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# **BRAY v. ALEXANDRIA WOMEN'S HEALTH CLINIC: ABORTION PROTESTORS ARE NOT LIABLE UNDER THE KU KLUX KLAN ACT**

SUE MOTA\*

## INTRODUCTION

Abortion protest has become the largest and, perhaps, the most visible civil disobedience campaign in American history.<sup>1</sup> Many protestors who have illegally blockaded abortion clinics have been arrested and charged under state criminal law and sued civilly by abortion clinics under state trespass and nuisance laws.<sup>2</sup> In addition, these protestors have been subject to suit by abortion clinics under the Ku Klux Klan Act<sup>3</sup>

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<sup>1</sup> See Phillip F. Lawler, *An Issue This Paper Can't Sidestep*, WALL ST. J., Aug. 29, 1991, at A13; see also Robin Toner, *Die-Hards in Opposite Camps on Abortion Fight on After Battle-ground Deserts Them*, N.Y. TIMES, July 25, 1993, § 4, at 3 (discussing current status of abortion protest); David A. Gardey, *Federal Power to the Rescue: The Use of § 1985(3) Against Anti-Abortion Protestors*, 67 NOTRE DAME L. REV. 707 (1992) (discussing use of civil disobedience).

<sup>2</sup> See *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991) (plaintiffs claimed trespass, nuisance, and interference with business under state law); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.) (plaintiffs claimed trespass and interference with business relations under state law), *cert. denied*, 493 U.S. 901 (1989); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) (plaintiff claimed nuisance, conspiracy, and negligence under state law).

<sup>3</sup> 18 U.S.C. §§ 371-372 (1988); 42 U.S.C. §§ 1983, 1985 (1988). See, e.g., *Lucero v. Operation Rescue*, 954 F.2d 624 (11th Cir. 1992) (protestors sued by gynecologist and patients under Ku Klux Klan Act) (the "Act"); *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d at 218 (abortion clinic brought action against abortion protestors pursuant to Act);

(the "Act") and the Racketeer Influenced and Corrupt Organizations Act.<sup>4</sup>

On January 13, 1993, in *Bray v. Alexandria Women's Health Clinic*,<sup>5</sup> the United States Supreme Court held that the Act does not provide a federal cause of action for abortion clinics. First, this Article briefly discusses the Act and then analyzes the *Bray* decision in detail. Finally, it examines a bill recently enacted by the United States Congress which subjects certain abortion protestors to both federal civil and criminal penalties.

### I. THE KU KLUX KLAN ACT - 42 U.S.C. § 1985(3)

In 1871, Congress passed a civil rights act which commonly became known as the Act.<sup>6</sup> Abortion protestors have been routinely sued under the provisions of the Act, specifically § 1985(3) which provides, in pertinent part, that "[i]f two or more persons . . . conspire or go in disguise on the highway or . . . premises of another, for the purpose of depriving . . . any person or class of persons of . . . equal protection . . . or . . . privileges and immunities," the injured party may recover "against any one or more of the conspirators."<sup>7</sup>

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Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) (protestors of abortion clinic sued under Act); National Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989) (holding anti-abortion related services constituted violation of Act), *cert. denied*, 495 U.S. 947 (1990); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989) (finding no evidence to support claim against abortion protestors under Act); Roe v. Abortion Abolition Soc'y, 811 F.2d 931 (5th Cir.) (determining plaintiffs not in class sought to be protected under Act), *cert. denied*, 484 U.S. 848 (1987); Upper Hudson Planned Parenthood, Inc. v. Doe, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063 (N.D.N.Y. Sept. 16, 1991) (plaintiffs sought injunction under Act); Planned Parenthood Ass'n. v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991) (holding women seeking abortions are class protected under Act); Southwestern Medical Clinics v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) (granting plaintiffs injunctive relief due to likelihood of success under Act); Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989) (holding women are class protected by Act).

<sup>4</sup> 18 U.S.C. §§ 1961-1968 (1988). *See, e.g.*, National Org. for Women v. Scheidler, 114 S. Ct. 798 (1994) (holding Racketeer Influenced and Corrupt Organizations Act ("RICO") applies to suits against abortion protestors); Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991) (upholding RICO conviction).

