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# NOTES

## Operation Rescue's Anti-Abortion Rescue Blockades and 42 U.S.C. § 1985(3) (a/k/a the Ku Klux Klan Act)*

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"'[The] disorders are so great in some of the states as to paralyze the power of local authorities.'"

— James N. Tyner (Republican-Indiana, 1871)[1]

### INTRODUCTION

Ever since the controversial decision of *Roe v. Wade*[2] recognized that a woman's constitutional right to privacy includes the right to terminate a pregnancy in its early stage, confrontations between those labeling themselves "pro-choice" and "pro-life" have escalated. Between

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* Editor's Note: After this issue of the *Indiana Law Review* went to press, the United States Supreme Court announced its decision in a pivotal case discussed in this Note, Bray v. Alexandria Women's Health Clinic, No. 90-985, 1993 Lexis 833 (Jan. 13, 1993). In five separate opinions, a five-to-four majority ruled that 42 U.S.C. § 1985(3) may not be invoked to enjoin anti-abortion rescue blockades. The *Bray* case is discussed *infra* at notes 52-74 and 131-32, and accompanying text.

Notwithstanding the Court's recent ruling in *Bray*, we believe that this Note will be of value to those interested in the modern application of § 1985(3).

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1. Robert Abrams, *Justice Department is Wrong in Wichita*, NEWSDAY (N.Y.), Sept. 9, 1991, at 39 (quoting James N. Tyner from the Congressional debates regarding the enactment of the Ku Klux Klan Act).

2. 410 U.S. 113 (1973), *modified*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), *modified*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

1977 and 1990, there were "829 acts of anti-choice violence, including 34 clinic bombings, 52 clinic arsons, 266 [clinic] invasions, 64 assaults and batteries, 2 kidnappings, 22 burglaries, 77 death threats, and 269 incidents of vandalism."[3] Not surprisingly, the violence resulting from this emotional issue has not been one-sided.[4] In the summer of 1991, another chapter was added to the ongoing saga when the nation's attention turned to events occurring in Wichita, Kansas.

On July 15, 1991, a national pro-life organization known as Operation Rescue began a series of anti-abortion protests in the midwestern city. The organization specifically targeted Wichita because it was the home of one of the few clinics in the nation that performed third-trimester abortions.[5] Conducting what the organization termed "rescue missions," members of Operation Rescue created human blockades to prevent access to several local abortion clinics.[6] Within seven weeks, approximately 2,700 arrests of protesters were made;[7] the city and county governments expended approximately $800,000 in responding to the demonstrations;[8] a federal judge, Patrick Kelley, was thrust into the limelight of the national media;[9] and the United States Department of Justice and President Bush had contributed their views to the controversy.[10] Emerging from the center of the turmoil was a potent legal issue—whether a 120-year-old federal civil rights law could be applied to enjoin the clinic blockades.

Inspired by political turmoil and violence against the newly freed slaves following the Civil War, Congress enacted the Civil Rights Act

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3. Celeste Lacy Davis & Eve W. Paul, *Operation Rescue: Was the Justice Dept. Right to Intervene in Wichita?*, A.B.A. J., Nov. 1991, at 44, 45.

4. *See, e.g.*, Mimi Hall, *Abortion Foes Copy Wichita Protest*, USA TODAY, Sept. 16, 1991, at 3A (Wichita abortion clinic director arrested after she hit two protesters); Richard Lacayo, *Crusading Against the Pro-Choice Movement*, TIME, Oct. 21, 1991, at 26-27 (Operation Rescue's Randall Terry described the violence against his followers: "'[O]ur people have had their limbs broken, women have been sexually molested by prison guards, Mace has been used on nonviolent demonstrators . . . . In some jurisdictions the police have systematically tortured people . . . . When you have police pushing their knuckles into people's eye sockets or lifting people up by their jawbones, that's agonizing'").

5. *Abortion Foes Told to Leave Wichita*, L.A. TIMES, Aug. 31, 1991, at A24.

6. Lacayo, *supra* note 4, at 28.

7. *Anti-Abortion Arrests*, NEWSDAY (N.Y.), Sept. 8, 1991, at 16. Many of the protesters were arrested more than once; these 2,700 arrests involved an estimated 1,700 people. *Id.*

8. *Kansas*, USA TODAY, Sept. 24, 1991, at 8A.

9. *See, e.g.*, William Bradford Reynolds, *Judicial Excess in Wichita*, N.Y. TIMES, Sept. 1, 1991, § 4, at 11.

10. *See, e.g.*, Abrams, *supra* note 1, at 39; Gary Lawson, *Operation Rescue: Was the Justice Dept. Right to Intervene in Wichita?*, A.B.A. J., Nov. 1991, at 44. *See infra* notes 16, 18.

of 1871.[11] Since its inception, the Act, commonly known as the Ku Klux Klan Act, has been the subject of divisive debate regarding its constitutionality and scope.[12] The civil conspiracy section of the Act provides, in pertinent part:

> If two or more persons . . . 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, . . . [and] 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 . . . .[13]

District Court Judge Patrick Kelley invoked this Section to issue a preliminary injunction, enjoining Operation Rescue's blockading activities in Wichita.[14] In the aftermath of his decision, Judge Kelley found himself

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11. Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. Rev. 911 (1986).

12. *Id.*

13. 42 U.S.C. § 1985(3) (1988). The complete Section 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; or if two or more persons conspire to prevent by 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.*

14. *Women's Health Care Serv., P.A. v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kan. 1991) (Judge Kelley cited 13 prior federal cases passing on the applicability

to be the focus of considerable attention. He was criticized, on one hand, for exceeding his authority[15] and improperly invoking the federal statute.[16] On the other hand, he was praised for protecting the rights of women through the invocation of federal law[17] and for standing firm against pressure from the Department of Justice to adopt a narrow interpretation of the statute.[18]

This Note explores the history, scope, and contemporary applications of the civil conspiracy section of the Ku Klux Klan Act, with a particular focus on: (1) whether it is available to protect the rights of women seeking abortion-related services and the clinics that provide those services, and (2) the reasoning which supports its application against those conducting the rescue missions.[19]

## I. A Brief History of 42 U.S.C. § 1985(3)

Following the conclusion of the Civil War and the emancipation of slaves in the United States, the Ku Klux Klan and similar organizations waged a widespread campaign of intimidation and violence in an effort to turn back the changes brought about during the Reconstruction Era.[20]

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of 42 U.S.C. § 1985(3) to anti-abortion clinic blockades, 10 of which granted relief under the Section. The court endeavored to enjoin the blockading activities without enjoining Operation Rescue's legitimate First Amendment rights to protest the provision of abortion-related services.) For a discussion of the reasoning underlying the invocation of the equitable remedy of an injunction when the statute specifies "damages," see *infra* notes 72-74 and accompanying text.

