, or by showing that the predicate acts themselves include a specific threat of repetition. Supra. In the case of PLAN and Operation Rescue, these requirements are easily met: not only have anti-choice protestors consistently engaged in their illegal behavior in the past, they also have promised to continue to do so in the future.

For example, plaintiffs in RICO actions against anti-abortion protestors have alleged successfully that Operation Rescue has engaged in a pattern of Hobbs Act extortion as the requisite “predicate acts.” Supra. The Hobbs Act states:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

The actions of groups like Operation Rescue satisfy this definition. When anti-abortion protesters blockade clinics, harass clients and staff, and trespass on or vandalize clinic property, they engage in extortion in that they “use[] force, threats of force, fear and violence in their efforts to drive the clinic out of business.” Supra. The “property” that they extort from the clinics is the property right to operate their businesses.

Courts are in agreement that, under the Hobbs Act, defendants need not receive any benefit from their actions. Supra. Nevertheless, some courts have required that plaintiffs demonstrate an economic motive either behind the enterprise itself or behind the extortion under the Hobbs Act, Supra.
that the purpose behind Operation Rescue's extortionate activity is "to stop the performance of abortions, not to make money." As with the economic motive requirement in the definition of "enterprise," the economic motive requirement of the Hobbs Act when used as a predicate act is still unsettled. Much of the activity of the anti-abortion movement is designed specifically to place economic coercion on clinics and local police to make abortion unavailable. These actions should fulfill an "economic motive" test.

With Operation Rescue (or PLAN) as the RICO enterprise, and Hobbs Act extortion as the predicate act, RICO plaintiffs may allege claims under §§ (a), (c), and (d) of § 1962 of the RICO statute. Under § 1962(a), plaintiffs may be able to demonstrate that a cause of action exists because anti-abortion groups derive income through their extortionate activity. Through its well-publicized "rescues," Operation Rescue receives donations of support from members. Since the statute requires only that income be derived from racketeering activity "directly or indirectly," the conspiracy of groups such as Operation Rescue seems to fall under the statute's scope.

Under § 1962(c), RICO plaintiffs may demonstrate that anti-abortion groups are enterprises because of their pattern of racketeering activity. If either the claim under § 1962(c) or under § 1962(a) succeeds, § 1962(d) provides a cause of action for conspiring to commit violations of those provisions. Since anti-choice activists devote a significant amount of time to planning their blockades and publicizing their activities, and even host training seminars in the "art" of anti-abortion protest, the requirement of planning and conspiring can easily be demonstrated. Consequently, civil RICO provides a formidable weapon against groups such as Operation Rescue, one that is well tailored to the crimes these organizations commit against women and the clinical staff that serve them.

336. For example, one court described the actions of Operation Rescue in one city:
   Prior to each protest, the defendants informed Town officials that if the Town permitted the protest to go forward without interference, the defendants would in turn limit the number of protests and thus limit the expense to the Town of policing the protests. If the Town interfered with the protests, however, the Town would incur resistance and severe expense in carrying out arrests and court processing of the protesters.

338. Such a claim was alleged, and rejected by the Seventh Circuit. Scheidler, 968 F.2d at 623.
340. But see Scheidler, 968 F.2d at 625 (requiring a "but/for" cause in the collection of income from the racketeering activity and concluding that the extortionate acts of Operation Rescue do not meet this judicially-created test).
342. Id.
343. Gray, supra note 126.
344. Several commentators have expressed concerns about the use of civil RICO against the anti-abortion movement, particularly because if abortion should become illegal, such a cause of action might then be used against pro-choice demonstrators. See, e.g., Michele R. Moretti, Note, Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?, 25 NEW ENG. L. REV. 1363 (1991) (expressing such concerns yet ultimately rejecting them, and advocating civil RICO's
Now that one critical roadblock to successful RICO challenges against PLAN and Operation Rescue has been removed, the requirement of an economic motive, the next step is to prove the individual elements of a cause of action, as described above. It may be inevitable that the defendants in any RICO action will raise a defense based on the First Amendment's guarantee of freedom of expression. The response to the First Amendment challenge was expressly reserved in Scheidler and is beyond the scope of the present article. Nevertheless, it is a firmly established legal principle, recently reiterated by a unanimous Supreme Court in Wisconsin v. Mitchell that criminal conduct is not constitutionally protected speech merely because it expresses an idea. It cannot be argued that murder, arson, theft, vandalism, death threats, or other crimes actionable under RICO are protected by the First Amendment.

D. The Sherman Antitrust Act

Although this technique is not as common and does not receive as much media attention as either the RICO or § 1985(3) actions, NOW and several health centers have sued PLAN, Operation Rescue, and individual anti-choice activists under the Sherman Antitrust Act, claiming that the anti-choice groups and individuals have engaged in a conspiracy in restraint of the trade of providing abortion services and reproductive health care. Courts have dismissed these actions on the grounds that Operation Rescue and NOW (or the clinics) are not competitors, that the restraint was premised upon social, not economic, rationales, and that the Sherman Antitrust Act was not intended to reach this kind of behavior. Nonetheless, commentators have argued that federal antitrust laws should reach Operation Rescue's interference with women's medical clinics.

The only case in which a federal appellate court explicitly reviewed an antitrust claim against Operation Rescue is the Seventh Circuit's decision in NOW v. Scheidler, the case recently reversed by the Supreme Court on the issue of the interpretation of the RICO statute. In the lower court case,
the court detailed Operation Rescue's organized efforts to close women's health centers that perform abortions, and indirectly suggested that the actions of the anti-abortion protestors resembled activity that violates the Sherman Act.\textsuperscript{353}

The court described the activities that would potentially constitute illegal acts in restraint of trade: physical and verbal intimidation directed at clinic staff and clients, trespass upon and damage to clinic property, blockading clinics, destroying center advertising, organizing telephone campaigns to tie up center phone lines, scheduling false appointments to prevent legitimate clients from obtaining health clinic services, and interfering with health clinics' business relationships with landlords, staff, clients, and medical laboratories, as well as maintaining links with arsonists who have fire-bombed health centers.\textsuperscript{354}

The court took legal notice of defendant Joseph Scheidler's book, \textit{Closed: 99 Ways to Stop Abortion},\textsuperscript{355} a manual which advocates illegal means of interfering with the operations of women's health centers.\textsuperscript{356} It also described Operation Rescue's "blitzes," in which the organization uses methods such as "lock and block," where members pour glue into clinic door locks, and individual abortion protesters lock themselves to the doors.\textsuperscript{357} Furthermore, the court described in detail Operation Rescue's organized conspiracy to steal fetal remains from a laboratory.\textsuperscript{358} It also rejected Operation Rescue's argument that these activities were protected by the First Amendment because, the court reasoned, they were not intended to influence legislation, but rather were clear examples of criminal behavior and vigilante mob violence.\textsuperscript{359}

However, the court found that although Operation Rescue's actions directed toward "destroying all health centers performing abortions" would otherwise be criminal activities, the plaintiffs failed to make the required showing that Operation Rescue's actions had the purpose and effect of restraining trade.\textsuperscript{360}

The court thus reasoned that Operation Rescue's behavior could not be reached by the Sherman Antitrust Act.\textsuperscript{361} Quoting extensively from the Act's legislative history,\textsuperscript{362} the court drew an analogy between NOW's claim and the claims of liquor distributors against prohibitionists, going so far as to note the similarities between NOW's present claim and that of the state of Missouri when NOW attempted to organize a boycott of states that had refused to ratify the Equal Rights Amendment.\textsuperscript{363} The court concluded that the Sherman

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\item \textsuperscript{353} 968 F.2d at 617-18.
\item \textsuperscript{354} Scheidler, 968 F.2d at 615, n.5.
\item \textsuperscript{355} SCHEIDLER, supra note 48.
\item \textsuperscript{356} Scheidler, 968 F.2d at 615.
\item \textsuperscript{357} Id.
\item \textsuperscript{358} Id. at 616.
\item \textsuperscript{359} Id. at 618 n.6.
\item \textsuperscript{360} Id. at 622-23.
\item \textsuperscript{361} Id. at 623.
\item \textsuperscript{362} Id. at 618-19.
\item \textsuperscript{363} Id. at 617-20 (citing State of Missouri v. NOW, 620 F.2d 1301 (8th Cir.), \textit{cert. denied}, 449 U.S. 842 (1980)).
\end{itemize}
Antitrust Act was not designed to reach all activities in restraint of trade, particularly not those that are designed to espouse social causes.\(^{364}\)

The court did, however, reject Operation Rescue's argument that the Noerr-Pennington doctrine protects their activities.\(^{365}\) That doctrine was derived from two Supreme Court cases\(^{366}\) which held that the efforts of businesses and other associations to obtain a governmental imposition of a trade restraint are not actionable under the Sherman Antitrust Act. The court noted that in order for the exception to apply the defendants must have petitioned the government directly.\(^{367}\) This holding is significant, for at least one other court has held that the Noerr-Pennington doctrine may protect the activities of groups like Operation Rescue.\(^{368}\)

The court emphasized that the controlling element in this case was that Operation Rescue's activities were not motivated by a desire to restrain trade to gain *economic* advantages.\(^{369}\) The court refused to analogize Operation Rescue to a business, and contended that Operation Rescue has "no ability to concentrate economic power."\(^{370}\) In summary, the court held that the plaintiffs had failed to "make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers."\(^{371}\) Because Operation Rescue is not in the market of supplying abortion services, the court concluded that Operation Rescue is not in competition with the clinics and that this was sufficient to defeat application of the Sherman Act.\(^{372}\) The court did concede, however, that cartels or would-be monopolists who try to injure competitors by raising costs may

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\(^{364}\) Id. at 618, 623.