<sup>5</sup> 113 S. Ct. 753 (1993), *rev'g in part, vacating in part* National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990).

<sup>6</sup> *See* 18 U.S.C. §§ 371-372; 42 U.S.C. §§ 1983, 1985.

<sup>7</sup> 42 U.S.C. § 1985(3). Section 1985(3) states in full:

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; or if two or more persons conspire to prevent by

In 1971, in *Griffen v. Breckenridge*, the United States Supreme Court held that § 1985(3) is not limited to state action, but, rather, encompasses private conspiracies that involve “invidiously discriminatory motivation” aimed at “a deprivation of the equal enjoyment of rights secured by the law to all.”<sup>8</sup> The Court stated that Congress had the power to punish private conspiracies under its power to regulate interstate travel, as well as under the Thirteenth Amendment of the United States Constitution.<sup>9</sup>

However, recently in *Bray v. Alexandria Women's Health Clinic*,<sup>10</sup> the Supreme Court held that § 1985(3) did not provide a federal cause of action for persons attempting to recover damages from protestors who obstruct access to abortion clinics.<sup>11</sup> In *Bray*, several abortion clinics and organizations (the “Plaintiffs”) failed to demonstrate that abortion protest is equivalent to racial discrimination as a class-based, invidiously discriminatory animus which motivated the protestors’ actions.<sup>12</sup> The Court found that the demonstrations by Operation Rescue and other individuals (the “Defendants”) were not specifically targeted toward women, but, rather, were intended to protect the victims of abortion, to stop the practice of abortion, and to reverse the legalization of abortion.<sup>13</sup> Indeed, it was noted that many common and respectable reasons for oppos-

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force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; 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.

*Id.*

<sup>8</sup> 403 U.S. 88, 102 (1971). This case was remanded to determine the purpose of the conspiracy. *Id.* at 107.

<sup>9</sup> *Id.* at 104-06. In *Griffen*, the court found that the defendants, white citizens of Mississippi, “wilfully . . . and maliciously conspired . . . to block the passage of [the] plaintiffs,” Negro citizens of Mississippi, in order to stop and detain them, and, ultimately, to injure them with deadly force. *Id.* at 90. The defendants “wilfully . . . and maliciously . . . assaulted . . . the . . . plaintiffs by pointing firearms and wielding deadly blackjacks, pipes or other kind[s] of clubs, while uttering threats to kill and injure [the] plaintiffs . . . and club[bing] each of [them] on . . . the head, severely injuring all of them.” *Id.* at 91.

<sup>10</sup> 113 S. Ct. 753.

<sup>11</sup> *Id.* at 768.

<sup>12</sup> *Id.* at 758.

<sup>13</sup> *Id.* at 760.

ing abortion exist other than presenting a derogatory view of women as a class.<sup>14</sup>

## II. SUMMARY OF *BRAY V. ALEXANDRIA WOMEN'S HEALTH CLINIC*

*Bray* was filed in the United States District Court for the Eastern District of Virginia under the name of *NOW v. Operation Rescue*,<sup>15</sup> when several abortion clinics and organizations sued Operation Rescue and other individuals who were opposed to abortions and "deeply committed to taking active steps to advance their views"—steps which often included rescue demonstrations.<sup>16</sup> At one particular "rescue," the demonstrators, or "rescuers," intentionally trespassed on an abortion clinic's premises with the intent to block its entrances and exits, thereby effectively closing the clinic.<sup>17</sup>

Periodically during November 1989, the Defendants planned a series of rallies, meetings, and rescues which prompted the Plaintiffs' action.<sup>18</sup> The Plaintiffs claimed trespass, tortious interference with business relations, and public nuisance under state law. In addition, pursuant to 42 U.S.C. § 1985(3), the Plaintiffs alleged that the Defendants conspired to deny women their constitutional rights to travel, privacy, and abortion services.<sup>19</sup> On November 9, 1989, the district court

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<sup>14</sup> *Id.* The court noted that this is evident from the fact that there are men and women on both sides of the petitioners' demonstrations. *Id.*

<sup>15</sup> *NOW v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, *rev'd in part, vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753.

