Clinic Blockades: What Is the Problem? What is the Harm? What Is the Solution?

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CLINIC BLOCKADES:

WHAT IS THE PROBLEM?

WHAT IS THE HARM?

WHAT IS THE SOLUTION?

by Nona LaPlante*

edited by Kelly Linn Ball and Karen Leonard

A woman's right to choose whether or not to terminate a pregnancy continues to be recognized under the United States Constitution. But the freedom of choice is meaningless when one's freedom of access is denied. After all, how can one continue to have the freedom to choose when one is simultaneously obstructed from acting on that choice?

The battle over access to abortion and abortion related services is not new. Neither are the views--political, ethical, and moral--espoused by all sides. What is new is the increasingly violent nature of anti-choice activities aimed at clinics, staff members, and individuals seeking services. Unlike traditional campaigns of picketing and public discourse, these acts of terrorism and intimidation have nothing to do with the exercise of free speech or other protected activities.

In response, those who work to ensure the availability of reproductive choice are concentrating on new judicial and legislative interventions. The United States Supreme Court cases of Bray v. Alexandria Women's Health Clinic and National Organization for Women, Inc. (NOW) v. Scheidler explore possible federal causes of action, both civil and criminal, that may be utilized to challenge blockaders' obstructionist tactics. In Bray, the Court effectively dismantled use of the deprivation clause of Section 1985(3) of the Civil Rights Act of 1871 as a means of civil remedy in clinic blockade cases. However, the

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2 National Org. for Women (NOW) v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, NOW v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), rev'd in part, vacated in part, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). "Defendants' use of 'rescue' demonstrations as an anti-abortion protest is not a recent phenomenon. For example, on almost a weekly basis for the last five (5) years Commonwealth Women's Clinic has been the target of 'rescue' demonstrations by Operation Rescue." Id. at 1489.

3 The protests, the picketing, and the acts of expression of anti-choice demonstrators are not the concern of this paper, nor are they the basis of the lawsuits and legislation addressing the blockades. Rather, the focus is on the acts of violence that are clearly outside the protection of the First Amendment. Every person in the United States has the right to express their beliefs. However, no person has the right to physically force their beliefs upon others. Wisconsin v. Mitchell, 113 S. Ct. 2194; Cox v. Louisiana, 379 U.S. 536, 555 (1965); United States v. Gilbert, 884 F.2d 454 (9th Cir. 1989). Some anti-choice activists have openly acknowledged that many of their actions fall well outside the scope of constitutionally protected activity. See e.g. Beyond Clinic Blockades: Protecting Patients and Providers from Intimidation and Violence: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong., 2d Sess. Apr. 1 (1993) (statement of Randall A. Terry, Founder, Operation Rescue) [hereinafter Beyond Clinic Blockades].


5 114 S. Ct. 798 (1994).
dissenting Justices, and one concurring Justice, implied that there may be a potential cause of action under the hindrance clause of the same section of the Civil Rights Act. More promising is the decision in Scheidler, which established that no economic motive was required in the underlying racketeering act or enterprise to prosecute under the Racketeer-Influenced and Corrupt Organization Act (RICO). Scheidler's decision appears to open the door for federal criminal prosecution of clinic blockaders and blockade organizers.

In immediate response to the Bray decision, Representative Charles Schumer (D-NY), along with co-sponsor Representative Constance Morella (R-MD), introduced H.R. 796, the Freedom of Access to Clinic Entrances Act of 1993. Subsequently, the Senate introduced a counterpart, S. 636. On May 26, 1994, Congress passed and enacted an amended version of the proposed legislation, The Freedom of Access to Clinic Entrances Act of 1994 (FACE). Essentially, FACE provides both federal criminal and civil causes of action against individuals and organizations which obstruct access and/or cause damage to medical facilities providing abortions and related services.

This article discusses the national scope and destructive nature of recent blockades through personal and direct accounts, and examines potential remedies against denial of access to clinics. Part I focuses on defining the problem, and challenges the misperception that clinic blockades are isolated, local problems. A shift in anti-choice strategies from protest to violent obstruction necessitates effective police and government intervention. However, as the first section highlights, local and state governments are immobilized many times by personal beliefs or by the tactics used by blockaders. The lack of effective intervention intensifies the problem. Ultimately, the clinic blockades occurring in each community web together, causing a national impediment to abortion services that blankets the United States.

Part II illustrates the profound impact this denial of access has upon the individuals who provide reproductive services and upon those who attempt to exercise their right to choice. Service providers, doctors and staff members, face two major obstacles due to blockades and blockade tactics. The first is an impaired working environment. The second is the harassment and violence directed at providers themselves. Many anti-choice supporters believe that one way to prevent abortions is to eliminate those who provide them. Tactics against service providers range from distribution of literature about the doctors' practices to murder. Of course, women seeking pregnancy related services are also harmed by anti-choice blockades. Blockades and blockaders not only impinge on their constitutional right to reproductive choice, but they also endanger women's health, both mentally and physically.

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6 Bray, 113 S. Ct. at 758. The Court concluded that to prove a Section 1985(3) deprivation clause claim, precedent requires, inter alia, that a plaintiff show "(1) that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action,' Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) and (2) that the conspiracy 'aimed at interfering with rights' that are 'protected against private, as well as official encroachment.' Carpenters v. Scott, 463 U.S. 825, 833 (1983)." Id. at 758. The Court found that plaintiffs failed to sufficiently show either element. Id. See infra notes 153-170 and accompanying text.

10 Id.
11 Personal accounts and descriptions most powerfully capture the nature of the blockaders' activities, and the varied and numerous harmful effects these acts have upon providers and patients alike.
12 Equally significant is what this paper does not do. This is not a discussion of the constitutionality of the right of reproductive choice. Nor is this a discussion of the free speech issues involved in a blockade of abortion clinics. Inevitably, the freedom of speech is woven into the issue of clinic blockades. Nevertheless, there are actions that fall beyond the scope of First Amendment protection, and these types of violent acts, as opposed to expressions of ideas, are the focus of this paper. Thus, this article attempts to provide a general overview of clinic blockades and their resultant harms. It then goes on to describe the recent Supreme Court decisions regarding such blockades, and what has been and might be done in response.
Potential remedies that address the illegality of blockaders' actions are examined in Part III. Specifically considered is whether a federal cause of action exists under Section 1985(3)'s hindrance clause of the Civil Rights Act of 1871 after Bray, and the impact of NOW v. Scheidler on the application of RICO statutes to the blockading of abortion clinics. Also, the provisions of FACE are discussed and local legislative action is suggested.

All of the potential solutions set forth in Part III must be employed simultaneously. However, these remedies address blockades after the fact. Action needs to be instituted to prevent blockades from occurring. Supporters of choice must send the strong, unified message through all levels of society that reproductive choice and the ability to exercise that choice is fundamental. The most dangerous trench to avoid is that of passivism, believing that the fight is over because there is a legal right to reproductive choice. The national epidemic of blockades and the violence associated with them emphasize that the fight to guarantee the ability to exercise the right of reproductive choice is anything but over.

I
DEFINING AND UNDERSTANDING THE PROBLEM

Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and Wisconsin have been forced to deal with some form of clinic obstruction.