\(^{365}\) Id. at 621.


\(^{367}\) See NOW v. Scheidler, 968 F.2d 612, 620-21 (7th Cir. 1992).


\(^{369}\) Scheidler, 968 F.2d at 621.

\(^{370}\) Id. at 621. This conclusion is disputable. For example, not only has the anti-abortion movement wielded sufficient power to successfully close women's health clinics, sometimes permanently, their lobbying power may affect diverse economic decisions such as what movies are acceptable to produce, and the content of television shows to broadcast. *See generally* Faludi, *supra* note 25, at 400-20 (1991) (describing some of the effects of the anti-abortion crusade in the United States). The anti-abortion movement has also arguably affected the decision of U.S. drug manufacturers not to test the controversial "abortion pill," RU-486, in the United States by threatening boycotts and other negative consequences if they do import the drug, which is used widely in Europe. *See* Marlene Cimons, *Abortion Pill Clears Hurdle Toward U.S. Sale*, *L.A. Times*, Apr. 21, 1993, at A1.

\(^{371}\) Id., 968 F.2d at 622-23 (footnote omitted).

\(^{372}\) Id., 968 F.2d at 622-23 (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 511 (1939) (holding that "the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as to monopolize the supply, control its price or discriminate between its would-be purchasers."). (quoting United Mine Workers v. Coronado Coal Co., 265 U.S. 457, 471 (1921)). The court also noted that "[r]estraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." Id. (quoting Apex Hosiery, 310 U.S. at 513).
indeed be subject to the antitrust laws. Nonetheless, the court wrote, even though a "[n]on-commercial purpose alone will not shield activity from antitrust scrutiny," Operation Rescue's acts are "far beyond those that Congress intended to reach with the Sherman Act." Noting that it is "unfortunate that the plaintiffs lack an effective remedy for the defendants' reprehensible conduct," the court declined to apply federal antitrust law, and instead indirectly suggested that NOW should have sued under § 1985(3) instead.

The Seventh Circuit could have chosen to apply the antitrust laws on restraint of trade to Operation Rescue's behavior. The court failed to recognize that Operation Rescue may in fact compete with women's health clinics, both by setting up fake clinics to divert business and by interfering with the clinics' business relationships. When the "industry" at stake is viewed as the provider of reproductive health care and counseling regarding reproductive decisions, rather than merely as the provider of abortion services, it appears that the radical anti-abortion movement is striving to create a monopoly on what choices women may or may not have. This argument is particularly compelling in light of the Seventh Circuit's concession that actions of non-competitor defendants may in some circumstances create a cause of action under the Sherman Act. Finally, the fact that anti-choice activists use coercion, intimidation, and illegal acts to control an industry provides a strong argument for the application of the Sherman Antitrust Act. After all, these were the evils that Congress originally intended the Act to redress.

A reasonable fear might be that if the Sherman Antitrust Act can be used against anti-abortion protestors, then it could also be used against pro-choice protestors and other ideologically motivated activist groups. It does not follow, however, that applying the Sherman Act to PLAN would lead to the inevitable slippery slope of outlawing legal boycotts. The actions of the radical anti-abortion movement go far beyond a mere boycott of the abortion industry; they stop at no means—not even murder—to destroy it. It is questionable whether, as a matter of policy, we would want to protect pro-choice protestors if they crossed the line from mere boycotts into the realm of coercion, intimidation, and illegal acts. Certainly we do not want to protect the current violence of the radical anti-abortion movement for fear of falling down a long and not too slippery slope.

It is distressing that both antitrust and RICO claims have been dismissed against anti-abortion groups because courts have decided that their conspiracy

373. Id. at 623 n.13.
374. Id. at 621-22.
375. Id. at 621 (referring to Volunteer Medical Clinic, Inc., v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991) (analyzing an abortion clinic's claim under 42 U.S.C. § 1985(3)). This suggestion seems ironic, since we now know that such a claim might well have been struck down under Bray.
376. Id. at 623.
377. See generally PoKempner, supra note 350.
is not economically driven, while § 1985(3) claims have been dismissed because courts have decided that the anti-choice groups’ conspiracy is not driven by an animus against women. In truth, radical anti-abortion activists seek both to destroy clinics (an economic motive) and to limit women’s reproductive rights (a sex-based discriminatory motive). As long as the courts ignore these realities, perhaps what we need are new causes of action designed specifically to stop anti-abortion violence. The next section, on federal legislative proposals, will discuss various alternatives.

IV. PROSPECTIVE FEDERAL LEGISLATION

Each potential federal remedy against anti-abortion demonstrators currently available is fraught with uncertainties and risks. Fortunately, Congress is currently debating new methods of protecting women’s rights to obtain safe and legal abortions free from violence and harassment. In the wake of Bray, new federal statutes appear the most effective and direct way to accomplish this goal.

A. The Freedom of Access to Clinic Entrances Act of 1993

1. Description of the Statute

On February 3, 1993, shortly after the United States Supreme Court issued the Bray decision, Representatives Constance Morella (R-Md.) and Charles Schumer (D-N.Y.) introduced federal legislation to outlaw the activities of anti-choice demonstrators who block access to abortion clinics. On November 18, 1993, the House passed H.R. 796, their version of this bill by a voice vote. This Act, titled the “Freedom of Access to Clinic Entrances Act of 1993,” seeks to amend Title 18 of the United States Code, the Federal Criminal Code, by creating a federal cause of action against protesters who block access to clinics. It provides for both private civil and criminal causes of action, as well as statutory damages for injuries sustained at the hands of anti-abortion protesters.

On March 23, 1993, an almost identical bill was introduced in the Senate by Senators Ted Kennedy (D-Mass.) and Barbara Mikulski (D-Md.). This bill differed from the House bill in only a few ways. For example, it contained


380. See Merida, supra note 379; Ana Puga, Senate OK's Bill to Outlaw Abortion Clinic Blockades, BOSTON GLOBE, Nov. 17, 1993, at 1.

slightly different penalties, and was designed to amend the Public Health Services Act rather than the Federal Criminal Code. It was passed by the Senate on November 16, 1993 by a vote of 69 to 30. The purpose of this proposed Act is:

[T]o protect and promote the public health and safety and activities affecting interstate commerce by prohibiting the use of force, threat of force or physical obstruction to injure, intimidate, or interfere with a person seeking to obtain or provide pregnancy or abortion-related services, and the destruction of property of facilities providing abortion services, and by establishing the right of private parties injured by such conduct, as well as the Attorney General of the United States and State Attorneys General in appropriate cases, to bring actions for appropriate relief.

The proposed law would make it illegal

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

It also prohibits the intentional damaging or destruction of medical facilities which provide pregnancy or abortion-related services. In sum, it covers four categories of conduct: acts of force, threats of force, physical obstruction and damage or destruction of property.

The sections prohibiting the use or threat of force are modeled on several federal civil rights laws, including 18 U.S.C. § 245(b), which prohibits the use or threat of force to willfully injure, intimidate, or interfere with any person because that person is or has been voting, engaging in activities related to voting or enjoying the benefits of federal programs, or in order to intimidate such person or any other person or class of persons from doing so. It was also modeled on 42 U.S.C. § 3631, “a provision of the Fair Housing Act that prohibits force or threat of force to wilfully injure, intimidate, or interfere with a person’s housing opportunities because of his or her race, color, religion,

382. Id.
384. S. 636, supra note 381. Because the House and Senate versions of this Act are so similar, a discussion of one of the two versions (in this case, the Senate version) should adequately convey the nature of the proposed law.
385. Id.
386. Id.
sex, or national origin." The subsection of the Act prohibiting property damage was modeled on 18 U.S.C. § 247, which prohibits, in certain circumstances, intentional damage to or destruction of property because of its religious nature.

The conduct prohibited by the Act contains both a scienter and a motive component. First, in order to violate the Act, the offender must act "intentionally" in using force, the threat of force, or physical obstruction, that "injures, intimidates, or interferes with any person . . . . from obtaining or providing [abortion] services." Second, the offender must have acted out of an abortion-related motive, meaning that the actor must have acted "'because' the target of the offender's conduct is or has been obtaining or providing abortion-related services," and not for any other reason (say, for example, because of the facility's environmental policies). According to the Committee on Labor and Human Resources, this motive requirement was necessary "to ensure that the Act is precisely targeted at the conduct that . . . requires new Federal legislation: deliberate efforts to interfere with the delivery of abortion-related services."