<sup>16</sup> *Id.* at 1488. The plaintiffs included abortion clinics in the District of Columbia, Maryland, and Virginia, including the Alexandria Women's Health Center, along with other organizational plaintiffs, including the National Organization for Women (the "Plaintiffs"). *Id.* at 1487. The defendants included Operation Rescue, Randall Terry, the founder of Operation Rescue, and Michael and Jayne Bray, who organized rescues in the Washington metropolitan area (the "Defendants"). *Id.* at 1488. See John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991) (discussing Operation Rescue's historical background and several major theories regarding civil disobedience).

<sup>17</sup> *NOW v. Operation Rescue*, 726 F. Supp. at 1487. All the Defendants "share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." *Id.* at 1488. "No one has put this point any better than Defendant Terry, who in an affidavit, states that 'while the child-killing facility is blockaded, no one is permitted to enter past the rescuers.'" *Id.* "Operation Rescue's literature defines 'rescuers' as *physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *Id.* at 1488 (citation omitted) (emphasis in original). At one of the largest rescues in the area in 1988, rescuers trespassed and physically blocked entrances and exits to the abortion clinic, defaced signs, damaged fences, and blocked the abortion clinic's parking lot by parking a car in the lot entrance and deflating its tires. *Id.* at 1489-90.

<sup>18</sup> *Id.* at 1490.

<sup>19</sup> *Id.* at 1490-91.

granted a temporary restraining order prohibiting rescue activities in northern Virginia during the effectiveness of the order.<sup>20</sup>

On December 6, 1989, the district court granted a permanent injunction. However, the injunction did not apply nationwide and did not extend to activities that merely expressed views on the issue of abortion.<sup>21</sup> Pursuant to 42 U.S.C. § 1985(3), the district court based its permanent injunction on the deprivation of the right to travel. However, the court expressed no opinion on the merits of the Plaintiffs' argument, based on the asserted fundamental right to an abortion.<sup>22</sup>

In September 1990, the Court of Appeals for the Fourth Circuit affirmed the judgment of the district court.<sup>23</sup> The court held that, though the Defendants' activities were designed to express their beliefs, they had "crossed the line from persuasion [to] coercion."<sup>24</sup> The Fourth Circuit, like the district court, found that the Defendants' activities infringed upon women's right to travel and, thus, constituted a violation of 42 U.S.C. § 1985(3).<sup>25</sup> The Fourth Circuit also failed to reach the issue of whether 42 U.S.C. § 1985(3) applied to an asserted violation of the right of privacy.<sup>26</sup>

In October 1991, the Supreme Court granted certiorari in *Bray v. Alexandria Women's Health Clinic* and heard oral arguments without

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<sup>20</sup> See *NOW v. Operation Rescue*, 914 F.2d 582, 584 (4th Cir. 1990).

<sup>21</sup> *NOW v. Operation Rescue*, 726 F. Supp. at 1498. The court held that nationwide injunctive relief was "overbroad" and that "variation in state laws" coupled with difficulty in enforcing such an injunction militated against granting such an injunction. *Id.* at 1497. The court noted that "Defendants have a significant First Amendment right to express their views on the . . . issue of abortion and nothing in the permanent injunction should be construed to limit that right." *Id.* Anyone violating the injunction would be subject to imprisonment and fined \$1,500. *Id.* at 1498.

<sup>22</sup> *Id.* at 1493-94. The court noted that the right to travel includes the right to "unobstructed interstate travel to obtain an abortion and other medical services." *Id.* at 1493 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)). The court found that the "conspiracy . . . effectively deprive[d] organizational [P]laintiffs' non-Virginia members of their right to interstate travel." *Id.* The district court found a cause of action for injunctive relief under the state claims of trespass and public nuisance, and did not reach the merits of the tortious interference with business relationships claim. *Id.* at 1495. Moreover, the Plaintiffs did not allege facts sufficient to establish that cause of action. *Id.* Because there were other grounds available upon which to decide the case, the court declined to address the constitutional issue of whether the rescue demonstrations infringed on the Plaintiffs' constitutional right to obtain an abortion. *Id.* at 1494.

<sup>23</sup> *NOW v. Operation Rescue*, 914 F.2d at 582.

<sup>24</sup> *Id.* at 585 (citing *NOW v. Operation Rescue*, 726 F. Supp. at 1492-93).