A. Obstruction and Denial of Access

While each blockade differs in specifics, blockaders share common goals and tactics of obstruction. In South Bend, Indiana, for example, the Women's Pavilion, a center that provides both gynecological counseling and abortion services, has been battling to keep its doors open against anti-abortion blockaders.53 In 1988, after protesters became physically threatening, the Pavilion sought and was granted a permanent injunction to prevent "protesters from trespassing on clinic property, harassing staff and patients of the clinic, taking photographs and writing down license plates [sic] and coming within 10 feet of the clinic, its patients or employees."55

54 Minnesota v. Rein, 47 N.W.2d 716 (Minn. Ct. App. 1951); Minnesota v. Friberg, 435 N.W.2d 509 (Minn. 1988).
55 Wisconsin Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989).
56 City of St. Louis v. Klocke, 637 S.W.2d 174 (Mo. Ct. App. 1982).
57 Telephone conversation with Deborah Ellis of NOW Legal Defense & Education Fund, April 9, 1993. During the past week there had been a clinic bombing in Montana.
73 Clinic Blockades: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 28 (1992) (statement of Marne J. Greening) [hereinafter Clinic Blockades].
74 Id. at 29. An anti-choice protester entered the clinic under the pretense of needing counseling about his troubled daughter. The man threatened to close the clinic. After the clinic director called the police, the protester paced back and forth in front of the clinic while carrying a wrapped package in his arms. Police finally physically removed him from the premises. Id.
Despite the injunction, blockaders obstructed access to the clinic on several occasions. On two occasions in particular access was completely blocked. During the latter of the blockades, five protesters gained access by pretending to need services. One of the persons who had entered the clinic claimed to need something from the car and left the clinic to get it. The protester gathered a large group of other protesters and when the clinic employees opened the door for the person to return the gang rushed into the clinic. Inside, the demonstrators chained themselves together with bike locks and extended their human chain from the waiting room to the recovery rooms. Patients were forced into bathrooms and under desks, while staff were trapped in the sterilization room. Clinic entrances were obstructed again on April 5, 1991 for four hours by over one hundred blockaders. In response to requests to leave, the group leader stated that, "they answered to a higher law, God's law."

The experiences of a Wisconsin doctor who testified before the House Subcommittee on Crime and Criminal Justice further illustrate the extent of the calculated obstruction. Doctor Neville Sender of Milwaukee, Wisconsin described ten blockades over a twenty-three month period against one clinic in which he worked. While blockades varied in both size and intensity, access, either the medical providers' or the patients', was obstructed on each separate occasion. Tactics employed by blockaders to deny access included, but were not limited to, using junk cars to block entrances, chaining people to clinic doors, gluing locks on clinic doors, and lying in front of and on top of cars.

Blockades like these have occurred in numerous cities and towns across the country. The scenes are repeated over and over in different locations. In Boston, Massachusetts on Wednesday, September 9, 1992, approximately "five anti-abortion protesters who locked themselves in homemade iron collars" were among the individuals arrested for blocking clinic access. On Saturday, November 21, 1992 in Milwaukee, Wisconsin:

[m]ore than 50 abortion protesters - more than half of them children - were arrested . . . for trying to block access to an abortion clinic . . . .

One man was arrested when he laid down in front of a police car, glued his hands together and attached himself to the chassis . . . .

Three teenage protesters, two of them handcuffed, laid down in front of a car being driven by [the] Police Chief . . . as he attempted to pull into the driveway of the clinic.

55 Id. at 30.
56 Id.
57 Id. at 31-32.
58 Id. at 31.
59 Id.
60 Id.
61 Id. at 31-32.
62 Id. at 32.
63 Id. at 33.
64 Id. at 62-72. (statements of Neville Sender, M.D.)
65 Id. at 70-72.
66 Id.
67 Id.
69 More Than 50 Abortion Opponents Arrested, UPI (Milwaukee, Wisconsin), Nov. 21, 1992 at § Domestic News.
Blockades that plagued metropolitan Washington D.C. and which led to the action in Bray v. Alexandra Women's Health Clinic were described by the District Court for the Eastern District of Virginia as follows:

On almost a weekly basis for the last five (5) years, Commonwealth Women's Clinic has been the target of "rescue" demonstrations by Operation Rescue. One of the largest of these occurred on October 29, 1988. That "rescue" succeeded in closing the Clinic from 7:00 a.m. to 1:30 p.m., notwithstanding the efforts of the ... Police Department. "Rescuers" did more than trespass on the clinic's property and physically block entrances and exists [sic]. They also defaced clinic signs, damaged fences and blocked ingress and egress from the clinics parking lot by parking a car in the center of the parking lot entrance and deflating its tires. On this and other occasions, "rescuers" have strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any car.

Similar events took place during the blockades of three clinics in the District of Columbia on Saturday, January 23, 1993. Reports of the blockades tell of hundreds of arrests and hours of strife. At the Southeast Hillcrest Women's Surgi-Center, also in Washington, D.C., blockaders meant to deny anyone and everyone access to the clinic:

Four antiabortion demonstrators, using iron pipes welded to a four-foot section of railroad track tethered themselves to the metal contraption and to the front of the door. At the side entrances, a dozen more demonstrators chained and handcuffed themselves to each other inside-and underneath-two cars with flattened tires that had been wedged against the doors.

B. INCREASING VIOLENCE AT THE HANDS OF BLOCKADERS

Blockades such as these beget acts of violence such as arson, assault and battery, bombings, and chemical attacks. Statistics highlight that the use of violence by anti-choice supporters is progressively increasing in both frequency and severity. Between the years 1977 and 1989, seventy-seven family-planning clinics were torched or bombed (in at least seven instances during working hours, with employees and patients inside), 117 were targets of arson, 250 received bomb threats, 231 were invaded, and 224 vandalized. According to The National Abortion Federation, "about 100 violent abortion-related incidents, including bombings, arson and death threats, were reported to police in 1990. By 1992 the number was 667," which is believed to be underestimated given the reluctance of many providers and patients to report such incidents for fear of provoking further violence. According to Patricia Ireland, President of the National Organization for Women (NOW), during 1992 "on an average of once every eight days, they [anti-choice supporters] vandalized or invaded a clinic. More than once a month, a clinic health-care worker or patient was physically assaulted or there was a death threat issued to them." During the first two months of 1993, there were at least twenty-seven violent incidents involving abortion clinics.

Id.
Supreme Court of the United States to Consider Anti-Abortion Protest (National Public Radio, Morning Edition, Jan. 2,
C. INEFFECTIVE ACTION ON THE PART OF LOCAL OFFICIALS

The increase in the number of blockades and the extreme violence now associated with them necessitates cooperation of local officials in ensuring access to clinics. Two situations, however, encourage blockaders and add to the problem. The first is that police officers and local government often agree with the views of protesters and therefore take little or no action to remove the barriers at clinics. Some law enforcement officials refuse to secure women's access to a clinic because of their personal conviction that abortion is wrong. Sheriff James T. Hickey from Nueces County, Texas explained to the Subcommittee on Crime and Criminal Justice that he would not enforce laws against anti-choice supporters:

When man's law fails, I must look to a higher law because I will not be a party to the slaughter of an innocent human being. If requested to remove rescuers from abortuary doors, I have said I will not, because that last rescuer moved is the last chance for life for a child whose right to life can only be abrogated by God.

Many law enforcement agents hold very similar beliefs, as do many state and local government authorities. Susan Hill, President of National Women's Health Organization, stated that local police commonly respond to blockade situations as follows:

[they] ask us to close our clinics for the day so that they won't have to deal with the problem. They have told us that they are tired of spending so much money arresting these people, only to see charges dropped. One prosecutor has refused repeatedly to prosecute any trespassers. We have petitioned two different courts in two states for special prosecutions, due to unwillingness of prosecutors to prosecute.