The measure would impose fines in accordance with Title 18 or a prison sentence of not more than one year for the first violent offense, or both, and fines or a prison sentence up to three years, or both, for repeat offenders. If the offense results in bodily injury, the Act authorizes fines or imprisonment of ten years, or both, and if death results, it provides for fines or any term of years up to life, or both. However, a person convicted of an offense involving only a nonviolent physical obstruction can be fined only up to $10,000 or imprisoned for up to six months, or both. For a subsequent offense, the fine may reach $25,000 and the prison sentence may be up to eighteen months.

Perhaps most importantly, the proposed Act creates a private right of action for any person injured in the ways prohibited by the Act. It provides for both temporary and permanent injunctive relief, as well as for compensatory and punitive damages, attorneys' fees, and costs of litigation. It also allows plaintiffs to elect to recover an award of statutory damages in the amount of $5000 per violation in lieu of compensatory damages. The Act authorizes courts to assess civil penalties against violators of the law of up to $15,000
for a first violation and up to $25,000 for subsequent violations. It also provides that the United States Attorney General or state Attorneys General may commence actions against anti-abortion protesters who are acting in violation of the Act, if their conduct "raises an issue of general public importance." Unfortunately, the Act holds "a narrow exception for the activities of a parent or legal guardian of a minor directed exclusively at that minor." In this regard, the Act does little or nothing to protect women under the age of eighteen from violence that might be directed at them by their parents when they attempt to obtain an abortion. Furthermore, this exception undermines the efforts of states that have enacted legal bypass systems to parental consent requirements for abortion. These bypass systems were designed to allow minors to obtain abortions either without the knowledge of, or against the wishes of, their parents if they succeeded in convincing judges that there were good reasons for the parents not to know—for example, that their parents might become abusive or otherwise act against the daughters' best interests. By denying parents the right to veto their daughters' decisions in the courts, but then granting a new right of veto through physical force outside an abortion facility, this exception may subject underage pregnant women to a greater risk of violence at the hands of abusive parents.

2. Constitutionality of the Statute

Anti-abortion organizations oppose the Freedom of Access to Clinic Entrances Act, claiming that it unconstitutionally discriminates against them on the basis of their viewpoint in violation of the First Amendment. They claim the bill arbitrarily attempts to stifle their movement, noting that it explicitly excludes different types of protest from its scope, such as picket lines by striking workers. Senator Dan Coats (R-Ind.) sponsored an unsuccessful amendment that would have included penalties for pro-choice demonstrators convicted of violent offenses. According to Senator Jesse Helms (R-N.C.), who spoke in favor of the defeated amendment, anti-abortion protesters should be treated the same as "gay-rights" or "women's rights" activists. The Senator bemoaned the fact that not one proponent of the Clinic Access Act had "voice[d] a critical syllable" about "those motley people who constantly march in the streets for what they call 'homosexual rights'" and "the vulgar people who parade up and down America's streets demanding that sodomy be

399.  Id.
400.  Id.
401.  Id.
402.  See 139 CONG. REC. E3053 (daily ed. Nov. 24, 1993) (Statement of Judge Karen L. Thurman) (testifying in opposition to the Delay Amendment, which incorporated this exception).
404.  See Puga, supra note 380.
regarded as 'just another lifestyle.' Rather, the opponents of the Act stress, this law is tailored to protect only the "pro-abortion" side of the debate at the expense of pro-life demonstrators.

These arguments have no merit. The bill is narrowly tailored to serve a specific government purpose, not to promote a particular viewpoint. Anti-abortion protesters are free to express whatever ideas they want, but they may not injure, intimidate, or interfere with women seeking to exercise their constitutional right to reproductive health care. Congress has emphasized that the law is designed to protect clinics and the consumers of health care who desire to use the clinics' services, and not the protesters on either side of the abortion debate. The law is modeled on existing federal criminal civil rights laws prohibiting interference with fundamental rights such as voting. It prosecutes violent interference with a constitutionally protected activity, and not a particular point of view.

The Freedom of Access to Clinic Entrances Act should withstand constitutional scrutiny. The Act is drafted so as not to prohibit constitutionally protected expression, such as peacefully carrying picket signs, giving speeches, passing out literature and praying in front of a clinic, as long as those activities do not physically obstruct access to a clinic or make passage to or from a clinic hazardous. To the extent that the Act might have an incidental effect on protected First Amendment activity, its analysis would fall under the rule set out by the Supreme Court in United States v. O'Brien. Under O'Brien, a government regulation is justified under the following circumstances:

[I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The federal government possesses constitutional authority to enact this legislation under both the Commerce Clause of the Constitution and § 5 of the Fourteenth Amendment. It is well established that under the Commerce Clause, which has been interpreted broadly by the Supreme Court, Congress has authority to regulate an activity if it has a rational basis for

406. See id.; See also Puga, supra note 380; Merida, supra note 379.
410. Id. at 377.
411. U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
412. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
believing that the activity substantially affects interstate commerce and if it acts rationally in regulating the activity.\textsuperscript{413} This power extends even to the regulation of activities that are purely local.\textsuperscript{414} In fact, once Congress determines that an activity in the aggregate has a cumulative effect on interstate commerce, it may regulate any individual instance of that activity, no matter how trivial an impact that act in isolation may have on interstate commerce.\textsuperscript{415} Clinics and other reproductive health service providers operate in the stream of interstate commerce, both directly and indirectly. As the Senate Committee on Labor and Human Resources found, “They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; and they generate income.”\textsuperscript{416} In addition, both patients and employees of the clinics engage in interstate commerce by traveling across state lines to obtain or provide abortion-related services.\textsuperscript{417} Finally, the Senate Committee on Labor and Human Resources determined that the types of activities that should be prohibited by the proposed Act—organized blockades of clinics and other anti-abortion violence—have a negative effect on interstate commerce.\textsuperscript{418}

The Committee noted that clinics have been closed because of the blockades and doctors have been frightened out of performing abortions, resulting in a decrease in interstate movement of people and goods.\textsuperscript{419} The Committee drew an analogy between this situation and the passage of Title II of the Civil Rights Act of 1964, which the Supreme Court upheld on the grounds that restaurants that discriminated served fewer customers and thereby suppressed interstate commerce.\textsuperscript{420} Here, according to the committee, the purpose of the anti-abortion protestors whose conduct would be made illegal under the Act is “to suppress the provision of abortion services.”\textsuperscript{421}

\textsuperscript{413} See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding the power of Congress under the Commerce Clause to exercise Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in places of public accommodation serving interstate travellers); see generally Laurence H. Tribe, American Constitutional Law §§ 5-4 to 5-8 (2d ed. 1988).

\textsuperscript{414} See United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (holding that the reach of the commerce power “extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power”).

\textsuperscript{415} See, e.g., Perez v. United States, 402 U.S. 146, 154 (1971) (upholding Congress’s power to criminalize local incidents of loan-sharking, upon its determination that loan-sharking in general affected interstate commerce, because “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class’) (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968)); see also Tribe, supra note 413, § 5-5.

\textsuperscript{416} S. Rep. No. 117, supra note 387, at 31.

\textsuperscript{417} Id. Similarly, a large number of clinics are served by doctors who provide abortion services in several states. Id. See also Doctor Targeted by Anti-abortionists Moving to Montana, UPI, Jan. 29, 1993, available in Lexis, News Library, UPI File (describing a physician who performs abortions in Minnesota, Montana, North Dakota, and Wisconsin).

\textsuperscript{418} S. Rep. No. 117, supra note 387, at 31.

\textsuperscript{419} Id.

\textsuperscript{420} Id. at 31-32. See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

\textsuperscript{421} S. Rep. No. 117, supra note 387, at 34.
Congress also has authority to enact the Freedom of Access to Clinic Entrances Act under § 5 of the Fourteenth Amendment, which grants Congress power “to enforce, by appropriate legislation, the provisions”\(^{422}\) of the Fourteenth Amendment, including the provisions dealing with “liberty,” “equal protection of the laws” and “the privileges or immunities of citizens of the United States.”\(^{423}\) Section 5 of the Fourteenth Amendment gives Congress authority to reach at least some purely private conduct.\(^{424}\) The actions of clinic blockaders and other potential offenders of the Freedom of Access to Clinic Entrances Act do not by themselves violate the Fourteenth Amendment since clinic blockaders are private actors. However, the Supreme Court has held that Congressional authority under § 5 to enforce the Fourteenth Amendment is significantly broader than that of the Judiciary. Congress may determine by means of its superior fact-finding capabilities and the broader range of remedies available to it that specific measures are needed to protect federal rights.\(^{425}\) In this case, Congress has determined that the Act is necessary to protect a woman’s right to terminate a pregnancy prior to fetal viability, a right protected from state interference by the Fourteenth Amendment’s liberty clause.\(^{426}\) Because “the States have been overwhelmed in their efforts to prevent private obstruction of access to abortion clinics and private violence against abortion patients and providers,”\(^{427}\) Congress has the power under § 5 of the Fourteenth Amendment to reach the purely private conduct of anti-choice activists. In other words, because states and municipalities acting alone are unable to provide sufficient protection against

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\(^{422}\) U.S. CONST. amend. XIV, § 5.