<sup>25</sup> *Id.* at 585-86.

<sup>26</sup> *Id.* at 586. In addition, the Fourth Circuit affirmed the district court's refusal to broaden the scope of the injunction to include activities that tend to intimidate, harass, or disturb patients or potential patients. In the court's view, such an expansion would risk enjoining activities clearly protected by the First Amendment. *Id.*

Justice Thomas present.<sup>27</sup> Further arguments were heard by the full Court in October 1992.<sup>28</sup> On January 13, 1993, the Court decided that 42 U.S.C. § 1985(3) did not provide a federal cause of action against persons obstructing access to abortion clinics.<sup>29</sup>

Writing for the Court, Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Kennedy, and Thomas, explained that to prove a private conspiracy in violation of the first clause of 42 U.S.C. § 1985(3), commonly known as the "deprivation" clause, a plaintiff must show that "some racial or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action."<sup>30</sup> Moreover, the plaintiff must show that the conspiracy was aimed at interfering with rights that are protected against both private and official encroachment.<sup>31</sup> The Court held that neither element was proven by the Plaintiffs.<sup>32</sup>

The Court dismissed the Plaintiffs' assertion that opposition to abortion qualifies as an "otherwise class-based, invidiously discriminatory animus" tantamount to racial discrimination.<sup>33</sup> Rejecting the district court's opinion, the Court held that women seeking abortions do not qualify as a class within the meaning of § 1985(3).<sup>34</sup> In its view, the class requirement "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors."<sup>35</sup> To rule otherwise, the Court explained, would allow innumerable tort plaintiffs to bring a § 1985(3) claim simply by defining a "class" as individuals engaging in an activity that the defendants disagreed with. This result would thus improperly convert a § 1985(3) claim into a general, federal tort claim.<sup>36</sup> According to the Court, the goal of preventing abortion did not deserve "such harsh description" or "derogatory association with racism."<sup>37</sup>

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<sup>27</sup> 60 U.S.L.W. 3331 (U.S. Nov. 5, 1991).

<sup>28</sup> 61 U.S.L.W. 3295 (U.S. Oct. 20, 1992).

<sup>29</sup> *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. at 759.

<sup>30</sup> *Id.* at 758 (quoting *Griffen v. Breckenridge*, 403 U.S. at 102). *See supra* notes 8-9 and accompanying text (discussing *Griffen*).

<sup>31</sup> *Bray*, 113 S. Ct. at 758 (quoting *United Bhd. of Carpenters & Farmers of Am. v. Scott*, 463 U.S. 825, 833 (1983)).

<sup>32</sup> *Id.* at 759.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 113 S. Ct. at 759. The rescues were not directed specifically at women, but, more precisely, at the goal of stopping abortion and reversing its legalization. *Id.* Moreover, men and women stand on both sides of the abortion issue, and both sexes demonstrate unlawfully against abortion. *Id.* at 760.

<sup>37</sup> *Id.* at 762.

After analyzing the second requirement of a private conspiracy, the Court rejected the Plaintiffs' assertions that the rescuers attempted to interfere with the constitutional rights that protect against private encroachment.<sup>38</sup> While the Plaintiffs and lower courts based their arguments on the right to interstate travel, a right which is constitutionally protected in some contexts, the Court concluded that the Defendants' opposition to abortion existed regardless of the relationship between the abortion and interstate travel.<sup>39</sup> Indeed, further rescues do not and would not affect the right to travel from state to state.<sup>40</sup> Moreover, the Court summarily held that the deprivation of the right to an abortion cannot form the basis of a purely private conspiracy.<sup>41</sup>

Justice Souter concurred in part and dissented in part.<sup>42</sup> He agreed with the majority's interpretation of the "deprivation" clause of 42 U.S.C. § 1985(3) and its conclusion that abortion protesters do not fall within its provisions.<sup>43</sup> However, Justice Souter stated that the Court should have considered the second clause of 42 U.S.C. § 1985(3), commonly known as the "prevention" clause.<sup>44</sup> The prevention clause sanctions conspiracies that prevent the constitutional authorities of any state from giving or securing equal protection to all of its citizens. The Plaintiffs' request at the reargument to file a supplemental brief on the prevention clause was denied. Justice Souter, however, voted to grant the request, arguing that the prevention clause should not be interpreted as narrowly as the

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<sup>38</sup> *Id.* at 760.