15. *See, e.g.*, Lawson, *supra* note 10, at 44; Reynolds, *supra* note 9, § 4, at 11 (Judge Kelley operated outside the boundaries set by Congress); *Lessons of a Summer of Abortion Protests: Two Sides in Wichita See Hard Times Ahead*, Wash. Post, Aug., 26, 1991, at A1 (Operation Rescue "denounced [Judge Kelley] for using 'Gestapo-style terrorist tactics.' They called him a 'loose cannon' and a 'Lone Ranger'.").

16. *See, e.g.*, Lawson, *supra* note 10, at 44; Abrams, *supra* note 1, at 39 (Bush administration argued in Department of Justice brief that Ku Klux Klan Act did not apply to Wichita facts); Reynolds, *supra* note 9, § 4, at 11 (Ku Klux Klan Act did not apply in the Wichita case as "[a]bortion is not mentioned. Nor have the Wichita protesters discriminated against a class; they oppose all who aid abortion.").

17. *See, e.g.*, Davis & Paul, *supra* note 3, at 45; *The Wichita Demonstrations*, Wash. Post, Aug. 27, 1991, at A22 (arguing that members of Operation Rescue must accept the consequences of their acts); John Elson, *The Feds vs. a Federal Judge*, Time, Aug. 19, 1991, at 22 (Abortion-rights advocates expressed support for Judge Kelley's order to federal marshals to get tougher on demonstrators violating his blockade-injunction).

18. *See, e.g.*, Davis & Paul, *supra* note 3, at 45 (characterizing Judge Kelley's ruling in the Wichita case as "courageous" in light of the Department of Justice's urging that the ruling be reversed).

19. This Note does not address whether abortion itself should be legal.

20. Shatz, *supra* note 11; Mark Fockele, *A Construction of Section 1985(3) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402 (1979). Other organizations active and similar in purpose to the Ku Klux Klan included the Knights of the White Camelia,

Reported incidents included murders and whippings,[21] as well as Klan members "terrifying the colored population, and putting whole neighborhoods in fear so that the Ku Klux [could] control an election."[22] In response to the confirmation of these and similar reports, President Grant dispatched a message to the 42nd Congress on March 23, 1871, requesting immediate legislation to deal with the ongoing political terrorism.[23] Acting on the President's request, Representative Shellabarger introduced a bill titled "An Act to Enforce the Fourteenth Amendment and for other Purposes," which was quickly enacted as the Ku Klux Klan Act.[24] Section 1 of the Act dealt with the enforcement of the Fourteenth Amendment and formed the basis of today's 42 U.S.C. § 1983.[25] Section 2 of the Act provided civil and criminal penalties designed to deal with conspiratorial lawlessness of the sort engaged in by the Klan.[26] By 1883, however, the Supreme Court had issued a series of opinions which effectively invalidated Section 2 of the Act.[27] For the

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the White Brotherhood, the Pale Faces, and the '76 Association. *Id.* at 407-08 (citing KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 199 (1965)). *See also* Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527 (1985) (presenting a highly detailed and descriptive account of the events leading up to the enactment of § 1985(3), as well as the legislative history of the Section).

21. Fockele, *supra* note 20, at 408 (quoting the majority report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States, H.R. Rep. No. 1, 42d Cong., 1st Sess. xxx-xxxi (1871)).

22. *Id.* at 409 (quoting Congressman Stoughton during the Congressional debates on the enactment of the Ku Klux Klan Act. CONG. GLOBE, 42d Cong., 1st Sess., at 517 (1871)).

23. Shatz, *supra* note 11, at 913.

24. Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871), CONG. GLOBE, 42d Cong., 1st Sess., at 914. The Ku Klux Klan Act, the Civil Rights Act of 1871, and the Force Act of 1871 are all phrases that have been used to describe the Act. Fockele, *supra* note 20, at 402 n.1. The official popular name, according to the Popular Names Table of the United States Code Service, is the Ku Klux Act. This Note uses the phrases "the Ku Klux Klan Act" or "the Act" to describe the subject legislation, and "42 U.S.C. § 1985(3)" or "§ 1985(3)" to describe the civil conspiracy section with which this Note is concerned.

25. Shatz, *supra* note 11, at 914. The text of § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

26. Shatz, *supra* note 11, at 911.

27. *Id.* at 911-12 (citing Civil Rights Cases, 109 U.S. 3 (1883); United States v.

next 100 years, Section 2, the civil conspiracy portion of which is codified at 42 U.S.C. § 1985(3), remained essentially dormant.[28]

During this period, the Supreme Court heard only one case brought under the civil conspiracy statute: *Collins v. Hardyman*.[29] In *Collins*, the Court rejected the plaintiff's private conspiracy claim, holding that the Section reached only conspiracies under color of state law, and expressing serious doubts whether Congress had the power to enact such a broad statute.[30]

In 1971, however, § 1985(3) was given new life with the Supreme Court's decision in *Griffin v. Breckenridge*.[31] The plaintiffs in *Griffin*, described as "Negro citizens of the United States,"[32] brought an action under § 1985(3) alleging they had been passengers in an automobile driven by a white male who was mistaken by the defendants as a civil rights worker. The plaintiffs claimed that they were traveling in the area of DeKalb, Mississippi, when the defendants, white males, "conspired, planned, and agreed to block the passage of said plaintiffs . . . to stop and detain them and to assault, beat and injure them with deadly weapons."[33] The plaintiffs further alleged that the defendants intended to deprive them and other black Americans of the enjoyment of equal protection, equal rights, and privileges and immunities under the laws of the United States and the State of Mississippi. The district court dismissed the complaint based on *Collins*, and the court of appeals affirmed the dismissal.[34] The Supreme Court granted certiorari in *Griffin* "to consider questions going to the scope and constitutionality of 42 U.S.C. § 1985(3)."[35]

After reviewing the legislative history of the Section, the Court found that the allegations in the plaintiffs' complaint brought them squarely within the language of § 1985(3) and that, contrary to the serious doubts expressed in *Collins*, Congress *did* have the constitutional power to enact the statute. The Court upheld the plaintiffs' complaint, stating:

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Cruikshank, 92 U.S. 542 (1875); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)). In United States v. Harris, 106 U.S. 629 (1883), the Court invalidated the criminal portion of Section 2, ruling that it was unconstitutional, on grounds which appeared equally applicable to the civil portion of the Section. Shatz, *supra* note 11, at 916.