\(^{423}\) Id. § 1.

\(^{424}\) See Tribe, supra note 413, § 5-15; see also United States v. Guest, 383 U.S. 745, 782 (1966) ("§ 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.") (Brennan, J., concurring in part and dissenting in part). In Guest, six Justices joined one of two concurring opinions concluding that Congress possessed the authority under § 5 “to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy.” Id. (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.); id. at 762 (Clark, J., concurring, joined by Black and Fortas, JJ.). See also District of Columbia v. Carter, 409 U.S. 418, 424 n.8 (1973) (reaffirming, in dictum, the proposition that to say that “the Fourteenth Amendment itself ‘erects no shield against merely private conduct’ . . . is not to say . . . that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment”).

\(^{425}\) See Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding Congress’s constitutional authority to enact a provision of the Voting Rights Act of 1965 that effectively overrode a New York literacy requirement even though the Supreme Court had previously held that literacy requirements did not violate the Fourteenth or Fifteenth Amendments). In Morgan, the Court held that § 5 “is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” Id. at 651. This well-established principle, first set out in Katzenbach, was reaffirmed by the Supreme Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (“The power to ‘enforce’ [the Fourteenth Amendment] may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.”) (emphasis in original).

\(^{426}\) S. REP. No. 117, supra note 387, at 32. This right was recently reaffirmed by the Supreme Court. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992).

\(^{427}\) Id. at 33.
private acts that threaten the full enjoyment of federal constitutional rights, including the right to terminate a pregnancy that was reaffirmed in 

Casey,
federal legislation is necessary and constitutionally justified.\textsuperscript{428}

Next, the Freedom of Access to Clinic Entrances Act would satisfy the second prong of the \textit{O'Brien} test in that it "furthers an important or substantial government interest."\textsuperscript{429} The Act is "designed to protect health care providers and patients from violent attacks, blockades, threats of force, and related conduct intended to interfere with the exercise of the constitutional right to terminate pregnancy."\textsuperscript{430} Congress specifically determined that

Medical clinics and other facilities throughout the nation offering abortion-related services have been targeted in recent years by an interstate campaign of violence and obstruction aimed at closing the facilities or physically blocking ingress to them, and intimidating those seeking to obtain or provide abortion-related services;

As a result of such conduct, women are being denied access to, and health care providers are being prevented from delivering, vital reproductive health services;

Such conduct subjects women to increased medical risks and thereby jeopardizes the public health and safety...\textsuperscript{431}

Certainly the protection of public health and safety, in particular the need to protect women against the increased medical risks to which Operation Rescue and other anti-abortion activists subject them, constitute an important government interest. Satisfying the third prong of the \textit{O'Brien} test, this purpose of the proposed Act is not related to the suppression of free expression, but only to the suppression of violence. As noted above, the Act explicitly excludes peaceful picketing and other forms of constitutionally protected speech from its list of prohibited conduct.\textsuperscript{432}

Finally, the statute would satisfy the fourth prong of the \textit{O'Brien} test in that the proposed Act is narrowly tailored to address a limited and specifically defined range of unprotected conduct. By limiting the reach of the proposed Act to acts of force, threats of force, physical obstruction, and damage or

\textsuperscript{428}. The Congressional Statement of Findings and Purpose stated that:

Those engaging in such tactics [of obstruction] frequently trample police lines and barricades and overwhelm state and local law enforcement authorities and courts and their ability to restrain and enjoin unlawful conduct and prosecute those who have violated the law; ... This problem is national in scope, and ... exceeds the ability of any single state or local jurisdiction to solve it; ... Such conduct operates to infringe upon women's ability to exercise full enjoyment of rights secured to them by federal and state law, both statutory and constitutional... See S. 636, supra note 381, § 2 (a)(5)-(a)(7).

\textsuperscript{429}. 391 U.S. at 377.

\textsuperscript{430}. S. Rep. No. 117, supra note 387, at 22.

\textsuperscript{431}. S. 636, supra note 381, § 2(a)(1)-(a)(3) (Congressional Statement of Findings and Purpose).

\textsuperscript{432}. Id. § 2(d).
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destruction of property, the Act only incidentally and minimally affects acts
of expression protected by the First Amendment.

The conclusion that the Act is indeed constitutional is further bolstered by
the recent decision of a unanimous Supreme Court in Wisconsin v. Mitchell. In Mitchell, the Supreme Court upheld a Wisconsin law which
provided enhanced penalties for crimes that were motivated by racial or ethnic
prejudice. The Court distinguished the Wisconsin law from that at issue in R.A.V. v. City of St. Paul in which the Court struck down the St. Paul
Bias-Motivated Crime Ordinance, on the grounds that "whereas the ordinance
struck down in R.A.V. was explicitly directed at expression . . . the statute in
[Mitchell] is aimed at conduct unprotected by the First Amendment." Chief Justice Rehnquist, writing for all nine justices, reiterated the firmly
established rule that conduct is not protected speech merely because the actor
"intends thereby to express an idea . . . . Thus, a physical assault is not by
any stretch of the imagination expressive conduct protected by the First
Amendment."

Like the conduct prohibited by the statute at issue in Mitchell, the conduct
prohibited by the Freedom of Access to Clinic Entrances Act (acts of force,
threats of force, physical obstruction, and destruction of property) are not
protected speech acts. As the Senate concluded, "It is not even arguable that
shootings, arson, death threats, vandalism, or the other violent and destructive
conduct addressed by the Act is protected by the First Amendment."

Furthermore, it is clear that physical obstruction of access to a clinic is not
constitutionally protected conduct. The Freedom of Access to Clinic Entrances
Act is similar to other federal statutes which criminalize the obstruction of
access to buildings or the obstruction of individuals in the performance of their
duties. One such statute, prohibiting the obstruction of settlement on or
transit over public lands, dates back to 1885. Another describes the
following federal offense:

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434. Id. at 2200.
437. Id. at 2199 ("[V]iolence or other types of potentially expressive activities that produce special
harm[s] distinct from their communicative impact . . . are entitled to no constitutional protection.") (citing
Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)) (citations omitted); NAACP v. Claiborne
obstruct or impede ingress or egress to or from any building, grounds, or area" designated as a temporary
residence of the President and/or his or her staff).
440. No person, by force, threats, intimidation, or by any fencing or inclosing
. . . shall prevent or obstruct, or shall combine and confederate with others
to prevent or obstruct, any person from peaceably entering upon or
establishing a residence on any tract of public land . . . or shall prevent or
obstruct free passage or transit over or through the public lands.
Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5000, or imprisoned not more than one year, or both.\(^441\)

If “clinic providing abortion-related services” were substituted for “courthouse” and “doctor providing abortion-related services” were substituted for “judge, juror, witness, or court officer,” the proposed Freedom of Access to Clinic Entrances Act would not differ greatly in form or substance from the law set out above. Indeed, regardless of the reason for the demonstration, the Supreme Court has pronounced, “A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.”\(^442\)

Similarly, the Constitution affords no protection to “threats of force.” As explained above, the sections prohibiting the use or threat of force are modeled on several Federal civil rights laws, such as the prohibition against “threat[s] of force” that “injure[ ], intimidate[ ] or interfere[ ] with” a person’s right to vote or to participate in any federal benefit, including federal employment,\(^443\) and the federal prohibition against force or threat of force to injure, intimidate, or interfere with a person’s housing opportunities because of his or her race, color, religion, sex, or national origin.\(^444\) Although the Constitution protects “political hyperbole,”\(^445\) it does not protect “true threats”\(^446\) such as the expression criminalized by the Freedom of Access Act. Since the proposed Act would punish only threats of violence that would “place a person in reasonable apprehension of bodily harm to him—or herself or to another,”\(^447\) it would not infringe on constitutionally protected speech.

Finally, contrary to the arguments raised by its opponents,\(^448\) the


\(^{444}\) 42 U.S.C. § 3631.

\(^{445}\) Watts v. United States, 394 U.S. 705, (1969); See also U.S. v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989) (holding that a defendant could be convicted of violating the provision of the Civil Rights Act of 1968, 42 U.S.C. §3631(c), which prohibits interference with housing rights through force or threat of force, even if the defendant did not explicitly state an intention to carry out the threats), cert. denied, 493 U.S. 1082 (1990).

\(^{446}\) See Watts, 394 U.S. at 707-08.

\(^{447}\) S. 636, supra note 381, § (e)(3).

\(^{448}\) S. REP. NO. 117, supra note 387, at 37 (statements of the minority view); Peter D. Lepiscopo, Sneaking Abortion in the Back Door, SAN DIEGO UNION-TRIB., Dec. 5, 1993, at G3; Merida, supra note 379 (stating that opponents of the bill see it as an attempt to “silence” the anti-abortion movement); Puga,
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Freedom of Access to Clinic Entrances Act would not constitute unconstitutional "viewpoint discrimination" by singling out "pro-life" viewpoints for criminal punishment. The motive element in the proposed Act (to violate the Act, the offender must have acted because another person is or has been obtaining or providing abortion-related services, or because he intended to intimidate someone from doing so) is necessary to ensure that the Act is precisely targeted at the conduct requiring new Federal legislation: "deliberate efforts to interfere with the delivery of abortion-related services." As Attorney General Reno testified before Congress, there is no evidence of a similar conspiracy of violence targeted at anti-choice individuals, although she promised to "look into" such allegations.