<sup>39</sup> *Id.* at 763. The Court noted that it "does not suffice for application of § 1985(3) that a protected right be incidentally affected." *Id.* at 762. It "must be a conscious objective of the enterprise" to deprive a protected right. *Id.* The Court held that there was no conspiracy to violate the right of interstate travel. *Id.*

<sup>40</sup> *Id.* at 762-63. The only actual barriers raised by the rescues affect intrastate, not interstate, travel. *Id.* at 763. Even if such barriers were raised intentionally against travelers from other states, they would have to be discriminatorily applied against such travelers. *Id.* As Plaintiffs conceded at oral argument, barriers were not raised discriminatorily against travelers from other states. *Id.*

<sup>41</sup> 113 S. Ct. at 764. The district court declined to rule on this, relying on the interstate travel theory. *Id.* The Court concluded that the "right to abortion was assuredly 'aimed at' by the petitioners," but the deprivation of that right could not be the object of a "purely private conspiracy." *Id.*

<sup>42</sup> *Id.* at 769 (Souter, J., concurring in part, dissenting in part).

<sup>43</sup> *Id.* at 770 (Souter, J., concurring in part, dissenting in part). The "deprivation" clause covers conspiracies "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." *Id.* at 769 (Souter, J., concurring in part, dissenting in part) (citing 42 U.S.C. § 1985(3)).

<sup>44</sup> *Id.* at 775 (Souter, J., concurring in part, dissenting in part). The "prevention" clause covers conspiracies, "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." *Id.* at 769 (Souter, J., concurring in part, dissenting in part) (citing 42 U.S.C. § 1985(3)).

deprivation clause.<sup>45</sup> He concluded that the Fourth Circuit's decision should be vacated and the case remanded to determine whether the rescuers' demonstrations were in fact actionable under the prevention clause of 42 U.S.C. § 1985(3).<sup>46</sup>

In his dissenting opinion, Justice Stevens, joined by Justice Blackmun,<sup>47</sup> found that the majority had construed the first portion of the statute too narrowly. In his view, the Defendants' conduct denied every woman the opportunity to exercise a constitutional right that only women possess.<sup>48</sup> Moreover, Justice Stevens believed that the Plaintiffs had unquestionably established a claim under the second portion of 42 U.S.C. § 1985(3).<sup>49</sup>

Finally, Justice O'Connor dissented, with Justice Blackmun again joining, arguing that the Defendants' activities fell squarely within the ambit of 42 U.S.C. § 1985(3).<sup>50</sup> Justice O'Connor maintained that women are a protected class under the statute and the conspiracy's motivation was directly related to characteristics unique to that class.<sup>51</sup> In her view, the conspiracy was class-based and impeded local law enforcement from securing equal protection of the law to clinics and the women they serve.<sup>52</sup>

### III. CLINIC ACCESS LEGISLATION

In response to the *Bray* decision, in June 1994, the United States Congress enacted the "Freedom of Access to Clinic Entrances Act of 1994" (the "Clinic Access Act").<sup>53</sup> In part, the Clinic Access Act is

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<sup>45</sup> *Id.* at 778 (Souter, J., concurring in part, dissenting in part).

<sup>46</sup> 113 S. Ct. at 779 (Souter, J., concurring in part, dissenting in part). Justice Souter recognized that a racial or other class-based animus is a necessary requirement for the deprivation clause, otherwise the statute might develop into general federal tort law. *Id.* at 775 (Souter, J., concurring in part, dissenting in part). While the Court has never faced a prevention clause claim, Justice Souter believed that the prevention clause does not require the conspirators' animus to be based on race or other class characteristics. *Id.* at 776-77 (Souter, J., concurring in part, dissenting in part).

<sup>47</sup> *Id.* at 779 (Stevens, J., dissenting).

<sup>48</sup> *Id.* at 792-94 (Stevens, J., dissenting).

<sup>49</sup> *See id.* at 795 (Stevens, J., dissenting). Justice Stevens stated that § 1985(3) provides a federal remedy for the defendants' violent concerted activities. *Id.* at 780 (Stevens, J., dissenting).