The blockades initiated by the anti-choice group Operation Rescue during July and August of 1991 in Wichita, Kansas further demonstrate local inaction. Blockaders had the support of Kansas Governor Joan Finney, the Wichita mayor, and the local United States Attorney. One reporter explained the effect of

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78 Larry Rohter, Doctor is Slain During Protest Over Abortion, N.Y. TIMES, Mar. 11, 1993, at § A1 [hereinafter Rohter, Doctor Slain].
79 Beyond Clinic Blockades, supra note 3, at 140 (statement of Susan Hill, President National Women's Health Organization). "Providers have been told by local police that if we can't take the heat, we should quit." Id.
80 Id. at 156 (statement of James T. Hickey, Sheriff, County of Nueces, Texas).
81 See Rick Szykoway, Life During Wartime, THE HUMANIST, July-Aug. 1992, at 9, 10 ("[I]n October 1991, Buffalo Mayor James D. Griffin announced that he would welcome Randall Terry and Operation Rescue with 'open arms.' Griffin went on to declare, in no uncertain terms: 'I want to see them in this city. If they can shut down one abortion mill, they've done their job.'"). See also Deborah A. Ellis, Analysis of Bray v. Alexandria Women's Health Clinic and Blueprint of Future Opposition to Clinic Blockaders, MEMORANDUM TO REPRD. FREEDOM ADVOCATES (NOW Legal Defense and Education Fund, New York, N.Y.), Feb. 11, 1993. at 13 ("[E]xperience nationwide has proven that many localities either cannot arrest blockaders quickly enough to allow women access to their health care providers without risk to their health, or will not do so.").
82 Beyond Clinic Blockades, supra note 3 (prepared statement of John E. Cowles, Esq.). Attorney Cowles in discussing the 1991 "Summer of Mercy" in Wichita stated:

Wichita police calmly watched the protesters arrive by the bus load, walk to the driveway and form the blockade. No arrests were made until a patient vehicle arrived. Then, as other protesters flooded into the street to throw themselves on or under the patient's car, the police would ask the protesters in the driveway to leave. When they refused, an arrest would finally commence, one protester at a time, 'baby-stepping' away from the driveway. If police tried to make them move faster or arrest more than one at a time, the protesters would be ordered by Operation Rescue to go limp requiring several officers to carry each one away.

This choreography was the result of earlier meetings between Operation Rescue leadership and the Wichita mayor and city manager. The city manager would not allow police to establish lines on either side of the driveway to prevent the blockades from forming, and police officers were forbidden to make immediate arrests.

Id.
83 Governor Finney actually made an appearance at the rally to show her support for the blockaders. Nightline (ABC Television broadcast, Aug. 6, 1991). "Operation Rescue [had] also received encouraging words from the mayor and the
such political support this way:

With that kind of encouragement, the local police found themselves in a near-impossible situation. On the one hand, they had to enforce trespassing laws and arrest protesters who blocked entrance to the clinic. But they gave great leeway, allowing many to take 'baby steps' on the way to the paddy wagon and, after being arrested, they were immediately let back on the streets after paying a $25 fine.\(^\text{84}\)

Support of local government, however, does not make the actions of blockaders any less illegal. Judge Kelly, of the United States District Court for the District of Kansas, granted an injunction against Operation Rescue and called in federal marshals to restore order when local officials refused to do so.\(^\text{85}\) He refused to tolerate blockaders' illegal tactics and made it clear that blockaders were going to jail.\(^\text{86}\)

The second hindrance to restoring access is one precipitated by a strategy of blockaders outnumbering law enforcement officers. Police, even when they want to act, are hindered in their attempts to secure access to facilities because of the sheer number of protesters. Anti-choice supporters realize that large numbers make it nearly impossible for all the supporters to be removed. It was estimated by a witness that at one Operation Rescue blockade there were approximately 1600 anti-choice protesters. The witness described the scene:

The speed of the arrests depended on how slow these protesters could walk to the other side of the street and get on the bus. When one person got up another would sit in their place. With 1600 people standing by to jump in it became very apparent that we might not get into the clinic at all.\(^\text{87}\)

The large numbers of blockaders and long hours of police intervention also significantly strain local law enforcement resources, and ultimately local tax payers.\(^\text{88}\) One example is the "Spring of Life" local U.S. attorney, much to the dismay of those who operate abortion clinics." Id. See also Clinic Blockades, supra note 53, at 9 (statement of Silvia Doe). Ms. Doe related to the House Subcommittee her experience of being required to sit in a car outside the blockaded clinic in order for police to continue arrests and for the difficulty she encountered because of the mayor's active support of the anti-choice blockaders:

We sat cramped in these cars not able to get out and exercise, except when the policemen were going to take their breaks we had to pull all the cars all the way back to the end of the street where they had this mobile setup to take blood pressure of policemen. We were allowed in there one time, but when the mayor heard that we were going in there for comfort, we were banned.

\(^{84}\) Nightline, supra note 83.  
\(^{85}\) Id.  
\(^{86}\) Id. Judge Kelly stated that blockaders "will do whatever it takes to shut down that clinic, as if to say somehow they have a supreme right, a legal right, to do that. And they do not." Id.  
\(^{87}\) Clinic Blockades, supra note 53, at 13 (prepared statement of Silvia Doe).  

Whenever possible, they will enter an abortion clinic, or at least blockade it. Using heavy Kryptonite bicycle locks, they chain themselves to concrete blocks or automobile steering wheels and then go limp, making it difficult for police to remove them. When arrested, they usually refuse to give their names—and they are more than willing to do jail time since that puts a financial burden on local law-enforcement systems.

Id. See also S. Rep. No. 169, 103d Cong., 1st Sess. 11 (1993) (quoting R. TERRY, To RESCUE THE CHILDREN 49 (1986)) ("You should check how overloaded the city's jail and court systems are. In many, many cities, the courts and jails are too overloaded to deal with rescue missions."). If a judge bows to the pressure of pro-abortion forces, he must know that * * * [t]hese cases will take up precious time on an already over-crowded docket. * * * He will look foolish to the public for issuing an order because rescuers won't obey" Id. (quoting testimony of N.Y. Attorney General Robert Abrams to Senate Labor and Human Resources Committee, May 12, 1993, which quotes Randall Terry, of Operation Rescue (citations omitted)).
campaign launched against clinics in Buffalo, New York in April of 1992. During the two weeks that Operation Rescue attempted to close the facilities, police arrested 605 blockaders and trespassers, and the cost to the city and county was over $383,250. Manassas, Virginia Chief of Police, Sam Ellis, recounted the problems his community faced as a result of clinic blockades, stating that, "repeated events such as this may well make it difficult for us to do our job." The solution, Chief Ellis suggests, is "[f]ederal legislation, especially if it's in the form of help, either financially or manpower resources [sic]."

Janet Reno, the Attorney General for the United States, and the United States Congress agree that the violence visited upon clinics and physicians providing abortion services represents a nationwide problem. Obstruction and violence by clinic blockaders affects almost every state in this country. The repeated scenes of masses of protesters physically barring access, committing assaults on providers and women seeking access, and torts against the property of the clinics are increasing. Local officials usually are either unwilling or unable to control the tenor of the blockades. As blockades continue to upset the local community and economy, it is essential to realize the actual harm caused by blockades to health care providers and to pregnant women throughout the United States.

II
THE HARMs CAUSED BY BLOCKADERS

The consequences of the anti-choice blockaders' actions are too often overshadowed by the publicity surrounding the blockades themselves. Their effects can be divided into violence directed against individuals who provide or assist in providing abortion services and the mental and physical consequences to the women deprived of their constitutional right to reproductive choice. Both are equally devastating to the accessibility of reproductive choice.

A. HEALTH CARE PROVIDERS

Anti-choice supporters are focusing unprecedented attention on abortion providers. Randall Terry, Director of Operation Rescue, stated that "the doctor is the weak link," because "when you get doctors out, you can have all the laws on the books you want and it doesn't mean a thing." Terry has pledged that his group will "do everything [it] can to torment these people [doctors] . . . to expose them for the vile, blood-sucking hyenas that they are." The final goal is to "make targeted doctors a liability to everyone they encounter."