It is well within Congress's authority to determine that a discriminatory or criminal motive is an essential element of a federal offense. Just as it is crucial that a person be denied employment or housing benefits because of a discriminatory motive (on the basis of race or sex, for example) for a violation of federal civil rights legislation to occur, it is crucial that the obstruction of access to a clinic be motivated by a desire to deny a woman the right to obtain an abortion in order to establish a violation of the Freedom of Access to Clinic Entrances Act. As stated centuries ago by Blackstone and recently reiterated by the Supreme Court, "[i]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." Because the particular harms inflicted upon women by Operation Rescue and other anti-choice militants put millions of women and their doctors in grave danger, these crimes should be singled out for the greatest amount of remedial action by Congress.

The Supreme Court may offer some answers to the questions regarding the Bill's constitutionality in its opinion in *Madsen v. Women's Health Center*, a case recently granted certiorari by the Court. The Supreme Court of Florida upheld the constitutionality of an injunction imposed against Operation Rescue and other anti-choice protestors. In the Florida case, the Supreme Court of Florida concluded that the injunction was a content-neutral reasonable restriction on speech narrowly tailored to serve important government interests—protecting the property rights of citizens, the free flow of traffic,
the public safety and order, and, most critically, the health and well being of women placed at risk by the actions of anti-abortion protestors.\textsuperscript{455}

Virtually any action expresses an idea. Just as Southern politicians were expressing a point of view when they stood in the doorways of newly desegregated schools to prevent African-American children from exercising their constitutional right to desegregated education, anti-abortion protestors are expressing a point of view when they stand in the doorways of health clinics to prevent women from exercising their rights to reproductive autonomy. In response to the schoolhouse blockades, the federal government acted to protect African-Americans’ rights. It is time that the federal government acted to protect women’s rights also.

B. The Freedom of Choice Act

Currently pending before Congress is a law that forbids states from “restrict[ing] the right of a woman to choose to terminate a pregnancy . . . (1) before fetal viability; or (2) at any time, if such termination is necessary to protect the life or health of the woman.”\textsuperscript{456}

As currently written, the law does little directly to protect women from anti-abortion violence. Nevertheless the statute could furnish a basis for a cause of action under § 1985(3), since it is not clear that the statute is limited to remedying violations of constitutional, rather than both constitutional and statutory, rights.\textsuperscript{457} In fact, the text does not limit itself to constitutional rights,\textsuperscript{458} and the legislative history of the statute reveals a congressional intent to include federal rights created by statute within the “equal protection of the laws” guaranteed by § 1985(3).\textsuperscript{459} Furthermore, although the Supreme Court has appeared to have limited § 1985(3) to remedying federal, rather than state, rights,\textsuperscript{460} the Court has not explicitly limited the scope of the statute

\textsuperscript{455} See id. at 671-76.
\textsuperscript{457} See Case Comment, supra note 280, at 339-40.
\textsuperscript{458} See 42 U.S.C. § 1985(3) (1988) (providing a federal cause of action against any private conspiracy formed 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 “preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons . . . the equal protection of the laws.”)
\textsuperscript{460} See Carpenters v. Scott, 463 U.S. 825, 833 (1984) (suggesting that a claim under § 1985(3) could be based on conspiracies to deprive persons of rights under state law); Great Am. Fed. Sav. & Loan Ass'n. v. Novotny, 442 U.S. 366, 376 (1979) (holding that § 1985(3) is a remedial statute that provides a cause of action when “some otherwise defined federal right . . . is breached”); cf. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 768 (1993) (stating that violations of state trespass laws do not support a claim under § 1985(3)).
to constitutional rights. The Court has suggested in dicta that federal statutory rights could form the basis of viable causes of action under the Ku Klux Klan Act. Such a result would be entirely consistent with the Supreme Court's interpretation of other federal civil rights statutes similar to § 1985(3). For example, the Supreme Court has upheld causes of action based on violations of federal statutory law under both 18 U.S.C. § 241 and 42 U.S.C. § 1983. Any danger that such an interpretation of § 1985(3) would upset the remedies contemplated by independent federal statutes could be mitigated by denying a § 1985(3) remedy wherever the underlying statute already provides a comprehensive enforcement scheme.

Ideally, the Freedom of Choice Act would explicitly state a private cause of action, so that it could be utilized in a manner similar to that of the proposed Freedom of Access to Clinic Entrances Act. But even if it did not state a private cause of action, the Freedom of Choice Act could nevertheless substantially mitigate problems faced by women who must travel great distances to obtain abortions by making abortion more available in their home states. Finally, the Act would serve a symbolic purpose of explicitly guaranteeing women the right to choose, a guarantee that could survive the swiftly changing political currents created by new membership on the Supreme Court.

Nevertheless, the Act in its current (still unenacted) form does little for the women most vulnerable to anti-abortion violence: poor women and women under the age of majority. More specifically, the Act allows states to

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461. In Bray, Justice Souter purported to leave the question open whether § 1985(3) applies only to constitutional rights, and even suggested that the hindrance clause might apply to protect state statutory rights. Bray, 113 S. Ct. at 777 n.9 (Souter, J., concurring in the judgment in part and dissenting in part).

462. See Carpenters, 463 U.S. at 833-34 (suggesting that § 1985(3) action could be based on "conspiracy to deprive respondents of rights, privileges, or immunities under state law or those protected against private action by the Federal Constitution or federal statutory law") (emphasis added); Novotny, 442 U.S. at 389 n.5 (White, J., dissenting) ("I think it clear that § 1985(3) encompasses all rights guaranteed in federal statutes as well as rights guaranteed directly by the Constitution.").


466. Such would be the case with the proposed Freedom of Access to Clinic Entrances Act, discussed supra part IV.A. This was the approach taken by the court in Novotny. See 442 U.S. at 378 (denying a § 1983 action based on an alleged violation of Title VII of the Civil Rights Act of 1964); see also Golden State Transit, 493 U.S. at 106-07 (laying out such an analysis for § 1983 claims).

467. For arguments supporting the use of federal statutory law over the tenuous solutions created by Supreme Court precedent, see infra; see also Mary Becker, Conservative Free Speech and the Uneasy Case for Judicial Review, 64 U. Colo. L. REV. 975 (1993) (cautioning against relegating important questions to the judiciary and removing them from the legislature and other forums of popular discussion and consideration).

468. In fact, it is disagreement over restrictive amendments that has apparently delayed the Act's enactment. See Eliza Newlin Carney, NARAL's Legislative Box Score, 26 NAT'L J. 525 (Mar. 5, 1994).
require parental consent before a minor can obtain an abortion, and does not provide for the use of government funds to subsidize abortions for women on public assistance. In this regard, the very women who are most vulnerable to anti-abortion tactics (because they have fewer options if locked out of one clinic) are the same women who are least protected by the Freedom of Choice Act.

It would be more difficult to wage a successful constitutional challenge against the Freedom of Choice Act than against the Freedom of Access to Clinic Entrances Act. Congress has constitutional authority to enact the Freedom of Choice Act under the Commerce Clause and independently under § 5 of the Fourteenth Amendment.

Congress has power to enact the Freedom of Choice Act under the Commerce Clause because state and local restrictions on abortion impose significant burdens on interstate commerce and interfere with the freedom to travel. If states had the freedom to place restrictions on the legality of abortion, many women would be forced to travel across state or international borders in order to obtain legal abortion services. These migrations, which would resemble those that took place prior to Roe v. Wade, would place a tremendous strain both on the health care systems in the states that provide abortions and on the women themselves who are forced to travel. According to Professor Laurence Tribe, "[T]his is the sort of interstate economic effect that is beyond the control of any one State and is a proper subject for congressional regulation under the Commerce Clause." Additionally, attempts to restrict access to abortions affect interstate commerce by creating a black market for illegal abortions and influencing the commercial movement of medical supplies, contraceptives, and medical personnel. All of these effects serve as sufficient justifications for congressional power to regulate abortion.

Congress also has an independent source of power to enact the Freedom of Choice Act under § 5 of the Fourteenth Amendment because, under Planned Parenthood v. Casey, the right to abortion is still a liberty interest protected by the Fourteenth Amendment. As discussed above, § 5 of the Fourteenth Amendment grants Congress the power to legislate to enforce the provisions of the Fourteenth Amendment, including the liberty interests

470. Because the Freedom of Choice Act does so little for low-income women and minors, a large segment of the pro-choice community opposes the proposed Act as written. Id.
472. See id.
473. Id. at 18, 25.
474. Id. at 25.
475. Id. at 18-19, 25.
protected therein. Additionally, Congress has the power to legislate to protect women's freedom of travel, freedom of access to contraceptives—a fundamental right under Griswold v. Connecticut—and freedom from the harms caused by illegal abortion. Perhaps most critically, the Supreme Court, in Casey, recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Congress has the authority under § 5 of the Fourteenth Amendment to facilitate the constitutional protection of gender equality.