28. Shatz, *supra* note 11, at 912. According to Shatz, during this period, the civil conspiracy portion of the Act was "invoked infrequently."

29. 341 U.S. 651 (1951). *See* Shatz, *supra* note 11, at 916.

30. *Collins*, 341 U.S. 651.

31. 403 U.S. 88 (1971). *See* Shatz, *supra* note 11, at 912.

32. *Griffin*, 403 U.S. at 89.

33. *Id.* at 90.

34. *Id.*

35. *Id.* at 93.

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.[36]

The Court broke down the requisite elements of a § 1985(3) claim based on the language of the statute:

> (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) an injury to person or property, or a deprivation of having and exercising any right or privilege of a citizen of the United States.[37]

The Court noted that because "the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery."[38]

The next landmark Supreme Court case interpreting § 1985(3) was the case of *United Brotherhood of Carpenters v. Scott*.[39] *Scott* involved a dispute between union and nonunion workers. The plaintiffs, construction workers and the nonunion company that hired them, brought an action under § 1985(3) alleging that the defendants, the trades council, its unions, and union members, had deprived them of their legally protected rights. The defendants allegedly engaged in violence and vandalism, injuring the individual plaintiffs and delaying the construction project at the center of the dispute. Relying in part on the *Griffin* case, both the district court and the court of appeals upheld the plaintiffs'

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36. *Id.* at 102.
37. *Id.* at 102-03.
38. *Id.* at 107.
39. 463 U.S. 825 (1983). *See* Shatz, *supra* note 11, at 912. The Court had also decided the case of Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979). The Court held in *Novotny* that a claim based on a deprivation of a right created by Title VII of the Civil Rights Act of 1964 could not be brought under § 1985(3) because a contrary holding would permit the avoidance of Title VII's administrative process. *Id.* at 378. The case is of lesser significance than *Griffin* or *Scott* with respect to the scope of § 1985(3) generally; the dicta in *Novotny*, however, takes on added import in light of the recent line of anti-abortion blockade cases. *See infra* notes 119-31 and accompanying text.

cause of action. The court of appeals held that "1985(3) reached conspiracies motivated either by political or economic bias."[40] In a five-to-four decision, the Supreme Court reversed the lower courts. The majority found "no convincing support in the legislative history for the proposition that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities."[41]

In reviewing the legislative history of § 1985(3), Justice White, writing for the majority, cited the words of Senator Edmunds, a member of the 42nd Congress, which supported the adaptation of a broad view of the statute: "He said that if a conspiracy were formed against a man 'because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.'"[42] As in the *Griffin* case, however, notwithstanding the statement of Senator Edmunds, the majority declined to render an opinion on the breadth of § 1985(3) beyond its narrow holding that the statute did not protect a group united solely by economic or commercial interests.[43] The majority left open the possibility, however, that the statute might reach private conspiracies "aimed at any class or organization on account of its political views or activities, or at any of the classes posited by Senator Edmunds . . . ."[44]

Writing for the four dissenting justices in *Scott*, Justice Blackmun addressed the economic aspects of the political turmoil which inspired the enactment of § 1985(3). Justice Blackmun wrote: "Congress' [sic] answer to the problem of Klan violence—a problem with political, racial, and economic overtones—was to create a general federal remedy to protect classes of people from private conspiracies aimed at interfering with the class members' equal exercise of their civil rights."[45] Justice

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40. *Scott*, 463 U.S. at 830.

41. *Id.* at 837. Shatz described the majority's opinion as "a mortal blow" to § 1985(3), despite its narrow holding and dearth of analysis. *See* Shatz, *supra* note 11, at 912, 923.

42. *Scott*, 463 U.S. at 836-37 (quoting CONG. GLOBE, 42d Cong., 1st Sess., at 567 (1871)).

43. Justice White noted that in *Griffin* the Court "withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments . . . ," *id.* at 837, and that it chose to "follow the same course here." *Id.* Justice White also wrote "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *Id.* The majority also held that a claim of conspiracy to violate First Amendment rights is not successfully asserted without evidence of state involvement. *Id.* at 833.

44. *Scott*, 463 U.S. at 837.

45. *Id.* at 853 (Blackmun, J., dissenting). Justice Blackmun was joined in his dissent by Justices Brennan, Marshall, and O'Connor.

Blackmun expressed the view that the statute was designed to protect those classes that were in danger of not being ensured equal protection of the laws by the local authorities. Further, "certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement, [and] other traits also may implicate the functional concerns in particular situations."[46] Justice Blackmun emphasized that the Court's modern approach to the interpretation of Reconstruction civil rights statutes had been to give them "'a sweep as broad as [their] language.'"[47] The dissenters found no reason to abandon that approach, and described the majority's interpretation of § 1985(3) as "crabbed and uninformed."[48]

Following the *Griffin* and *Scott* decisions, the interpretation and application of § 1985(3) has been inconsistent in the lower federal courts.[49] Neither the *Griffin* decision nor the *Scott* decision offered tangible guidelines for the proper modern uses of the statute. *Griffin* essentially concluded that because the facts in the case were so close to the events precipitating the enactment of § 1985(3), the plaintiffs' claim should be sustained. *Scott*, on the other hand, summarily eliminated classes defined solely by economic or commercial concerns from the realm of protected groups, without ruling on what other groups might fall within the Section's protection. Thus, the lower courts have been left to apply their own interpretation of the scope of § 1985(3).

## II. The Application of 42 U.S.C. § 1985(3) to Enjoin Anti-Abortion Rescue Blockades

Beginning in the late 1980s, a series of cases in which the plaintiffs sought protection under § 1985(3) from anti-abortion clinic blockades began percolating through the lower federal courts.[50] In the majority of

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46. *Id.*

47. *Id.* at 854 (quoting Griffin v. Breckenridge, 403 U.S. 88, 98 (1971) (quoting United States v. Price, 383 U.S. 787, 801 (1966))).

48. *Id.*

49. *See* Shatz, *supra* note 11, at 926-28. *See also* Gormley, *supra* note 20, at 550-64.