To accomplish the goal of ending abortion, anti-choice supporters use two main tactics directed at providers: impediment of services by denying access, and sheer physical violence. There is no question that during blockades the services at the targeted clinics are impaired. Either the health providers or the

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90 Clinic Blockades, supra note 53, at 51 (prepared statement of Sam Ellis, Chief of Police, Manassas, VA). "This" refers to a November 23, 1991 blockade of an abortion clinic in Manassas. Approximately 150 blockaders were involved. The blockaded occurred at approximately 10:00 am on a Saturday morning. "At that time" the "manpower allotment is five officers on the street." Id.
91 Id.
92 Id. at 12-14, 21. The Senate Report considered a wide variety of information in reaching this conclusion, including findings of courts across the country, statistics compiled by various organizations, testimony received by congressional committees, and media and personal accounts. Id.
93 Boodman, Abortion Foes, supra note 76, at A17 (quoting Randall Terry of Operation Rescue).
94 Id.
95 Id.
96 Id.
women seeking services are denied access. Additionally, many women who want to have abortion services are afraid to visit targeted clinics.

For some anti-choice supporters impeding abortion services by temporarily denying access or by hurting the physician's financial practice is not enough. Some supporters are willing to stop abortions by any means possible, including physically assaulting and harassing physicians, their staff, their families, their friends, and their communities. "Wanted posters" are routinely distributed listing the name, address, and itinerary of doctors providing abortion services. Such posters provide information that allows access to the physicians for those who wish to use violence against them. A doctor from Rhode Island told a Senate Committee about the numerous nails pulled from his car tires, and the nails subsequently discovered buried in the snow in his driveway.

Additionally, death threats, and threats of gruesome violence against providers and their families are commonplace. One threatening letter stated, "Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very very soon -- and you won't know when -- like the babies don't. Get ready your [sic] dead." A message on another doctor's answering machine said, "I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off." One clinic staff member was paralyzed and another injured when an anti-choice protester wearing a ski-mask used a sawed-off shotgun to attack a clinic in Springfield, Missouri.

Two of the most shocking examples of the blockaders' tendency to incite violence are the murders of Doctor David Gunn and Doctor John Britton and his volunteer escort James H. Barrett. National Women's Health Organization President Susan Hill confirms that at least five doctors other than Doctor Gunn had been receiving death threats for months. It was thought that Doctor Gunn was in less danger than the other physicians. However, at approximately 9:00 a.m. on Wednesday, March 10, 1993, Michael Griffin, anti-choice supporter and member of the group Rescue America, shot and killed Doctor

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97 S. Rep. No. 169, 103d Cong., 1st Sess. 4 (1994). Michael Bray, a Washington D.C. area coordinator for anti-choice supporters, gave the following testimony:

Mr. LEVINE. * * * Mr. Bray, you are quoted * * * in the Washington Post on Tuesday, December 3, 1991, in the following way: "Is there a legitimate use of force on behalf of the unborn? Michael Bray asks rhetorically. 'I say yes, it is justified to destroy the abortion facilities and yes, it is justified to--what kind of word should I use here? [']'Well, they use terminate a pregnancy,' Jane [sic] Bray says. 'Yeah, terminate an abortionist,' he says." Are you suggesting that you believe it would be appropriate to kill somebody who is involved in the delivery of abortion services by the statement that you are quoted as having made in the Washington Post?

Mr. BRAY. Clearly. As far as an ethical question goes, yes.

98 Id. (emphasis in original).

99 Id. at 7.

100 Id.

101 Id. at 10.

102 Id. at 4.

103 Doctor Gunn had recently opened Pensacola Women's Medical Services. It was the only clinic in the city, other than The Ladies Center, that would provide abortion services for women. He had provided abortion-related services at both clinics. Larry Rohter, Death of Doctor Refuels a Debate, N.Y. TIMES, Mar. 13, 1993, § 1 at 6 [hereinafter Rohter, Death Refuels Debate]; see also Rohter, Doctor Slain, supra note 78.


105 Rohter, Death Refuels Debate, supra note 103; Rohter, Doctor Slain, supra note 78 at A1.

106 Id.
Gunn. That morning, blockaders were depriving people of access to the Pensacola Women's Medical Services clinic. Doctor Gunn, who operated the clinic, tried to gain access through a side door. "According to witnesses, Griffin chased Doctor Gunn, then shot him three times in the back." David Gunn died in surgery approximately two hours later.

On July 29, 1994, just sixteen months after the slaying of Doctor Gunn, two more murders were committed at the hands of another anti-abortion group member--former Reverend Paul Hill. Doctor Britton, and his volunteer escorts, James and June Barrett, were pulling into the parking lot of The Ladies Center in Pensacola, Florida where Doctor Britton provided abortion services. Standing in front of them as they pulled in was Paul Hill, a former Presbyterian minister who had become a common fixture at the clinic entrance. Mr. Hill opened fire with a shot gun on the vehicle and its occupants. Both Doctor Britton and Mr. Barrett sustained gun shot wounds to the head and were killed.

Many providers now have bodyguards, or wear bullet proof vests. Some have installed bullet proof glass in their office windows. Some have stopped providing abortions. They have been driven out of their practices by the unchecked violence of national organizations determined to stop abortions, despite the fact that reproductive choice continues to be a constitutionally protected right.

**B. Women Seeking Services**

The impact of blockades and their calculated violence and obstruction on women seeking medical care is harmful on numerous levels. Physically, the harms are dangerous, and potentially life threatening. In the lower court case leading to Bray, the District Court for the Eastern District of Virginia found that due to the forced closing of the women's center for eleven hours, "five . . . women who had earlier commenced the abortion process at the clinic by having laminaria inserted were prevented by 'rescuers' from entering the clinic to undergo timely laminaria removal." This is necessary in order to "avoid

107 Abortion Protest Turns Deadly (Fox News television broadcast, Baltimore, MD, Mar. 10, 1993); Street Stories, supra note 18; Florida Doctor Slain by Abortion Opponent, Facts on File World News Digest, Mar. 18, 1993; Rohter, Doctor Slain, supra note 78 at A1.

108 Pro-life Protester Shoots Doctor to Death (Fox News television broadcast, Baltimore, MD, Mar. 10, 1993); Street Stories, supra note 18; Florida Doctor Slain, supra note 107; Rohter, Doctor Slain, supra note 78.

109 Florida Doctor Slain, supra note 107; Rohter, Doctor Slain, supra note 78.

110 Florida Doctor Slain, supra note 107.

111 Rohter, Doctor Slain, supra note 78. Michael Griffin was convicted of first degree murder in the death of Doctor Gunn and sentenced to life in prison. Murder at the Clinic, Wash. Post, Mar. 11, 1994, at A24; Lynne Bumpus-Hooper, Activist Gets Life in Killing of Doctor: Jury Finds Man Guilty in Abortion Clinic Case, Sun-Sentinel, Mar. 6, 1994 at 1A.

112 Mr. and Mrs. Barrett volunteered once a month to escort patients past protesters outside clinics. They also regularly escorted Doctor Britton from the Pensacola airport to The Ladies Center. See 1st Conviction Made, supra note 104; Clary, supra note 104.

113 Id.

114 Id. Just one month prior to the shooting, the Director of The Ladies Center, Linda Taggart, asked police to arrest Mr. Hill under the FACE Act because he was screaming into the clinic windows. The police felt that Mr. Hill had not broken the new law and that they could not arrest him. FBI Investigated Suspect, supra note 104.

115 FBI Investigated Suspect, supra note 104.

116 Id. Mrs. Barrett was also wounded in the attack. Paul Hill was convicted of first degree murder for the two slayings on October 5, 1994. The jury has recommended the death penalty for both murders. Craig Pittman, Hill Faces Death for Clinic Murders, St. Petersburg Times, Nov. 4, 1994, at 1A.