Finally, there are no constitutional impediments to the enactment of the Freedom of Choice Act. The Supreme Court has never even suggested that it would be unconstitutional to guarantee a woman's right to abortion; rather, the justices critical of Roe have merely argued that the right to an abortion is not one specifically protected by the Constitution. Even Justice Scalia, perhaps the most adamant abortion opponent on the Court, conceded in Casey that "the states may, if they wish, permit abortion-on-demand, but the Constitution does not require them to do so." Without a doubt, the Freedom of Choice Act is both constitutional and critically necessary.

C. The Equal Rights Amendment

What could an Equal Rights Amendment do for women's reproductive autonomy? It could create a new jurisprudence of reproductive rights, one that places women's rights to abortion under a mandate of equal protection rather than under the tenuous privacy right where it is presently located. It could establish a standard of strict scrutiny for gender discrimination, laws against abortion being one form of gender discrimination. Most importantly, if drafted correctly, it could create a right of equality for women protected against private and state interference, in a manner analogous to the way the right to racial equality is presently protected, thereby establishing an

478. 381 U.S. 479 (1965).
479. See S. REP. No. 42, supra note 471, at 12-18.
481. See S. REP. No. 42, supra note 471, at 28.
483. For a discussion of reproductive rights as a privacy rights see Casey, 112 S. Ct. 2791 (1992); Roe v. Wade, 410 U.S. 113 (1973). Proponents of the ERA in the past have compromised on the issue of abortion, conceding that the proposed amendment would not change the law of abortion because abortion was a matter of constitutionally protected privacy under Roe rather than a matter of Equal Protection. See The Impact of the Equal Rights Amendment: Hearings On S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 465 (1985) (prepared statement of John T. Noonan, Jr.). Nevertheless, as equal protection rationales for abortion rights are gaining in acceptance, it seems likely that ERA advocates might change their position on abortion as a women's equality right.
484. For an argument applying strict scrutiny to gender even in the absence of an ERA see John Galotto, Strict Scrutiny for Gender, via Croson, 93 COLUM. L. REV. 508 (1993).
indisputable claim for women seeking remedies against anti-abortion protestors under § 1985(3). All of these aspects could strengthen women's claims to constitutionally based reproductive rights when such rights are threatened by the violence and intimidation of the radical anti-abortion movement.

D. Advantages of Federal Statutes

There are several advantages to the use of a new federal statute or constitutional amendment over the use of already-existing federal law to target anti-abortion violence. First, a new statute or amendment would dispel any doubt that the actions of anti-abortion extremists are illegal and are not protected by the First Amendment. Second, the protection of women as established by federal statute rather than by judicial precedent may be more enduring. While judicially forged standards may change with the membership of the judiciary, clear legislative mandates, particularly with regard to criminal prohibitions, may have a greater potential to withstand changes in political currents. Finally, the public at large may possess a greater feeling of "ownership," and consequently respect for, laws that were enacted by democratically elected representatives rather than by appointed judges.

V. EXTRALEGAL MEANS OF STOPPING ANTI-ABORTION VIOLENCE

As demonstrated above, legal remedies are often inadequate in the battle against the army of anti-abortion activists. These activists often violate injunctions that have been issued, and even go to trial and to jail as an active means of publicizing their message. When courts do impose criminal sanctions, the penalties are often low and the sentences are typically brief.

When denied remedies by the courts, pro-choice activists have often taken to the streets to defend abortion rights. For example, in 1989, 300,000 pro-

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485. For a thorough overview of reasons for and potential benefits of an Equal Rights Amendment, see generally Barbara A. Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871 (1971).

486. For example, if the right to abortion were protected against both private and state interference, the Ku Klux Klan Act, described above, would provide a cause of action for women whose rights were being violated by anti-abortion demonstrators. It also would settle affirmatively the question of whether women are a protected category under the Act. See supra part III.B.

487. An example of this can be found in Supreme Court privacy doctrine. The constitutional right to abortion established in Roe v. Wade in 1973 was undermined during the course of the next twenty years to the point where the Supreme Court upheld highly restrictive limitations on abortion such as mandatory "informed consent," twenty-four hour waiting periods, and parental consent requirements in Planned Parenthood v. Casey. According to one commentator, "[H]ad Bush won the election, it is most likely that Roe would have fallen within the next four years." Becker, supra note 467, at 1015.

488. Id.

489. See id. at 976 ("The arguments supporting binding judicial review in a democracy remain uneasy . . . .")
choice activists marched in Washington,\(^\text{490}\) and in 1992, twice that number turned out, holding one of the largest demonstrations in Washington D.C.'s history.\(^\text{491}\) Although the work of pro-choice activists is very helpful and clearly essential at the current time in securing women's access to reproductive health services, this should not have to be the case. With other pressing problems facing women (rape and battery, to name but two examples) the resources dedicated to defending health clinics are a noticeable diversion from other important work.\(^\text{492}\) It would certainly benefit women if the government could protect our rights adequately. But, when the courts, the government, and already existing laws fail to protect women's rights, organizing collectively to protect them ourselves is a reasonable alternative.

A. Empowerment Through Activism

Across the country, hundreds of thousands of women and men mobilize to defend health clinics from anti-abortion protestors. Organized by groups such as NOW's Project Stand Up For Women Now, pro-choice activists are trained in non-legal and non-violent techniques of protecting clinics.\(^\text{493}\) Project Stand Up For Women Now is an international organization coordinated by the National Organization for Women with the goal of assuring women's access to safe and legal reproductive health care.\(^\text{494}\) Across the country, Project Stand Up for Women and other organizations, often associated with NOW, organize groups of pro-choice supporters to meet anti-abortion demonstrators at the clinics in order to forestall their attacks.\(^\text{495}\)

These organizations also try to coordinate information-gathering processes and defense strategies with local police and with the clinics themselves.\(^\text{496}\) Since groups like Operation Rescue benefit from the publicity they receive through mass arrests, pro-choice activists sometimes prefer to minimize the involvement of local police forces to the extent possible.\(^\text{497}\) But minimizing police involvement in the quest to protect women's right to choose can be both difficult and unwise. Usually, the problem seems to be one of too little, rather than too much police protection.

\(^{490}\) See BONAVOGLIA, supra note 16, at xxi.
\(^{491}\) Id.
\(^{492}\) That is not to say that there is no benefit to the process of organizing at women's health clinics. Many women have reported that their experiences at pro-choice clinic defense activities are positive and empowering. The abortion-rights movement also benefits women by uniting them in pursuing a goal that is shared by the vast majority of U.S. women, regardless of ethnicity, race, religion, sexual orientation, and political party affiliation. See, e.g., LUKER, supra note 25 (discussing women in the abortion rights movement).
\(^{493}\) See NOW GUIDELINES, supra note 33.
\(^{494}\) See id. at 2.
\(^{495}\) See id.
\(^{496}\) See id. at app. (providing sample letters to local police forces and to local women's health clinics).
\(^{497}\) See id. at 3.
Women have begun to increase their efforts to coordinate with the police and to use government power to their advantage. In addition to working toward the passage of new laws on both the state and federal level, women have been lobbying to elect pro-choice candidates and influence government policy choices. Women can benefit from working for change from both within and without the system—judicially, legislatively, and socially. Only by advancing on every front can we vindicate our rights as women to control our future.

B. Legalization of RU-486

Until recently, the United States enforced a ban on the French “abortion pill” commonly known as RU-486. This ban was instituted by the Bush administration, at the urging of anti-abortion organizations. This oral abortifacient, effective only in the early weeks of pregnancy, works either by preventing the implantation of a fertilized egg or by causing the womb to shed its lining along with the forming fetus. RU-486 itself is an “antiprogestin that causes an abortion by cutting off blood flow to the embryo, which is then flushed out by contractions of the womb.” It is used generally in conjunction with a “prostaglandin, to speed the ejection of the embryo by inducing stronger contractions.”

Immediately following his inauguration, President Clinton lifted several abortion-related bans and paved the way for testing and marketing of the drug in the United States.

Because RU-486 can be administered in a doctor’s office as well as in a clinical setting, it may provide a means for many women to avoid the harassment and violence of anti-choice protesters. In France, one-third of

498. See, e.g., Lisa Richwine, Women’s Group Offers $20,000 Reward for Bombing of Texas Clinic, STATES NEWS SERVICE, Mar. 5, 1993 (describing how the Feminist Majority Foundation collected funds to offer a large reward for information about an arson attack on an abortion clinic in Corpus Christi, Texas).