50. *See, e.g.*, Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 712 F. Supp. 165 (D. Or. 1988) (§ 1985(3) protects the right of travel, including the right to travel interstate to have an abortion, from encroachment by private conspiracies; women exercising their constitutional right to privacy by choosing to have an abortion are a protected class under § 1985(3)); New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989) (deciding that conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under § 1985(3)); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989) (deciding that women seeking abortions are a class under § 1985(3), and a conspiracy to deprive these women of their constitutional rights is actionable under § 1985(3)); Southwestern Medical Clinics of Nev., Inc. v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) (granting a preliminary injunction enjoining

these cases, the plaintiffs, typically medical clinics that provide abortion-related services and organizations seeking to protect their members' rights to obtain an abortion, received relief by successfully asserting a private conspiracy claim under § 1985(3).[51]

### *A. Cases Granting Relief Under § 1985(3)*

Thirteen cases involving anti-abortion protesting and clinic confrontations were reviewed for this Note. In all but three of these cases, the plaintiffs were granted relief under § 1985(3).[52] The case of *National Organization for Women v. Operation Rescue*, recently argued before the Supreme Court as *Bray v. Alexandria Women's Health Clinic*,[53] exemplifies the underlying facts and the legal issues found in this group

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anti-abortion clinic blockades under § 1985(3)); Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989) (deciding that women seeking abortions constitute a protected class under § 1985(3)). One of the first cases to link § 1985(3) to the abortion debate was Northern Va. Women's Medical Ctr. v. Balch, 617 F.2d 1045 (4th Cir. 1980), in which the court of appeals upheld the district court's injunction prohibiting anti-abortion blockades on pendent jurisdiction grounds, citing § 1985(3).

51. This was the same conclusion reached by Judge Kelley after reviewing the cases to date. Women's Health Care Serv. v. Operation Rescue-Nat'l, 773 F. Supp. 258 (D. Kan. 1991). Of the numerous § 1985(3)/clinic blockade cases surveyed for this Note, the plaintiffs were denied relief in only three cases: Roe v. Abortion Abolition Soc'y, 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987) (denying relief under § 1985(3) on grounds that class-based animus was not established); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989) (finding no discriminatory animus against women because anti-abortion protesters confronted all groups associated with the clinic including men, women of all ages, doctors, nurses, staff, and female security guards); National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989) (finding that a valid class was established but relief was denied on grounds that abortion seekers have never been designated as a class needing special protection). Cases in which the plaintiff(s) were granted relief under § 1985(3) include those cases set forth *supra* note 50, as well as: NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990) (finding private conspiracy to deprive women seeking abortions of their right to travel actionable under § 1985(3)); Lewis v. Pearson Found., Inc., 908 F.2d 318 (8th Cir. 1990) (declaring women seeking abortions to be a protected class under § 1985(3); class-based discriminatory animus established because defendants operated a mock abortion clinic in order to prevent abortions); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (deciding that women constitute a protected class under § 1985(3); injunction prohibiting anti-abortion clinic blockades was upheld). *See also* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3rd Cir. 1989) (upholding an injunction prohibiting anti-abortion clinic blockades on interference with contract grounds).

52. *See supra* notes 50-51.

53. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

of cases. The plaintiffs in *Bray* were several clinics that provided abortions and abortion-related services, and several organizations suing on behalf of themselves and their members, including the National Organization for Women. The defendants included the organization Operation Rescue (an unincorporated association of individuals opposed to abortion), and several individuals opposed to abortion, including Randall Terry, the National Director and founder of Operation Rescue.[54] The plaintiffs brought an action in the district court, requesting a permanent injunction to enjoin the defendants from conducting abortion clinic blockades.

The district court found that the defendants "agreed and combined with one another . . . to organize, coordinate and participate in 'rescue' demonstrations at abortion clinics in various parts of the country,"[55] and that Operation Rescue's own literature defined a "rescue" as "'*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims.'"[56] The court further found that Operation Rescue had three primary goals in conducting the clinic blockades: (1) to prevent abortions, (2) to persuade women not to obtain abortions, and (3) "to impress upon members of society the moral righteousness and intensity of their anti-abortion views."[57] Testimony adduced at trial established that the human blockades effectively prevented patients, prospective patients, and medical staff from entering and exiting the clinics, and created a substantial risk of physical and emotional harm to the patients. It also was established that one of the clinics, Commonwealth Women's Clinic, had been the target of these rescue demonstrations almost weekly for five years. Signs and fences were damaged during one of the largest of these demonstrations and nails were strewn across the nearby parking lots and public streets. During the particular demonstrations at issue in *Bray*, in addition to the disruptions common to rescue missions generally, five women who had commenced a multistage abortion process were prevented from entering the clinic to undergo laminaria removal.[58] This subjected the women to a substantial risk of infection, bleeding, and other potentially serious complications.

The plaintiffs brought several state and federal claims, including two claims for relief under 42 U.S.C. § 1985(3).[59] In analyzing the plaintiffs'

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54. Defendants Jayne Bray and Michael Bray were individuals who organized and coordinated "rescue" operations in the Washington Metropolitan area. Jayne Bray was arrested on October 29, 1988, for her activities as an anti-abortion rescue demonstrator.

55. *Operation Rescue*, 726 F. Supp. at 1488.

56. *Id.* at 1488 (citations omitted).

57. *Id.*

58. The removal of a cervical dilation device.

59. In addition to their § 1985(3) claims, plaintiffs also brought state-law claims based on trespass, public nuisance, and tortious interference with business relationships.

§ 1985(3) claims, the district court first enumerated the requisite elements of a claim brought under the private conspiracy statute as set forth in *Griffin*.[60] In examining whether the first element, the existence of a conspiracy, was satisfied, the court noted that a conspiracy has been defined as "'a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.'"[61] Based on this definition, the district court found the existence of a conspiracy among the defendants. The court then addressed the second element of "purpose," and noted a prior Fourth Circuit case, *Buschi v. Kirven*,[62] which stated that the "purpose" element requires that "the conspiracy be 'motivated by a specific class-based, invidiously discriminatory animus.'"[63] Rejecting defendants' claim that a sex-based animus does not satisfy § 1985(3)'s "purpose" element, the court again cited *Buschi* for the proposition that a class defined by such immutable characteristics as race and sex will satisfy the class-based, invidiously discriminatory animus requirement.[64] Thus, the court concluded, a conspiracy to deprive women seeking abortions of their constitutionally protected rights was actionable under § 1985(3).[65]

The court then turned to an examination of those constitutional rights of which the plaintiffs claimed to be deprived, specifically, the right to travel and the right of privacy. Citing the Supreme Court case of *Doe v. Bolton*,[66] which held that a requirement of in-state residency as a prerequisite to obtaining an abortion violated the right to travel, the court first held that Operation Rescue's clinic blockades deprived women who travel interstate to obtain abortions their constitutional right to travel.[67] The court found § 1985(3)'s "act in furtherance of the

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60. *Operation Rescue*, 726 F. Supp. at 1492 (citations omitted). For a discussion of *Griffin*, see supra notes 31-38 and accompanying text.