118 See supra note 1.

infection, bleeding and other potentially serious complications.\footnote{121} Therefore, as the court noted, if a blockade closes a clinic, a woman who needs a laminaria removal will have to wait and incur potentially deadly risks, or try to find somewhere else to go for services.\footnote{122}

Threats to one's physical safety are not isolated to women seeking abortion services. Clinics often offer gynecological and obstetric care not related to abortion. When obstruction occurs, all women who are patients at the clinic suffer possible physical endangerment. The Washington Supreme Court, in \textit{Bering v. Share},\footnote{123} described the clinic blockades as interfering with sick patients, endangering the health and life of a pregnant woman, and delaying help to a woman who was miscarrying a wanted pregnancy.\footnote{124} Kathryn Maxwell testified before the House Subcommittee on Crime and Criminal Justice that on August 26, 1991 she attempted to keep her 11:00 a.m. prenatal care appointment for her high risk pregnancy.\footnote{125} When Ms. Maxwell, along with her twelve year old daughter, attempted to enter the main lobby, blockaders told her that the building was closed and that her doctor was not seeing patients.\footnote{126} When she tried to explain that she was seeking prenatal care, blockaders refused to let her pass, saying her doctor was a "baby killer."\footnote{127} Ms. Maxwell fought her way through blockaders lining the stairway to reach the second floor. Unable to enter the office because of blockaders pushing her and barricading the door, she fought her way back outside.\footnote{128} When she told a police officer who had been in his car in the parking lot during this time what had happened, he merely replied that "he couldn't do anything because, if he did, there could be a potential riot."\footnote{129}

Blockades also take an emotional toll on women who have already struggled with their decision to end a pregnancy. During a press conference concerning the introduction of the House Freedom of Access to Clinic Entrances Act of 1993, Liana Huth recounted her experience with an abortion blockade.\footnote{130} Ms. Huth spoke of the counseling she received after learning she was pregnant, and the time it took her to decide to have an abortion. She believed "that [her] painstaking choice to have an abortion was to have been the most difficult aspect of [her] decision as a whole. [She] did not anticipate what [she] had to face when trying to gain access to the clinic where [she] had scheduled [her] private medical service."\footnote{131} Speaking of her experience in attempting to enter a clinic in the District of Columbia, Ms. Huth said:

\begin{quote}
I spoke to no one except for two individuals who repeatedly grabbed my arm in an attempt to save me. I told them not to touch me and a lack of dialogue fueled a one-sided screaming match . . . . It took 55 minutes to find legitimate clinic escorts to help me through the crowd and as we slowly crossed through the human barrier I was physically assaulted. A lone man took a flying leap, tackling my escort. I sustained only bruises, but one escort was hit to the ground.\footnote{132}
\end{quote}
Other women are afraid to even attempt to fight their way through blockaders. One patient who had previously been severely beaten by her husband left a clinic for fear that blockaders would find out who she was and then contact her husband.133

Silvia Doe's statements to the Subcommittee on Crime and Criminal Justice evidence most vividly the horrors of a blockade. She was one of the patients trying to gain access to a clinic in Wichita, Kansas during Operation Rescue's 1991 "summer of mercy."134 Ms. Doe was in her early thirties, and had one young daughter with her husband of eleven years. She wanted another child very much but was having difficulties in carrying a child to term. Within one year she had been pregnant three times: her first pregnancy was terminated at four months after the baby's heartbeat stopped; her second pregnancy ended in miscarriage after two months; and her third pregnancy was voluntarily terminated.

Ms. Doe was approximately "24 weeks along when, through an ultrasound, [doctors] discovered that the left side of the [fetus'] heart wasn't formed."135 Ms. Doe thought she could continue with the pregnancy, allowing God to "determine its destiny," until she learned that once born, she would have no control over the procedures her baby would be put through.136 Her baby would need a heart transplant after which its chance of survival was slight.137 The procedures involved were extreme: the baby would have been put on a life support system while waiting for a donor heart.138 According to doctors, "most children become brain dead" and "all vital organs usually fail."139 During the transplant surgery, "hardly any anesthesia is administered" because it may kill the baby.140 Ms. Doe had two choices left. She could give birth at home and allow the child to die naturally. She chose not to do this because of possible birthing complications and the need to involve other people.141 She chose instead to have an abortion at one of only three clinics in the country that perform third trimester abortions under such limited circumstances.142

The clinic Ms. Doe needed to access closed for one week during the Operation Rescue marching in Wichita to avoid the assaults of the protesters.143 Ms. Doe traveled from Virginia to Chicago, Illinois to leave her daughter with her grandparents, and then from Chicago to Wichita, Kansas.144 Upon arriving, Ms. Doe found that Operation Rescue had not left after the march, but rather, upset that the clinic had closed during their protest, had decided to stage a "Summer of Mercy." She described the scene outside the clinic this way:

We were told the next morning that we had to get in our cars and we had to line up one after the other in them to wait while they arrested the people; that they wouldn't arrest these people or let us get access to the clinic unless we're actually there. They would only start arresting if we were physically there and not able to get in. Although we sat in the cars and waited as we were instructed to do they did not get the bus [needed to make arrests] in place for almost half a day.

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133 Id. at 73-74.
134 Clinic Blockades, supra note 53, at 9-17 (statement of Silvia Doe).
135 Id. at 10.
136 Id. at 10, 13.
137 "[T]he probability . . . that [her] baby would live through [a heart] transplant was 1 in 400 . . . if everything went perfectly. (There are no known babies that have survived this type of operation at such a young stage of life.)" Id. at 13-14.
138 Id.
139 Id.
140 Id.
141 Id. at 14.
142 Id. at 10.
143 Id.
144 Id.
We sat there for 1 whole day in 109 degree heat while about 1,400 people were swarming around our cars. They were screaming at us violently, spitting, pounding on the windows, holding huge poster-sized pictures of bloody baby parts. It was a very volatile situation. I feared for my life. I had to go the bathroom; I couldn't go. Down six car lengths was this house where they would have allowed me to go in and go to the bathroom... An officer said, 'Well, if you want to chance it,' but they didn't offer any type of aid to get me through these crowds.

We sat cramped in these cars not able to get out and exercise, except when the policemen were going to take their breaks we had to pull all the cars all the way back to the end of the street where they had this mobile setup to take blood pressure of the policemen. We were allowed in there one time, but when the mayor heard that we were going in there for comfort, we were banned...

While we were sitting in these cars, we were made to roll down our windows and listen to people come up and tell us why we shouldn't have abortions... We were told [by the police] we had to roll down our windows to listen to keep everything safe...

People would lay down in front of cars. I thought what was most appalling were parents making their children lay down, 11- and 12-year-olds.

Ms. Doe was not alone in her experience at the Wichita clinic. Three of the other patients were young girls—eleven, fifteen, and nineteen—who had been raped. According to Ms. Doe, "[t]wo [rapes] were very brutal. All three [girls] had their lives and families' lives threatened if they told. One rapist was a family friend, another was incest [sic], and another a stranger. The 19 year old introduced herself... via a puppet..." One of the girls said to Ms. Doe, "If I am made to have this baby, I will commit suicide."

The above accounts set the stage for judicial and legislative approaches discussed in the next section. In response to the denial of access and the violence, medical clinics and women seeking services are searching for effective means of striking back. They are attempting to initiate both civil and criminal litigation against blockaders to redress the illegality of their actions. In addition, federal legislation has been passed that should make it easier for individual plaintiffs and prosecutors to prevail in the court room.

III

STRATEGIES FOR ENSURING THE RIGHT TO ACCESS

Individual plaintiffs can bring trespass and nuisance actions against blockaders. However, this process is slow and cumbersome, and the statutes provide minimal penalties for violators. Recognizing

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145 Id. at 10-11.
146 Id. at 11, 15.
147 Id. at 15.
148 Id. at 11.
149 Id. at 11.
150 Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 768 (1993). Justice Scalia for the majority: "Trespassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises. These offenses may be prosecuted criminally under state law, and may also be the basis for state civil damages." Id.
151 Beyond Clinic Blockades, supra note 3, at 4 (statement of Susan Hill, President, National Women's Health Organization):

Abortion providers have been told to use the legal system and we have to no avail. My organization has obtained federal court injunctions against protester's illegal activity. We have obtained state court
the inherent flaw in this method of remediation, pro-choice supporters continue to seek more appropriate federal remedies that address the national scope of the anti-choice supporters' tactics of obstruction, deprivation, harassment, and intimidation.  