<sup>50</sup> *Id.* at 799 (O'Connor, J., dissenting).

<sup>51</sup> 113 S. Ct. at 799 (O'Connor, J., dissenting).

<sup>52</sup> *Id.* at 805 (O'Connor, J., dissenting). Justice O'Connor stated that *Bray* is neither about abortion nor about the disfavoring of abortion by state legislatures. *Id.* at 804 (O'Connor, J., dissenting). Rather, she explained, *Bray* "is about whether a private conspiracy to deprive members of a protected class of legally protected interests gives rise to a federal cause of action." Justice O'Connor answered this inquiry in the affirmative. *Id.*

<sup>53</sup> Pub. L. No. 103-259, 108 Stat. 694 (to be codified at 18 U.S.C. § 248) (the "Clinic Access Act"). *See* Marcia Coyle & Chris Carmody, *Hill Leaders Plan to Seek "Klan Law" Reversal*,

designed to supplement existing civil rights laws by criminalizing the physical obstruction of a medical facility or the use of force with the intent to injure, intimidate, or interfere with any person seeking to provide or obtain reproductive health services.<sup>54</sup> If convicted under the Clinic Access Act, a defendant could be fined, imprisoned for up to a year, or both.<sup>55</sup> A repeat offender could be fined, imprisoned for up to three years, or both.<sup>56</sup> The statute also mitigates penalties for nonviolent

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NAT'L L.J., Jan. 25, 1993, at 5 (discussing Supreme Court's refusal to extend civil rights protection to abortion clinics).

<sup>54</sup> Section 248(a) of the Clinic Access Act states:

(a) Prohibited Activities. - Whoever -

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

108 Stat. at 694-95 (to be codified at 18 U.S.C. § 248(a)).

<sup>55</sup> Section 248(b) of the Clinic Access Act provides:

(b) Penalties. - Whoever violates this section shall -

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than \$10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall be not more than \$25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

108 Stat. at 695 (to be codified at 18 U.S.C. § 248(b)).

<sup>56</sup> See 108 Stat. at 695 (to be codified at 18 U.S.C. § 248(b)(2)).

physical obstructions, while imposing greater penalties for acts resulting in bodily injury or death.<sup>57</sup>

In addition, the Clinic Access Act provides for civil remedies for persons "aggrieved" by conduct prohibited under the statute.<sup>58</sup> Plaintiffs may seek injunctive relief, as well as compensatory and punitive damages, and reasonable attorneys fees and costs.<sup>59</sup> Prior to a final judgment, plaintiffs recovering compensatory damages may, instead, elect to receive statutory damages of \$5,000 per violation.<sup>60</sup>

The Clinic Access Act further allows for both the United States Attorney General and state attorneys general to bring civil actions in United States District Courts to seek injunctive relief or compensatory damages for persons "aggrieved" by acts prohibited under the statute.<sup>61</sup>

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<sup>57</sup> See 108 Stat. at 695 (to be codified at 18 U.S.C. § 248(b)). On October 5, 1994, Paul Hill was the first person convicted under the Clinic Access Act for shooting and killing a doctor, Dr. John Britton, and his bodyguard outside the Pensicola, Florida clinic where Britton performed abortions. See *The Week: Abortion Violence*, TIME, Oct. 17, 1994, at 17. Mr. Hill was later convicted on state murder charges and currently faces sentencing under Florida's death penalty. Mireya Navarro, *Jury Votes for Death Penalty for Abortion Foe*, N.Y. TIMES, Nov. 4, 1994, at A20. *Id.*

<sup>58</sup> Subsection 248(c)(1)(A) of the Clinic Access Act provides, in part:

(c) Civil Remedies. -

(1) Right of Action. -

(A) In General. - Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

108 Stat. at 695 (to be codified at 18 U.S.C. § 248(c)(1)(A)).

<sup>59</sup> Subsection 248(c)(1)(B) of the Clinic Access Act provides, in part:

(c) Civil Remedies. -

(1) Right of Action. -

.....  
(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. . . .

108 Stat. at 695 (to be codified at 18 U.S.C. § 248(c)(1)(B)).

<sup>60</sup> Subsection 248(c)(1)(B) states that "[w]ith respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of 5,000 per violation." 108 Stat. at 695 (to be codified at 18 U.S.C. § 248(c)(1)(B)).