61. *Id.* at 1492 (quoting 3 EDWARD J. DEVITT, FEDERAL JURY PRACTICE & INSTRUCTIONS § 103.23 (1987) (citing MODEL PENAL CODE § 5.03 (Proposed Official Draft 1962))).

62. 775 F.2d 1240 (4th Cir. 1985).

63. *Operation Rescue*, 726 F. Supp. at 1492 (quoting Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985)). The Supreme Court first delineated this requirement in Griffin v. Breckenridge, 403 U.S. 88 (1971) (declaring that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action). *See supra* notes 31-38 and accompanying text.

64. *Operation Rescue*, 726 F. Supp. at 1492.

65. *Id.* at 1493.

66. 410 U.S. 179 (1973).

67. *Operation Rescue*, 726 F. Supp. at 1493. The court also held that because the right to interstate travel is protected from both private and governmental interference, the plaintiffs were not required to make a showing of state action. *Id.* (citing Griffin v.

conspiracy" element easily satisfied by "[d]efendants' history of obstructionist activity, continued 'rescue' training sessions, and recent violations of temporary restraining orders preventing 'rescue' behavior."[68] Likewise, the court found § 1985(3)'s "injury" requirement satisfied by the substantial risk posed to the health of women who had undergone an abortion-related procedure or who otherwise required timely medical attention.[69] Accordingly, the court held that the organizational plaintiffs were entitled to relief under § 1985(3) based on the deprivation of their members' constitutional right to travel.[70]

The court then turned to the plaintiffs' right of privacy claim. The court reiterated the view that when a plaintiff invokes a constitutional right to be free from governmental interference, such as a penumbral privacy right, the plaintiff must establish that the alleged deprivation resulted from, or implicated, state action. Noting that the plaintiffs had already established an independent basis upon which relief would be granted under § 1985(3), the court decided to avoid the "thicket" of having to determine whether the claimed deprivation implicated state action.[71]

Having determined that the plaintiffs were entitled to relief under § 1985(3), the court addressed the propriety of granting the requested permanent injunction. Citing numerous authorities, the court wrote that "[p]ermanent injunctive relief is appropriate where (i) there is no adequate remedy at law, (ii) the balance of the equities favors the moving party, and (iii) the public interest is served."[72] Finding all three of these elements to be satisfied, the court granted the plaintiffs' request for a permanent injunction with respect to the blockading activities, but denied as overbroad the plaintiffs' request for an injunction enjoining those First Amendment activities of defendants "that tend to intimidate, harass, or

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Breckenridge, 403 U.S. 88 (1971) and New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989)). Further, the court held the defendants' claim that the blockades affected only intrastate travel to be without merit, especially in light of evidence that women traveled interstate to obtain abortion-related services from the plaintiff clinics. *Id.*

68. *Id.* at 1493.

69. *Id.*

70. *Id.*

71. *Id.* at 1493-94. With regard to the plaintiffs' state claims, the court upheld the claims based on trespass and public nuisance, and declined to rule on the claim based on tortious interference with business relationships. *Id.* at 1494-96.

72. *Id.* at 1496 (citing New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1262 (S.D.N.Y. 1989); Southern Packaging & Storage Co., Inc. v. United States, 588 F. Supp. 532, 544 (D.S.C. 1984); Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co., 544 F. Supp. 1104, 1122 (D. Md. 1982), *aff'd*, 742 F.2d 1449 (4th Cir. 1984); LaDuke v. Nelson, 560 F. Supp. 158, 162 (E.D. Wash. 1982), *aff'd*, 726 F.2d 1318 (4th Cir. 1985)).

disturb patients or potential patients of the clinics."[73] The Court of Appeals for the Fourth Circuit affirmed the district court's decision, held that "the district court operated in conformity with other circuits on the relevant questions of law,"[74] and rejected the defendant-appellants' claim that the district court abused its discretion.

### *B. Cases Denying Relief Under § 1985(3)*

Courts have denied plaintiffs' claims under § 1985(3) in only three of the thirteen anti-abortion protest cases surveyed for this Note. The first such case was *Roe v. Abortion Abolition Society*,[75] decided by the Court of Appeals for the Fifth Circuit in 1987.

The plaintiffs in *Abortion Abolition Society* (individuals, a clinic, and a clinic-transportation service) sought relief under § 1985(3), alleging that the protester-defendants formed a religiously motivated conspiracy "to deny the plaintiffs their rights of education, freedom of choice, privacy, and travel."[76] The district court held that a class defined as persons not sharing the defendants' religious beliefs about abortions was not a class which would satisfy § 1985(3)'s class-based animus requirement, and dismissed the plaintiffs' claims under the statute.[77] On appeal, for the purpose of analyzing the plaintiffs' claims, the court of appeals assumed, without deciding, that the "right to equal exercise of the right to choose an abortion is protected by § 1985(3),"[78] and then turned to the question of whether the plaintiffs constituted a valid class under the statute. The court held that even if religious discrimination is prohibited by § 1985(3), the plaintiffs had not adequately pleaded a claim of discrimination against a class based on religion. The court quoted the dissent in *Scott* for the oft-repeated rule that "the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action."[79] Accordingly, the court found that a class defined as "persons who do not share defendants' religious beliefs about abortion" was not a "class" for § 1985(3) purposes.[80] Finding no class, the court did not rule on the

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73. *Id.* at 1497.

74. *Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

75. 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

76. *Id.* at 932.

77. *Id.* at 932-33.

78. *Id.* at 934.

79. *Id.* at 935 (quoting United Bhd. of Carpenters & Joinders v. Scott, 463 U.S. 825, 850 (1983)).