A. Judicial Inroads

1. Applicability of the Civil Rights Act of 1871

*Bray v. Alexandria Women's Health Clinic* was an attempt to apply a federal cause of action that would enjoin blockades on a statewide level, and assist local officials by providing additional federal officers. The *Bray* plaintiffs, clinics that perform abortions and organizations that support choice in reproduction, applied for a permanent injunction in the United States District Court for the Eastern District of Virginia to enjoin Operation Rescue and six individuals from "trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from, any facility in the Washington metropolitan area that offers and provides legal abortion services and related medical and psychological counseling."  

At issue in *Bray* was the applicability of the Civil Rights Act of 1871, section 1985(3)'s deprivation clause to present-day anti-choice tactics. Ultimately, the Supreme Court found the deprivation clause inapplicable to clinic blockade actions for two reasons. First, respondents failed to obtain injunctions against unlawful activity by protesters. We have obtained over 1,000 arrests. We have spent over $500,000 in legal fees. We have been awarded damages and attorneys fees of over $100,000. We have collected $0. In Delaware out of 255 protesters arrested, the average fine was $25 with no jail time. In Ft. Wayne, 455 protesters were arrested. All charges were dropped. In Milwaukee, in the last year, there were 2100 arrests with only 20 prosecutions. We are attacked by a group of people who have been taught how to be judgement proof, and how to beat the system. They have workshops on beating the system. They do it with pride and defiance.

*Id.* See also *Id.* (prepared statement of John E. Cowles, Esq.). Attorney Cowles described the action his firm took on behalf of clinics and providers in response to the blockaders' "Summer of Mercy" in Wichita:

We filed for an injunction in federal court rather than state court because our state court judges are elected and because Wichita police would have had to enforce the state court injunction in conflict with their superiors at city hall. Our federal injunction was able to cover both the clinic in Sedgwick County and the physician's home in neighboring Butler County, whereas venue requirements would have required two state court actions to protect both locations. We never doubted our decision to file in federal court. Later, one of the protesters who picketed the federal courthouse carried a sign that said, "Don't re-elect Judge Kelly." This symbolized the appropriateness of the federal forum.

*Id.* See also Ellis, supra note 81, at 17-18:

Experience nationwide has proven that many localities either cannot arrest blockaders quickly enough to allow women access to their health care providers without risk to their health, or will not do so. . . . [S]tate laws are usually not as effective as federal injunctions. The most obvious practical consequence is the lack of federal law enforcement help. Federal marshalls and other federal law enforcement personnel can be crucial to keeping clinics open because Operation Rescue often succeeds in overwhelming local authorities. Also, state criminal and civil laws such as trespass are designed to protect clinics and other property rights rather than the civil right of women. . . . State laws may also provide lesser contempt penalties than federal laws. Finally, state judges, who are often elected, are more likely to be influenced by local anti-choice political sentiment.

*Id.* See also Clinic Blockades, supra note 53, at 97, 178 (statements of Marne Greening, John H. Schafer, Esq., & Washington Area Task Force); John H. Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 Harvard Women's L.J. 251 (1990). But see Clinic Blockades, supra note 54 at 120 (statement of Jay Sekulow, Esq., attorney for Operation Rescue National).

151 Ellis, supra note 81. See infra notes 152-224 and accompanying text.


154 See supra note 6.

155 The majority held 6 to 3 against the "deprivation" action, with Justices Scalia, Rehnquist, White, Kennedy, and Thomas joining. Justice Souter concurring in part and dissenting in part, and Justices Stevens, Blackmun, and O'Connor dissenting. Although the "hindrance" clause claim was only mentioned in dicta, the Justices aligned themselves
meet the threshold showing of "class-based, invidiously discriminatory animus" directed against them. Respondents essentially argued that Petitioners directed their illegal conspiracy at women seeking services. The Court, however, was persuaded by Petitioner's argument that the blockaders' actions were aimed not at the women seeking services, but rather at ending abortion services. It was the Court's opinion that blockaders were only concerned with keeping a fetus from being aborted and were really not concerned with the women carrying the fetus. Implicit in the Court's acceptance of this argument is the invisibility of the woman.

Second, Respondents failed to identify a right "protected against private action that has been the object of the alleged conspiracy." The Civil Right's Act of 1871 prohibits private infringement upon particular private individual rights. Respondents argued that the right to interstate travel and the right to choose abortion were violated and therefore the infringement on private rights is satisfied. The Court found that the right to interstate travel is constitutionally protected against private interference, but held that blockaders did not direct their activities at interfering with interstate travel. In the view of the Court, interstate travel was only incidentally affected. In order for Section 1985(3) to apply, the private right must be "aimed at." The Court found the reverse for the right to choose abortion. The majority held that protesters did aim their actions at the right to reproductive choice. However, the Court limited the scope of the Act by determining that only the most preferred rights are protected against private action.

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Court classified the right to choose abortion as a general right to privacy and refused to extend such rights protection from private infringement. While the state can be prohibited from interfering with reproductive choice, that right is not protected under the Act from interference by individuals. Therefore, the majority stated that Plaintiffs could not prevail.

The dissenting opinions in *Bray* described what dissenters Stevens, Blackmun, and O'Connor considered to be the majority's mischaracterization of the issue at hand. Justice Stevens characterized it this way:

> [I]t is irrelevant whether the Court is correct in its assumption that 'opposition to abortion' does not necessarily evidence an intent to disfavor women. Many opponents of abortion respect both the law and the rights of others to make their own decisions on this important matter. Petitioners, however, are not mere opponents of abortion; they are defiant lawbreakers who have engaged in massive concerted conduct that is designed to prevent all women from making up their own minds about not only the issue of abortion in general, but also whether they should (or will) exercise a right that all women - and only women - possess.

Indeed the error that infects the Court's entire opinion is the unstated and mistaken assumption that this is a case about opposition to abortion. It is not. It is a case about the exercise of Federal power to control an interstate conspiracy to commit illegal acts.

The dissenting opinions also criticized the Court's failure to follow the congressional intent behind Section 1985(3), stating that Congress intended "to protect this Nation's citizens from what amounts to the theft of their constitutional rights by organized and violent mobs across the country."

Despite the Court's finding that the anti-choice blockades did not fall within the deprivation clause of the Civil Rights Act of 1871, it was intimated that the hindrance clause of the Act may be applicable. Justice Souter, although concurring in the Court's decision, dissented from the majority's hindrance clause analysis. He reasoned that, depending on the facts presented, an action based on the hindrance clause of Section 1985(3) may be a proper cause of action for plaintiffs to use against clinic blockades. Justice Souter concluded that the extratextual elements of a deprivation action would not be required under the less-interpreted hindrance clause. Therefore, the hindrance clause may be an appropriate federal action to use against a conspiracy "intended to hobble or overwhelm the capacity of duly constituted state police authorities to secure equal protection of the laws." The action would be valid "even when the conspirators' animus is not based on race or a like class characteristic, and even when the ultimate object of the conspiracy is to violate a constitutional guarantee that applies solely against state action." Justices Stevens, O'Connor, and Blackmun took an even stronger position on a hindrance clause action. In their view, the *Bray* plaintiffs had "unquestionably established a claim under the ... hindrance provision."