<sup>61</sup> Subsection 248(c) states, in part:

(c) Civil Remedies. -

In such actions, the court may also impose penalties of up to \$15,000 against first offenders and up to \$25,000 for each subsequent violation.<sup>62</sup>

The Clinic Access Act exempts activities protected by the First Amendment of the United States Constitution,<sup>63</sup> and further specifies that it is not intended to expand or limit remedies for First Amendment violations occurring outside a reproductive health facility.<sup>64</sup> Also, the statute does not preempt state remedies or interfere with the enforcement of state and local reproductive health laws.<sup>65</sup>

(2) Action by Attorney General of the United States. -

(A) In General. - If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent -

(i) in an amount not exceeding \$10,000 for a nonviolent physical obstruction and \$15,000 for other first violations; and

(ii) in an amount not exceeding \$15,000 for a nonviolent physical obstruction and \$25,000 for any other subsequent violation.

(3) Actions by state attorneys general. -

(A) In General. - If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

108 Stat. at 695-96 (to be codified at 18 U.S.C. § 248(c)).

<sup>62</sup> See 108 Stat. 695-96 (to be codified at 18 U.S.C. § 248(c)(2)(B)).

<sup>63</sup> Subsection 248(d)(1) of the Clinic Access Act states that the statute "shall [not] be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 108 Stat. at 696 (to be codified at 18 U.S.C. § 248(d)(1)).

<sup>64</sup> Subsection 248(d)(2) provides that the Clinic Access Act "shall [not] be construed . . . to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference." 108 Stat. at 696 (to be codified at 18 U.S.C. § 248(d)(2)).

<sup>65</sup> Subsection 248(d) of the Clinic Access Act states that the statute shall not "provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by [the statute], or to preempt State or local laws that may provide such penalties or remedies" nor "interfere with the enforcement of State or local laws regulating the performance of abor-

It is submitted that the Clinic Access Act is troublesome for several reasons. First, such a statute is not necessary. Abortion clinics can resort to state tort causes of action, such as nuisance and trespass, to combat anti-abortion protestors.<sup>66</sup> Moreover, the federal government currently has the option of using federal resources and marshals to control protestors.<sup>67</sup>

Second, the Clinic Access Act is discriminatory. Though the statute indicates that it will not interfere with conduct protected by the First Amendment,<sup>68</sup> it singles out anti-abortion protestors for federal criminal and civil sanctions. There, for example, are no comparable federal statutes aimed expressly against animal rights activists who gain access to medical research facilities, or prohibiting violence against anti-abortion protestors. Thus, this bill discriminates against anti-abortion protestors primarily due to the content of their expression and beliefs underlying their protest.

Finally, the imposition of criminal penalties of up to one year imprisonment for a first offense, as well as fines of up to \$15,000, compensatory and punitive damages, and attorneys fees and expenses, are extraordinarily harsh.<sup>69</sup>

#### CONCLUSION

In *Bray*, the Supreme Court ruled that anti-abortion protestors cannot be sued under the Ku Klux Klan Act. However, anti-abortion activists who remain within the bounds of protected free speech and free assembly still may be responsible under state civil and criminal trespass and nuisance laws, and federal assistance may be requested to assist state law enforcement officials in controlling illegal protest activities.

Despite *Bray*, however, with the passage of the Clinic Access Act, anti-abortion protestors are still subject to suit under federal law. The Clinic Access Act singles out anti-abortion protest as a federal crime, discriminatorily imposing civil remedies and criminal sanctions based on the content of demonstrators' expression. This author strongly criticizes this legislation because it goes beyond those remedies which were granted by the Fourth Circuit under 42 U.S.C. § 1985(3) in *Bray*—remedies which the Supreme Court subsequently held were not properly available.

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tions or other reproductive health services." 108 Stat. at 696 (to be codified at 18 U.S.C. § 248(d)(3), (4)).

<sup>66</sup> See *supra* notes 2 and 57 accompanying text.

<sup>67</sup> See 42 U.S.C. § 1051 (1988).

<sup>68</sup> See *supra* note 63.

<sup>69</sup> See *supra* notes 55 & 59-61.