500. See id. at 461-63.

501. Deal Seen on Abortion Pill, N.Y. TIMES, Nov. 15, 1993, at A12. Notably, Operation Rescue’s position was based on such unfounded assumptions about women as that making the alternative of RU-486 available would “encourage” women to have abortions. See, e.g., Tamar Lewin, Plans for Abortion Pill Stalled in U.S., N.Y. TIMES, Oct. 13, 1993, at A17. Since the medical profession largely supports the testing of RU-486 in the United States, it could hardly be asserted that the ban on the pill has anything to do with concern for women’s health. See Allison Carper, RU-486 on Trial: Abortion Pill Debate Heats Up with Approach of U.S. Test, NEWSDAY, Oct. 10, 1993 (citing the National Academy of Sciences for the position that RU-486 is so safe and effective that no clinical trials in the United States are needed prior to its entrance in the U.S. market).


503. Lewin, supra note 501.

504. Id.

abortions are done using RU-486 in combination with prostaglandin. At least 150,000 women have taken RU-486 in France, Great Britain, and Sweden, where the pill is dispensed by government-run health clinics. Not surprisingly, “[a]bortion foes have threatened to boycott the drug-makers’ other products if the pill is distributed in the United States.” Nonetheless, it seems likely that the drug will be made available in the United States in the near future.

In fact, the researcher who developed RU-486, Dr. Etienne-Emile Baulieu, has already “reached a preliminary agreement with his former employer, Roussel-Uclaf, [the company that makes the pill], and its parent company, the German chemical giant Hoechst AG, [which would allow Baulieu] to set up a pharmaceutical concern” consisting of a group of scientists to make and distribute RU-486 in the United States as soon as the pill receives FDA approval.

In the past, apparently due to pressure from boycotts threatened by anti-abortion groups, the German company had been hesitant to allow Roussel to move towards marketing the drug in the United States, but allegedly after “pressure from the F.D.A.,” Hoechst agreed to look for a third party to distribute the pill in the United States, and eventually decided to “allow the Population Council, a nonprofit research group based in New York, to find an American manufacturer for the drug, conduct clinical tests and win Government approval to sell the drug in the United States.” Even though the FDA has declared that no trials would be necessary prior to the introduction of RU-486, and has pledged to expedite an application to sell RU-486 in the United States, the drug’s manufacturers continue to delay completion of the contract with the Population Council.

506. OUR BODIES, OURSELVES, supra note 16, at 375. Experts claim that the fact that the drug is used by a greater percentage of women in France than in Britain and other countries is a reflection on those countries’ national health care systems. In France, abortion is legal only during the first twelve weeks of pregnancy, so doctors are accustomed to providing abortions quickly. In Great Britain, on the other hand, “abortion is legal through the second, and in some cases, third, trimester,” so that means of providing speedy abortions is not a priority in public hospitals. Carper, supra note 501. The United States’s decisions on national health care and the plan’s provision of abortion services will undoubtedly affect the availability of RU-486 in the United States. Some sources reveal that President and Hillary Rodham Clinton plan to include abortion coverage in the proposed national health care plan (with exemptions for health care workers who are “morally opposed”), although the recent failure to retract the Hyde Amendment, which prohibits the use of federal funds, may be foreshadowing a national health care package that covers abortions may be difficult to pass through Congress. Beyond the Abortion War, ATLANTA CONST., Sept. 29, 1993, at A12. RU-486, a prescription drug, seems certain to be covered by the plan. Id.

507. Deal Seen on Abortion Pill, supra note 501.
508. Id; see also Cimons, supra note 505.
513. Lewin, supra note 501.
514. Id.
RU-486 has several other potential medical purposes. For example, scientists have discovered that it could be used as a form of birth control, to alleviate some pregnancy complications, and to treat cancer and benign brain tumors.\textsuperscript{515} The FDA has approved clinical tests of the drug for women with advanced breast cancer.\textsuperscript{516} "The tests will be conducted by the Breast Center and Cancer Institute at Long Beach Memorial Medical Center, using as subjects [forty] women whose cancer has spread beyond the breast" and who "have responded in the past to some form of hormonal cancer treatment."\textsuperscript{517} The drug works in breast cancers with a progesterone receptor by going into the cells and turning off the mechanism that causes cell division.\textsuperscript{518} While its side effects are said to be less severe than those of chemotherapy, it may still cause nausea, vomiting, fatigue and rashes.\textsuperscript{519} It is possible that approval of RU-486 for purposes of treating cancer may accelerate the arrival of its availability as a substitute for surgical abortion in the United States.

RU-486, while considered relatively safe, carries a risk of severe side effects, such as severe abdominal cramps, dizziness, diarrhea, vomiting, and a risk of hemorrhaging that is twice as great as that with surgical abortions.\textsuperscript{520} Although RU-486 has been labeled a drug of "convenience,"\textsuperscript{521} in reality its use is far from convenient. While RU-486 works immediately to block the action of progesterone, and thereby prevent or dislodge the implantation of a fertilized egg, it may take the prostaglandin administered in the second step several hours, or in rare cases days, to cause the fertilized egg to be expelled.\textsuperscript{522} During this waiting period, women experience contractions that are so severe that one-third "ask to be injected with a pain reliever."\textsuperscript{523} "In the late 1980's, during clinical trials in France, prostaglandin was blamed for the heart attack and death of a thirty-one year old woman" who was a heavy smoker in her thirteenth pregnancy.\textsuperscript{524} Some studies have linked prostaglandin with "long-term damage to body metabolism, the central nervous system and future pregnancies," as well as a suppressed immune system.\textsuperscript{525} Thus, while RU-486 may allow a woman to avoid the risks of attempting to enter a blockaded abortion clinic or of undergoing anesthesia, the administration of RU-486 may require considerably more time, risk and pain than a surgical abortion, which generally takes only fifteen minutes and has no known long-term side effects.\textsuperscript{526}

\textsuperscript{516} Abortion Pill Approved for Breast Cancer Test, N.Y. TIMES, Nov. 19, 1993, at A20.  
\textsuperscript{517} Id.  
\textsuperscript{518} Id.  
\textsuperscript{519} Id.  
\textsuperscript{520} OUR BODIES, OURSELVES, supra note 16, at 375.  
\textsuperscript{521} See Lewin, supra note 501.  
\textsuperscript{522} See Carper, supra note 501.  
\textsuperscript{523} Id.  
\textsuperscript{524} Allison Carper, Pill's Unlikely Opponents, NEWSDAY, Oct. 10, 1993, at 63.  
\textsuperscript{525} Id. These links are disputed. Id.  
\textsuperscript{526} See Carper, supra note 501.
Even if the introduction of RU-486 in the United States is blocked, it is possible that other, similar oral abortifacients may become available in the near future. After all, RU-486 was invented once; as a chemical compound, it certainly can be re-invented or at least simulated. For example, at least one abortion rights organization has announced that a laboratory has illicitly produced a number of doses of the drug. This group, Abortion Rights Mobilization, has stated its intention to attempt "to test it under a little-used state law." The group is hoping to test their version of the drug on "a couple thousand women in New York," in an attempt to pressure Roussel to enter the U.S. market. Its leader contends if Roussel continues to delay its contracts with the Population Council or a different organization, the group will attempt to take the patent "for the public good." If this were indeed possible, this route may lead to the most favorable results for U.S. women, allowing market competition for RU-486 to drive down the drug’s price and make the drug more widely available.

Even more promising is the research being done at the highly acclaimed University of California at San Francisco. There, two scientists have revealed that two drugs, already approved by the FDA for other purposes, can successfully terminate a pregnancy in its early stages when used together. In their study, seven out of ten pregnant women had uncomplicated miscarriages after receiving a low dose of methotrexate, a commonly used chemotherapy agent that has also been used to induce abortions in cancer patients, "followed by misoprostol, an artificial hormone also used to induce uterine contractions after a woman takes RU-486."

Like RU-486 "methotrexate ‘destabilizes’ the lining of the uterus,” and "misoprostol, an artificial version of the hormone prostaglandin, causes the uterus to expel both the lining and the fetus.” Methotrexate and misoprostol may serve as a highly viable means of obtaining an abortion for women who do not have a lot of money or who live far from abortion clinics. Unlike RU-486, which will cost at least $200, and traditional suction abortions, which cost even more, methotrexate costs less than four dollars a dose, and misoprostol costs less than two dollars per dose. Since the drugs are available by prescription at any pharmacy, use of the drugs may help women who live in rural America where surgical abortions “are largely

527. Lewin, supra note 501.
528. Id.
529. Id.
530. Id.
531. See Ronald Kotulak, An Option to Surgical Abortions? Scientists See Promise with Already Available Drugs, CHI. TRIB., Oct. 22, 1993, at N1. The initial study had fifty subjects, but the researchers plan to expand the study to one involving “thousands of American women.” Id.
533. Id.
534. Abortion is available in only 17% of counties in the United States. See Kotulak, supra note 531.
535. See Krieger, supra note 16.
off-limits.” Finally, this new pharmaceutical combination possesses an advantage that even RU-486 lacks: a woman can have an abortion in the privacy of her own home, in the company of friends and family, and far from doctors and clinics. In fact, all fifty of the women in the initial study in San Francisco chose to have their abortions at home, since there was no “need for them to be watched at a doctor’s office.”