80. *Id.* at 935.

merit of plaintiffs' underlying claims of deprivation.[81] The decision in *Abortion Abolition Society* is not necessarily at odds with those cases in which relief was granted to the plaintiffs under § 1985(3). The primary factor in the outcome of the case appears to have been the plaintiffs' ineffective pleading of a novel legal theory.[82]

The second anti-abortion protest case in which relief was denied was the 1989 case of *Mississippi Women's Medical Clinic v. McMillan*.[83] Also decided in the Fifth Circuit, *McMillan* involved anti-abortion protests, but not blockades, at the plaintiff-clinic. The purpose of the protests was to persuade patients of the clinic not to obtain abortions. The plaintiff sought an injunction under § 1985(3) to ban the anti-abortion protests on public sidewalks within 500 feet of the clinic. The district court denied the requested relief.[84] The court of appeals affirmed the lower court's decision on several grounds.[85]

First, the court held that the plaintiff failed to show the requisite animus for a § 1985(3) claim.[86] The plaintiff had characterized the class as "women of childbearing age who seek medical attention" from the plaintiff.[87] The court reasoned that, assuming the class was a protected class under § 1985(3), the plaintiff failed to show the requisite animus against the class in light of the record. The record indicated that the "protesters (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc."[88] Noting prior authority for the proposition that the class-based invidious discrimination element should be evaluated based on animus or motivation, rather than impact, the court deemed the class, as stated by the plaintiff, underinclusive.[89]

The court then examined the rights underlying plaintiff's alleged deprivation. Noting that the plaintiff had requested that the protesting activities be enjoined within a 500-foot radius of the clinic and that no physical blockades or restraints had been erected, the court characterized the plaintiff's complaint as a claim that potential clients were "being denied a supposed right not to hear speech that they do not wish to

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81. *Id.* at 937.

82. The cases in which the plaintiff classes have been granted relief under § 1985(3) are discussed *supra* notes 50-74 and accompanying text.

83. 866 F.2d 788 (5th Cir. 1989).

84. *Id.* at 790.

85. *Id.* at 791.

86. *Id.* at 794.

87. *Id.*

88. *Id.*

89. *Id.* (citing United Bhd. of Carpenters & Joinders of America v. Scott, 463 U.S. 825, 834 (1983)).

hear."[90] Consequently, the court rejected the plaintiff's claim, because a contrary decision would infringe upon the protesters' First Amendment rights.[91]

The court also ruled that failure to issue the injunction posed no threat of irreparable harm to the plaintiff's clients because abortions were still being performed at the clinic, and that the defendants' First Amendment rights outweighed the privacy rights of the plaintiff's clients.[92] Finally, the court found no compelling public interest basis on which to reverse the lower court's denial of the requested injunctive relief.[93]

A concurring opinion emphasized that the only issue before the court was whether the district court abused its discretion. Finding that the plaintiff had failed to establish any likelihood of success on the § 1985(3) claim, the concurrence found no abuse of discretion. In a separate opinion, concurring in part and dissenting in part, Judge Wisdom wrote that he would grant protected-class status to "women seeking medical aid from the clinic,"[94] and that he would issue an injunction "because of the coercive atmosphere generated by the protestors."[95]

The third anti-abortion protest case in which relief was denied under § 1985(3) was *National Abortion Federation v. Operation Rescue*,[96] decided in 1989. The plaintiffs brought a § 1985(3) action seeking relief from abortion clinic blockades. The court held that women seeking abortions were a class, given that the class existed independent of the actions of the defendants,[97] but denied relief under § 1985(3) on the grounds that "courts have never designated 'abortion seekers' as a class requiring special protection . . . [a]nd Congress has never so indicated in legislation."[98] Citing several cases contrary to its view, the court wrote: "With all due respect to these cases . . . [this court] concludes that women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act."[99] The court expressed the view that if the facts at issue constituted sex-based discrimination, they would recognize a class entitled to protection under § 1985(3). The court reasoned, however, that the case presented a sub-class of women comprised of those women seeking abortions and that the animus was not directed at women in

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90. *Id.*
91. *Id.*
92. *Id.* at 795-96.
93. *Id.* at 796-97.
94. *Id.* at 797.
95. *Id.*
96. 721 F. Supp. 1168 (C.D. Cal. 1989).
97. *Id.* at 1170.
98. *Id.* at 1171.
99. *Id.* at 1170.

general as a class.[100] Therefore, the court ruled, no protection was available under § 1985(3). Accordingly, the court granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted.[101]

### *C. The Present Debate*

There are two levels to the present debate regarding whether § 1985(3) is a proper avenue of relief for women prevented from exercising their fundamental and constitutionally protected rights to travel, privacy, and contract, as implicated in a woman's choice to terminate a pregnancy.

The first and most fundamental level of the debate turns on a frequently raised but never fully answered question: To whom are the protections of 42 U.S.C. § 1985(3) to be extended—emancipated slaves and their supporters alone, all persons deprived of fundamental rights as the result of an "invidiously discriminatory animus," or only certain persons deprived of fundamental rights as the result of an "invidiously discriminatory animus?"

The second, narrower level of the debate focuses on whether women, or women seeking abortions, constitute a protected class for § 1985(3) purposes. This level of the debate is demonstrated by the Fifth Circuit's *National Abortion Federation* decision.

## III. The Scope of § 1985(3) Generally

The actual language of § 1985(3) supports a broad application of the statute. The words speak in terms of protecting "any person or class of persons" from both direct and indirect conspiratorial deprivations "of the equal protection of the laws, or of equal privileges and immunities under the laws."[102] In addition to the facial breadth of the statute, the historical context in which the statute was created also supports a broad interpretation. Although the activities of the Ku Klux Klan during the Reconstruction Era inspired the creation of the legislation, Congress did not limit the scope of the statute to the protection of emancipated slaves or their supporters. To hold today that only black Americans or racial minorities (and their "supporters") are protected by § 1985(3) would be to disregard the language and plain meaning of the statute. In *Griffin*, the Supreme Court adopted an approach which accorded the language of the statute the power of its plain meaning.[103] This approach was

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100. *Id.* at 1171-72.

101. *Id.*

102. 42 U.S.C. § 1985(3). The complete text of the Section is set forth *supra* note 13.

103. *See supra* notes 31-38 and accompanying text.

reaffirmed by the four dissenting justices in *Scott*.[104] Additionally, in interpreting the criminal analogue of § 1985(3), currently codified at 18 U.S.C. § 241, the Supreme Court has stated that it "must accord it a sweep as broad as its language."[105]

Congressional reports of the 42nd Congress also support a broad application of § 1985(3). As noted in *Scott*, Senator Edmunds, the member of the 42nd Congress who managed the bill on the Senate floor, spoke in terms of protecting an individual from conspiratorial deprivations formed against a man in a variety of types of classes, including "Democrat," "Catholic," "Methodist," or "Vermonter."[106] Representative Shellabarger, the sponsor of the bill, described the purpose of an amendment to the statute in the following fashion:

> The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.[107]

An examination of another provision of the Ku Klux Klan Act also supports extending § 1985(3)'s protections to groups other than blacks or racial minorities and their supporters. Currently codified at 42 U.S.C. § 1983,[108] § 1985(3)'s companion statute provides an avenue of relief for "every person" who has suffered a deprivation under color of law of "any rights, privileges, or immunities secured by the Constitution."[109] Section 1983 has been applied to protect a wide range of persons[110] and,

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104. The dissent in *Scott* is discussed *supra* notes 45-48 and accompanying text.