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167 Id.
168 Id.
169 Id. However, the six Justices who held the deprivation clause to be inapplicable constitute a relatively youthful consensus. See Geoffrey R. Stone et al., *Constitutional Law* L.VII - L.XIV (2d ed. 1991 & Supp. 1992). The years of their births are as follows: (1) Justice Scalia born 1936, (2) Justice Rehnquist born 1924, (3) Justice White born 1917, announced retirement 1993, (4) Justice Kennedy born 1936, (5) Justice Thomas born 1948, (6) Justice Souter born 1939. Since *Bray*, Justice White has resigned from the Court, with Justice Ginsberg ascending to take his seat, and the retiring Justice Blackmun has been replaced by Stephen Breyer.
170 Bray, 113 S. Ct. at 798.
171 Id. at 780.
172 Id. at 777-78.
173 Id. at 771-75.
174 Id. at 776-77.
175 Id. at 777.
They explained, through the statutory language, congressional intent, and judicial precedent, why the judicially imposed requirement of "class-based, invidiously discriminatory animus" does not and should not apply to a hindrance clause action. Rather, the type of conduct the "hindrance" clause of the statute would reach is a "large-scale conspiracy that violates the victims' constitutional rights by overwhelming the local authorities and that, by its nature, victimizes predominantly members of a particular class."n178

Whether the Court will recognize a hindrance action against clinic blockaders is debatable. The answer seems to depend on one of two possibilities: (1) whether any one of the Justices joining the Bray majority will, when presented with a fully documented hindrance action, conclude that it is a viable action, and (2) whether the change in the composition of the Court--in light of Justice Ginsberg's ascent, and Justice Breyer's recent appointment and confirmation--will change the balance to favor the outcome hinted at in Bray dicta.

2. APPlicability of the RACKETEER-Influenced and Corrupt ORGANIZATIONS (RICO) STATUTES

RICO statutes apply to a variety of both state and federal crimes which are defined under RICO as "racketeering activity."n180 Pursuant to the RICO statutes, it is unlawful for any person to use or invest any money derived from any racketeering activity in any enterprise or activity affecting interstate commerce. The statutes also proscribe participation in any enterprise through racketeering activity, or conspiracy to violate any part of the RICO Act. Individuals who advocate using RICO to address the acts of clinic blockaders assert that a valid claim may be brought under the last two categories: participation in an enterprise through a pattern of racketeering acts, and conspiracy to violate the enumerated provisions of RICO.

In order to establish a prima facie case under the RICO statutes, the prosecutor must prove seven elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce."n185

Establishment of the predicate racketeering act is an obstacle in applying RICO to clinic blockade activities. Some advocates of this cause of action argue that "anti-abortion blockaders engage in violations of the Hobbs Act," which is expressly included by the legislature as constituting a predicate act under

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176 Id. at 804.
177 Id. at 796-805.
178 Id. at 797.
180 18 U.S.C. §1961(1). Some of the state crimes that may be prosecuted under RICO include kidnapping, arson, gambling, and extortion. All must be crimes individually punishable by more than one year of imprisonment under state penal law. 18 U.S.C. §1961(1)(A). Some of the federal crimes that fall within the RICO statutes are violations of 18 U.S.C. §§ 201 (bribery), 1341 (mail fraud), 1503 (obstruction of justice), 1511 (obstruction of state or local law enforcement), and 1951 (interference with interstate commerce, robbery or extortion). 18 U.S.C. §1961(1)(B) (1988).
184 A "pattern of racketeering activity" is "two or more related criminal acts that amount to or threaten the likelihood of, continued criminal activity." Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983). At a minimum, it must include the "commission of two statutorily-defined predicate acts within a ten-year period." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989).
185 Henn & Del Monaco, supra note 150.
186 Id. The Hobbs Act, 18 U.S.C § 1961(a) (1988), states:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in volition if this section shall be fined not more than $10,000 or imprisoned not more
RICO.\textsuperscript{187} To prove a violation of the Hobbs Act, one must show (1) "the defendants induce their victims to part with property, (2) that the defendants do so through the use of fear, and (3) that, in doing so, the defendants adversely affect interstate commerce."\textsuperscript{188} Advocates argue that the "property" involved in the clinic blockades is the right of a woman to contract with medical providers. Both the women and the providers are deprived of their right to contract by the acts of the blockaders.\textsuperscript{189} Additionally, the Hobbs "fear" factor is met because clients and providers alike are in "fear" of losing their contractual rights, which is viewed as a form of economic loss.\textsuperscript{190}

In the Supreme Court decision of NOW v. Scheidler,\textsuperscript{191} the providers and pro-choice organizations claimed just such a Hobbs violation of RICO. The Court, however, refused to express an opinion regarding whether clinic blockaders violated the Hobbs Act.\textsuperscript{192} Instead, the Court limited its review to whether a racketeering activity must be economically motivated.\textsuperscript{193} A unanimous Court determined that no such economic motivation was necessary.\textsuperscript{194} After reviewing the language of the statute, the Court concluded that the language of the statute is unambiguous and clearly does not require a monetary basis.\textsuperscript{195} If Congress had meant for RICO to apply solely to an enterprise driven by economic motive, versus any other type of motive, then it could have easily done so by simply including the word "economic" in its definition of "enterprise." Furthermore, the Department of Justice Guidelines did not bolster the defendant's argument that economic motive was essential in that they had been amended in 1984 to state that "an association-in-fact enterprise must be 'directed toward an economic or other identifiable goal.'"\textsuperscript{196}

Thus, Scheidler, while clarifying the requirements regarding motivation, leaves open the question of whether, in any given case, the required predicate acts can be established. Also, Justices Souter and Kennedy underscored another issue that will likely have to be addressed in any claim under RICO to enjoin blockades of abortion clinics: whether a legitimate First Amendment defense exists to a charge of a RICO violation, and the impact such a defense, if successful, would have on the potential relief.\textsuperscript{197} In striving to stop the non-free speech elements of a blockade, all parties must be cognizant of the protected free speech rights. An attempt to create an absolute governmental gag on anti-choice supporters will fail, as it should.

**B. Legislation**

Securing clinic access has been attempted through legislation at almost all levels of government.\textsuperscript{198} Federal legislation to protect a woman's right to access was introduced in the U.S. House of

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\textsuperscript{188} Henn & Del Monaco, supra note 150, at 271 (citing United States v. Local 560 of the Internat'l Bd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 780 F.2d 267, 281 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986)).

\textsuperscript{189} Id.

\textsuperscript{190} Id.

\textsuperscript{191} 114 S. Ct. 798 (1994).

\textsuperscript{192} Id. at 801.

\textsuperscript{193} Id.

\textsuperscript{194} Id. at 806.

\textsuperscript{195} Id. at 803-06.

\textsuperscript{196} Id. at 805 (citing U.S. Dept. of Justice, United States Attorney's Manual § 9-110.360 (Mar. 9, 1984) (emphasis added by Court)).

\textsuperscript{197} Id. at 806-07.

Representatives before Bray was decided. Representative Charles Schumer (D-NY), Chairman of the House Subcommittee on Crime and Criminal Justice, held a hearing on clinic blockades in May of 1992. He recognized then what more and more people are coming to understand now: "What this is about is whether a legal right will have any meaning, and whether women will be able to exercise this right in peace and in privacy or whether lawless, mob-like rule will be allowed to prevail." On February 3, 1993, Representative Schumer, along with Representative Constance Morella (R-MD), introduced H.R. 796, the Freedom of Access to Clinic Entrances Act of 1993. Both Representatives stressed that this bill is not meant to interfere with the legitimate right to protest and to speak freely. Senator Edward Kennedy offered S. 636 as a Senate counterpart on March 23, 1993. While the two bills differed in language, the purported purpose of both was the same: to prevent violence and obstruction against individuals who seek, as well as those who provide, abortions and related services.