Nevertheless, this new method of abortion is still controversial, and critics on both sides of the abortion debate have pointed to risks and shortcomings associated with the use of methotrexate and misoprostol. For example, the new method, with an estimated success rate of eighty percent, is not as effective as RU-486, which historically has been about ninety-six percent effective in causing abortions. Nonetheless, in the cases where the fetus and placenta are not completely expelled by the drug treatment, the surgical procedure necessary to complete the abortion is “less invasive than a complete [fully surgical] abortion and can be performed by most gynecologists.”

Another argument against the use of methotrexate and misoprostol is fear of the drugs' toxicity, methotrexate in particular. Methotrexate works by killing fast-growing cells and is currently used to treat breast cancer, leukemia, rheumatoid arthritis, and a skin condition called psoriasis. It is also used to treat cancerous as well as ectopic pregnancies, a condition in which the embryo grows outside the womb, which occurs in an estimated one in eighty pregnancies and is life-threatening for the mother. Because of its toxicity, both pro-choice and anti-choice individuals caution against the use of the drug, stating that methotrexate has been linked to the death of patients in the past. Still, women in the San Francisco study had few side effects: they bled for ten days and suffered from nausea, diarrhea, and cramps (although the cramping was easily relieved by over-the-counter pain

536. Id.
537. Id.
538. Id.
539. See Kotulak, supra note 531.
540. Id.
541. Id.; Krieger, supra note 16.
542. See Kotulak, supra note 531.
543. For example, Mary Beth Bonacci of United For Life criticized the drugs from basically a feminist viewpoint: “If you want to help women, invading their bodies with a drug, especially a drug as powerful as chemotherapy with God only knows what side effects, to kill their children just doesn’t strike me as really getting at the heart of women’s problems or women’s issues or what women really need.” Craig Heaps, New Pill Might Mean Cheap Abortions and Stormy Politics, CNN, Oct. 19, 1993. Not all anti-choice spokespersons are equally articulate or as visibly concerned with women’s health when it comes to these experimental drugs: “We’re concerned about any studies that are perfecting the killing of a human being. . . . And there is the risk of more direct psychological impact on the mother, immediately or years later, when she is more involved in the killing, because it is not a surgical procedure.” Krieger, supra note 16 (quoting Jan Carroll, Associate Western Director of the National Right to Life Committee).
544. See Allison Carper, Existing Drugs Induced Abortions; But Some Warn About Toxicity, NEWSDAY, Oct. 22, 1993, at 7 (quoting Dr. Hakim Elahi, the medical director of Planned Parenthood of New York City as saying that the unpredictable side effects in addition to its overly toxic nature would convince him not to use methotrexate as an abortion drug in any case).
killers).\textsuperscript{545} Although both methotrexate and misoprostol have been approved by the FDA for other purposes, the use of these drugs for abortion purposes will probably not be approved by the FDA within the next year.\textsuperscript{546}

Even if the use of RU-486 or one of its chemical substitutes becomes available in the United States soon, these drugs will not solve the problems caused by the radical anti-abortion movement. For example, RU-486 is most effective only when used within the first nine weeks of pregnancy and when followed forty-eight hours after ingestion of prostaglandin.\textsuperscript{547} For this reason, unlike most surgical abortions, the administration of RU-486 generally requires two trips to the clinic or the doctor’s office. This can create hardships for women who work, who have children, or who live far from a doctor’s office. If anti-choice forces decide to picket doctor’s offices as well as abortion clinics, the women who select drug-induced abortions are no better off than those who select surgical abortions.

With the risk of violence escalating at abortion clinics, women may feel compelled to undergo these risks as a means of obtaining safe abortions. Ideally, women should have a choice of their abortion method. While RU-486 and its potentially risky substitutes may lessen the damage caused by anti-choice protesters on thousands of women, it will not make anti-abortion violence go away.

C. Prevention of Unwanted Pregnancies

“The best way to stop an abortion is to stop an unplanned pregnancy,” our new Surgeon General, Dr. Joycelyn Elders, has testified.\textsuperscript{548}

If Medicaid does not pay for abortions, does not pay for family planning, but pays for prenatal care and delivery, that’s saying: “I’ll pay for you to have another good, healthy slave, but I won’t pay for you to use your brain and make choices for yourself” * * * If you are poor and ignorant, you are a slave.\textsuperscript{549}

Dr. Elders has repeatedly pledged that her biggest priority while in office as Surgeon General is to reduce or eliminate unwanted and unplanned pregnancies.\textsuperscript{550} Undoubtedly, she has the right idea.

\textsuperscript{545} See Kotulak, \textit{supra} note 531.
\textsuperscript{546} Krieger, \textit{supra} note 16.
\textsuperscript{547} See \textit{OUR BODIES, OURSELVES}, \textit{supra} note 16, at 375.
\textsuperscript{549} Id.
Ideally, there should be less of a need for abortion services. We can move closer to a society where all pregnancies are planned by devoting more resources to making planned pregnancies the only kind of pregnancies that occur. According to one commentator, citing statistics collected by the National Center for Health Statistics, twenty percent of all babies born in the United States—totaling fourteen million people—would not have been born if their mothers had given birth only to those babies that they wanted at the time in which they became pregnant. Dr. Elders asserts that as many as sixty percent of all children born in the United States are “unplanned and unwanted.”

These births do not result from nonuse of birth control alone; from 1.2 to 3 million unintended pregnancies in the United States yearly result either from the failure of a trusted birth control method, such as diaphragms, IUDs, the sponge, foam, and the Pill, or from human error in using these methods incorrectly. One study performed on the postpartum floor of a large New York City hospital revealed that forty-eight percent of all new mothers interviewed claimed that their pregnancies had been completely unplanned. Often these mothers are children themselves; over one million teenagers get pregnant annually in the United States.

Birth control must be made available to all women who desire to use it. Men must also be explicitly encouraged to take responsibility for the use of birth control, and for the economic and social burdens that accompany both planned and unplanned pregnancies. Eventually, better sex education in schools, more complete health care services, a system of better health care resources and information, or a combination of all three, may improve the currently bleak situation. Although President Clinton and Hillary Rodham Clinton, as well as Secretary of Health and Human Services Donna Shalalala and Surgeon General Elders, have promised to institute such changes, it is yet to be seen whether this country will soon (or ever) improve in any of these respects. One can only hope that President Clinton will follow through on his promise to deliver a comprehensive system of national health care—one that encompasses contraception as well as abortion.

552. See Nomination of Elders, supra note 548, at S11,005.
553. BONAVOGLIA, supra note 16, at xxx.
554. See STOLTENBERG, supra note 551, at 96.
555. See BONAVOGLIA, supra note 16, at xxxi.
556. Even in the age of AIDS, studies consistently report that men continue to refuse to use condoms. See Christine Gorman, Health: A Woman's Way to Make Sex Safer, TIME MAGAZINE, May 10, 1993, at 58 (describing the new “female condom,” designed particularly for the 80% of women whose male partners refuse to wear condoms).
557. Congress is currently debating whether and how to ensure that women receiving Title X funds are informed of their reproductive options. See Providing for Consideration of H.R. 670, Family Planning Amendments Act of 1993, 139 CONG. REC. H1602-03, 103d Cong., 1st Sess. (Mar. 25, 1993).
558. Some commentators are optimistic that the Clinton administration will deliver such a system. See, e.g., Beyond the Abortion War, ATLANTA CONST., Sept. 29, 1993, at A12.
VI. CONCLUSION: EXPOSING AND STOPPING ANTI-ABORTION VIOLENCE

Even with organized legal and extralegal efforts to secure women’s reproductive autonomy, anti-abortion forces have made a real dent in the availability of abortion services in the United States. While abortion is still technically legal (with restrictions), the anti-abortion crusade’s relentless harassment, violence, intimidation, publicity, and litigation has gone far towards making abortion a de facto impossibility for much of the female population.

Existing legal remedies are grossly inadequate to remedy the larger social problems that lay at the heart of the battles waged at clinic entrances. It will take more than a federal injunction to remedy the antagonism towards women’s autonomy espoused by many anti-abortion activists. Still, federal remedies are the best we have, if the courts would recognize that women’s problems are “federal issues.”\(^{559}\) The social and legal rules which govern our culture were not created by women. The very fact that women were excluded from virtually all legal decision-making\(^ {560}\) undermines our efforts to protect and exercise our rights. As long as courts continue to dismiss the application of existing laws in attempts to ensure reproductive freedom on the basis that the laws were not written with such purposes in mind, women will have to continue to fight outside of the courthouse.

This article began with the voices of women who have been injured by anti-abortion violence. With any luck, in the near future, those voices will be heard in the federal courts—articulating problems that belong uniquely to women, yet are worthy of national concern.

\(^{559}\) Cf. Resnik, supra note 32 (describing ways in which women are excluded from standing in the federal courts).

\(^{560}\) See, e.g., Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1281-83 (1991) (describing the lack of opportunity afforded to American women to participate in the drafting of the U.S. Constitution and the civil rights laws).