105. Respondents' Brief at 16, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

106. United Bhd. of Carpenters & Joinders v. Scott, 463 U.S. 825, 838 (1983) (quoting CONG. GLOBE 42d Cong., 1st Sess., at 567 (1871)).

107. Shatz, *supra* note 11, at 914 (quoting CONG. GLOBE, 42d Cong., 1st Sess. at 478 (1871)).

108. 42 U.S.C. § 1983 was originally enacted as Section 1 of the Ku Klux Klan Act. *See supra* notes 20-25 and accompanying text.

109. 42 U.S.C. § 1983 (1988). The text of § 1983 is set forth *supra* at note 25.

110. Respondents' Brief at 17, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985). *See, e.g.*, Richard v. Penfold, 839 F.2d 392 (7th Cir. 1988) (deciding that a genuine issue of material fact precluded summary judgement in § 1983 action brought by an inmate alleging that a prison official violated his constitutional rights by failing to protect him from sexual assaults by other inmates); Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980) (holding that an equal protection claim is actionable under § 1983 even if the plaintiff is not a member of a suspect class; class status goes to the level of scrutiny only).

as noted in the Respondents' Brief in *Bray*: "Neither statute refers to race; nothing in Section 1983 suggests that its reference to 'persons' is any broader than the 'persons' referred to in Section 1985(3)."[111]

The primary limit on the scope of § 1985(3) appears to be the principle that it should not be applied to create a general federal tort law. As noted in *Griffin*, "[t]hat the statute was meant to reach private action does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."[112] Evidence that Congress did not intend to create a general federal tort law can be found in the congressional reports,[113] and concern regarding such a result has been reiterated in the cases interpreting the Section.[114] There exists a wide expanse, however, within which many persons could be afforded the protection of the statute, between the outer boundary of not creating a general federal tort law, and the unnecessarily narrow view that § 1985(3) may be applied to protect only black Americans subjected to deprivations based on race. Justice Blackmun, writing for the dissent in *Scott*, may have hit upon the key to resolving this conflict: The statute should be applied to protect those classes who are "in danger of not being ensured equal protection of the laws by the local authorities."[115]

## IV. § 1985(3) Applied to Enjoin Anti-Abortion Rescue Blockades

### *A. The Requisite Elements*

The question of whether § 1985(3) is properly invoked to enjoin anti-abortion clinic blockades appears to turn upon the "class-based animus requirement" expressed in *Griffin*. Each of the other requisite elements for a successful § 1985(3) claim are satisfied easily in the clinic blockade cases. As noted by the district court in *Bray*, a conspiracy has been defined as "a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some

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111. Respondents' Brief at 17, *Bray* (No. 90-985).

112. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

113. The Court in *Griffin* wrote: "[T]hough the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.'" *Id.* at 102-03 (quoting Cong. Globe, 42d Cong., 1st Sess., at 485 (1871)).

114. *See, e.g., id.* at 102-03; United Bhd. of Carpenters & Joinders v. Scott, 463 U.S. 825, 835 (1983).

115. *Scott*, 463 U.S. at 854 (Blackmun, J., dissenting).

lawful purpose by unlawful means."[116] The common usage of the term connotes a "plot."[117] None of the protester-defendants in the anti-abortion blockade cases surveyed asserted the absence of a conspiracy in defense to the claims brought against them.

The requirements of an act in furtherance of the conspiracy and an injury to the target of the conspiratorial deprivation also appear to be satisfied in the anti-abortion blockade cases. The stated purpose of Operation Rescue's "rescue missions" includes, inter alia, preventing women from obtaining legal abortions. Organizing and coordinating a clinic-blockade constitutes an act in furtherance of that conspiratorial purpose. Plaintiff clinics, individuals, and organizations have had no difficulty establishing the resultant injuries when blockades are utilized by protesters.[118]

### *B. "Women" as a Class for § 1985(3) Purposes*

The congressional reports of the debates surrounding the enactment of § 1985(3) supports the statute's application to protect women as a class. In addition to the comments of Senator Edmunds and Representative Shellabarger which support the application of § 1985(3) to a wide variety of classes of persons, another member of the 42nd Congress, Representative Buckley, stated that "'the 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* . . . ."[119] Additionally, numerous courts of appeals have held that women constitute a protected class for § 1985(3) purposes.[120]

Although the Supreme Court has not explicitly held that women constitute a protected class under § 1985(3), the Court implied that women are among those protected by the statute in the 1979 case of

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116. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1492 (E.D. Va. 1987) (quoting 3 EDWARD J. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 103.23 (1987) (citing also MODEL PENAL CODE § 5.03 (Proposed Official Draft 1962)).

117. THE RANDOM HOUSE COLLEGE DICTIONARY (Revised Edition 1988).

118. The plaintiffs in Mississippi Women's Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989), had difficulty with the injury element as the court found no irreparable harm in denying the requested injunctive relief. That case is distinguishable from the other cases surveyed, however, as no clinic blockades occurred. *See supra* notes 83-95 and accompanying text.

119. Respondents' Brief at 20, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871), at App. 190).

120. *See, e.g.*, Lewis v. Pearson Found., 908 F.2d 318 (1990); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988); Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984).

*Great American Federal Savings & Loan Association v. Novotny*.[121] The plaintiff in *Novotny* was a male employee who alleged that he was fired because of his vocal support of female employees. He filed a complaint under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission and, upon receiving a right-to-sue letter, brought an action seeking damages under § 1985(3), claiming a conspiratorial deprivation of equal protection and privileges and immunities under the laws. The district court granted the defendant's motion to dismiss, holding that a single corporation could not engage in a conspiracy.[122] The court of appeals reversed the district court's ruling, holding that "conspiracies motivated by an invidious animus against women fall within § 1985(3), and that Novotny, a male allegedly injured as a result of such a conspiracy, had standing to bring suit under that statutory provision."[123] The court of appeals also ruled that a Title VII right was an appropriate basis for a § 1985(3) action, and that intra-corporate conspiracies are covered by the Section.