After many amendments and revisions, The Freedom of Access to Clinic Entrances Act of 1994 (FACE) was enacted and became effective May 26, 1994. FACE provides broad protection for both the individuals exercising their rights and for the facilities where the rights are exercised. Section 248(a)(1) prohibits the intentional injury, intimidation or interference, or any such attempt, through force, threat of force or physical obstruction of "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." As written, this section clearly includes acts directed at persons prior to, during and after receiving or rendering reproductive health services. The statute further proscribes damage or destruction of the property of a facility, or any attempt to damage or destroy, because the facility provides reproductive health services.

Violation of the statute may result in both federal criminal and civil actions. Criminal penalties are divided between first and subsequent offenses. First offenders may receive a fine and/or up to one year imprisonment. Persons convicted of a second or subsequent offense are subject to fine and/or up to three years imprisonment. Limits are in place, however, for violations that are exclusively nonviolent physical obstructions. The penalties for first offenders are $10,000 and not more than six months imprisonment. Subsequent offenses are limited to $25,000 and not more than eighteen months imprisonment. However, when bodily injury results from any action, imprisonment can be extended to ten years. In the event of death any term of imprisonment including life may be imposed.

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199 Clinic Blockades, supra note 53.
200 Id. at 1.
201 News Conference with Representative Charles E. Schumer (D-NY) and Representative Constance A. Morella (R-MD), supra note 130.
202 Id. See also Clinic Blockades, supra note 53.
208 Reproductive health services is defined as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. §248(c)(5) (Supp. 1994).
214 Id.
Civil actions may also be instituted against violators of FACE. Not only may the aggrieved individuals bring civil suits but the United States Attorney General and the State Attorneys General may also institute proceedings.\footnote{18 U.S.C. §248(c) (Supp. 1994).} The statute provides that any actions under Section 248(a)(1) only may be brought by a person seeking to provide or obtain, or providing or obtaining reproductive health services. The reference to "a person" may preclude civil actions by the facility itself, although employees of the facilities would be entitled to bring suit. Plaintiffs may seek injunctive relief, compensatory and punitive damages as well as costs.\footnote{18 U.S.C. §248(c)(1)(B) (Supp. 1994).} The combination of criminal and civil penalties in the Act is designed to prevent the occurrence of blockades through injunctive relief and to punish violators when blockades do occur.\footnote{Access to Abortion Clinics: Hearings before the House Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103rd Cong., 2d Sess. Sept. 22, 1994 (testimony of Jo Ann Harris Assistant Attorney General).} Civil actions brought after the proscribed activities have taken place increase the liability that blockaders face and is hoped to have a deterrent effect. In addition to bringing suits against individuals, plaintiffs can institute civil actions against blockading organizations which, as entities, cannot be jailed.

Finally, FACE has been carefully drafted to ensure that the protesters' First Amendment rights are not infringed upon in the enforcement of the Act.\footnote{18 U.S.C. §248(c)(1)(B) (Supp. 1994).} FACE explicitly states that it is not to be construed to proscribe or prohibit any action lawfully engaged in under the First Amendment.\footnote{18 U.S.C. §248(a)(2) proscribes any person from obstructing, injuring or intimidating any person who is lawfully exercising their First Amendment right of religious freedom at a place of religious worship. Therefore, it is debatable whether or not this part of FACE will apply to blockaders.} In order to protect the protesters' rights, Congress narrowly defined what conduct constituted an offense and who could bring an action. It also defines terms fundamental to its interpretation such as "interfere with"\footnote{18 U.S.C. §248(e)(2) (Supp. 1994). The term "interfere with" means to restrict a person's freedom of movement. \textit{Id.}} and "intimidate."\footnote{18 U.S.C. §248(e)(3) (Supp. 1994). The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another. \textit{Id.}} Since FACE was enacted there have been seven challenges to its constitutionality. Thus far, six have been dismissed with decisions that affirm its constitutionality.\footnote{Access to Abortion Clinics: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103rd Cong., 2d Sess. Sept. 22, 1994 (testimony of Jo Ann Harris, Assistant Attorney General).} In fact, Paul Hill was the first person successfully prosecuted under FACE.\footnote{112 S. Ct. 2791 (1992).} And so the battle lines have been redrawn.

\section*{IV

CONCLUSION}

In light of the continuing escalation of violence, the conclusion is clear: the people of the United States must stand up and protect themselves. The Court continues to recognize a woman's right to choose to terminate a pregnancy; and as Justice O'Connor recognized in \textit{Planned Parenthood v. Casey,}\footnote{112 S. Ct. 2791 (1992).} it is the Court's obligation to "define the liberty of all, not to mandate [its] own moral code."\footnote{\textit{Id.} at 2806.} Thus, those who support choice must insist that the courts fulfill their obligation to define, and uphold, the rights of citizens.
Focusing attention on the illegal, terrorist actions of blockaders can say what supporters of choice cannot find words enough to describe: that this country will not allow a group of individuals to physically deprive women of their constitutional right and inflict harm upon numerous individuals because of that group’s view of what is moral. Individual plaintiffs are challenging the blockaders’ actions with the laws presently available. The United States Congress has enacted FACE and the legislatures of many states are working on laws that offer some relief.

The answer, however, cannot rest solely in the judicial and political arenas. Supporters of reproductive choice must continue to act on their convictions. A solid foundation, grounded in education, is the best defense against the deprivation of one’s rights by extremist organizations. We must work toward societal awareness: through the local and national media, the schools and colleges, the community and organizations, and even during lunch dates and coffee breaks. By uniting as many voices as possible, we let the extremists know that they are just that, the extreme. By refusing to remain silent about the consequences of the blockades and by sharing the experiences women and clinic providers have had forced upon them by vigilante blockaders, the public is better able to understand the problem. Some people might argue that anti-choice protesters should be silenced. This, however, would be violating their rights in much the same way they now violate the rights of individuals seeking access to clinics that provide abortions and related services. In fact, the people who fight to protect a woman’s right to reproductive choice are many times the same people who demand that any law putting a stop to anti-choice supporters’ illegal acts of obstruction must reach no further than that illegal action. Anti-choice supporters must, and should, be able to voice their opposition to a woman’s right to exercise her free and independent will. At the same time, however, the attempt by blockaders to justify their terrorist acts through the inapplicable defense of free speech must be recognized as the subterfuge it is and rejected as a validation of blockaders’ actions.

While all this is occurring, people who believe that reproductive choice is a constitutional right must consider whether that right is one they are willing to protect. For, make no mistake about it, as this paper has illustrated, the right to reproductive choice is under attack. The time for passivism is behind us. The time has come to act. Those who do nothing allow those who would obviate the right of choice to gain precious ground. Put down this paper and make a phone call. Ask the local Planned Parenthood if they need volunteers. Write newspaper editorials. Go to community meetings that discuss zoning and ordinances. Voice the pro-choice philosophy. Speak up now while there is still something left to speak up for.

Telephone interview with George Jepsen, Hartford, Connecticut State Senator (Mar. 9, 1993). Senator Jepsen is one of the most aggressive advocates of a law protecting access to medical and counseling facilities. At the same time, Senator Jepsen is one of the most aggressive advocates of organized labor, and the right of free speech. As of March 9, 1993, Senator Jepsen was working with the ACLU and labor unions on a state law that would address the issue of blockades against abortion clinics while ensuring protected activities such as picketing and peaceful protest would not be hindered. See e.g. Clinic Blockades, supra note 53, at 1 (statement of Rep. Charles Schumer). After confirming his support for reproductive choice, Rep. Levine of California said, “I am certain that every member of this subcommittee supports picketing, protesting, speech, and advocacy, and I certainly will take a back seat to no one in terms of my advocacy on behalf of first amendment protections, speech, assembly, picketing, and protests. This bill does not circumscribe speech or picketing or protests or advocacy or assembly. Picketing, protesting, demonstrations, and leaflets are all protected rights and should not be compromised in any way, and this bill does not compromise them.” Id. at 5.