On review of the case, the Supreme Court first noted the remedial nature of § 1985(3), writing that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."[124] The Court then specifically held that a Title VII right was not a suitable basis for a § 1985(3) claim, as to hold otherwise would permit plaintiffs to avoid entirely the detailed provisions and administrative processes created by Congress under Title VII. The majority opinion appears to have assumed, without specifically ruling on the matter, that sex-based discrimination is an appropriate basis for a § 1985(3) claim, its holding resting solely upon the importance of upholding the congressional scheme found in Title VII.[125]

Justice Powell filed a concurring opinion, writing that he would limit § 1985(3)'s application exclusively to "conspiracies to violate those fundamental rights derived from the Constitution."[126] He expressed that he would not extend the statute's protection to statutory rights created subsequent to § 1985(3)'s enactment. Justice Stevens also filed a concurring opinion, agreeing with Justice Powell that the remedial value of

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121. 442 U.S. 366 (1979).

122. *Id.* at 369.

123. *Id.* at 371.

124. *Id.* at 373.

125. *See, e.g.*, Lewis v. Pearson Found., 908 F.2d at 324 ("[T]he Supreme Court 'has implicitly held that discrimination on the basis of sex is sufficient under the statute.'") (citations omitted). *See also* Respondents' Brief at 20, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985) ("The Court assumed, without deciding, in . . . *Novotny* . . . that a conspiracy to discriminate in employment on the basis of sex came within Section 1985(3).").

126. *Novotny*, 442 U.S. at 380 (Powell, J., concurring).

§ 1985(3) should be limited to the redress of deprivations of fundamental rights derived from the Constitution. Justice Stevens specifically added, however, that "[p]rivate discrimination on the basis of sex is not prohibited by the Constitution . . . . I do not believe that [§ 1985(3)] was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not been enacted . . . ."[127]

Justice White issued a dissenting opinion, joined by Justices Brennan and Marshall. Regarding the majority's specific holding, the dissent expressed the view that concerns about undercutting the Title VII administrative scheme could be alleviated by requiring plaintiffs to exhaust their administrative remedies under Title VII prior to bringing a § 1985(3) action. The more interesting and pertinent portions of Justice White's opinion appear in the footnote to the dissent. He wrote:

> I am not certain in what manner the Court conceives of sex discrimination by private parties to proceed from explicit constitutional guarantees. In any event, I need not pursue the issue because I think it clear that § 1985(3) encompasses all rights guaranteed in federal statutes as well as rights guaranteed directly by the Constitution.[128]

Justice White also wrote that the majority correctly assumed that discrimination on a basis other than race may be vindicated under § 1985(3), based on the Section's broad reference to "all privileges and immunities, without any limitation as to the class of persons to whom these rights may be granted."[129] Significantly, he added: "It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3)."[130]

The *Novotny* decision, the dissenting opinion in *Scott*, and numerous lower federal court cases ruling on the issue all point to the extension of § 1985(3)'s protections to women as a class. Although the matter is far from conclusively settled, the requisite groundwork has been laid for the Supreme Court to explicitly hold that women constitute a class against which a "class-based invidiously discriminatory animus" might be directed, and that such a class of women is protected under § 1985(3).[131]

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127. *Id.* at 385 (Stevens, J., concurring). Justice Stevens added: "I agree with the Court's conclusion that [§ 1985(3)] does not provide respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex." *Id.* Justice Stevens appears to have been alone in perceiving that the Court reached such a conclusion.

128. *Id.* at 388-39, n.5 (White, J., dissenting). Justice White noted the Court's repeated rulings that the criminal analogue to § 1985(3), 18 U.S.C. § 241, encompasses all federal statutory rights, and that 42 U.S.C. § 1983 encompasses both statutory and constitutional rights. *Id.*

129. *Id.* at 389, n.6 (White, J., dissenting).

130. *Id.*

131. It appears that the class-based invidiously discriminatory animus element re-

## V. Conclusion

Neither the language of the statute itself, nor the inferences which might be drawn from the legislative history of § 1985(3), preclude applying the statute to enjoin the rescue blockades. In fact, such a use is in large measure supported by the language of the statute and the available congressional reports pertaining to congressional intent. In addition to the fact that the statutory prerequisites set forth in the Supreme Court opinion in *Griffin v. Breckenridge* have all but uniformly been held to have been satisfied, the Court's decision in *United Brotherhood of Carpenters v. Scott* does not preclude the application of § 1985(3) to the facts at hand. Significantly, the anti-abortion clinic blockade cases present a scenario envisioned by the dissenters in *Scott* as being fitting for the application of § 1985(3): the inability of local authorities to adequately protect the rights of the injured parties.

The Court's opinion in *Bray v. Alexandria Women's Health Clinic* may resolve the conflict in the lower courts regarding the use of § 1985(3) to enjoin anti-abortion rescue blockades.[132] More importantly, the decision may offer new guidelines for the application of the statute that will permit the protection of a broad range of persons without turning the statute into the feared general federal tort law.

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quired for a successful § 1985(3) action will be the most difficult analytical issue for the Supreme Court to resolve in the clinic blockade cases. In *Bray*, discussed *supra* notes 52-74 and accompanying text, reargument before the court presented opposing perspectives on the satisfaction of this element in the clinic blockade cases. Counsel for Operation Rescue argued that women seeking abortions are not a class, and that "a protected class should be defined by who people are, not by what they do." 61 U.S.L.W. 3295, 3296 (Oct. 20, 1992). "Their motive, he emphasized, is opposition to the practice of abortion, not animus toward women." *Id.* Counsel for the plaintiff-respondents in the case, on the other hand, observed that "the defendants . . . do not dispute that women are a class, but argue instead that plaintiffs are only a subset of that class," and noted that discrimination typically works against a subset of a class. *Id.* She also drew analogy to school blockades by anti-integration demonstrators who claimed that they were opposed to integration, but not blacks themselves, and argued that "in most cases, the defendants deny the plaintiffs a right available to all . . . [B]ut here . . . they deny a right available only to women—one that is indispensable to their equality." *Id.*

132. *Bray* is discussed *supra* notes 52-74 and accompanying text. The Supreme Court first heard oral arguments in the case on October 16, 1991. *See* Charles F. Williams & Robert S. Peck, *Supreme Court Preview: Blockade*, A.B.A. J., Oct. 1991, at 48. On June 8, 1992, the case was restored to the Court's calendar for reargument. 112 S. Ct. 2935 (1992). The case was reargued on October 6, 1992, after Justice Thomas joined the Court, causing speculation that Thomas's vote was needed to break a four-to-four tie. 61 U.S.L.W. 3295 (Oct. 20, 1992).