NOTES

OBSTRUCTIONIST ACTIVITIES AT ABORTION CLINICS: A FRAMEWORK FOR REMEDIAL LITIGATION

I
INTRODUCTION: THE PROBLEM

Women who attempt to obtain abortions are often stopped at clinic doors by the verbal protests and obstructionist activities of anti-abortionists. Anti-abortion obstructionist activities burden both the constitutional right of a woman to obtain an abortion and the ability of a clinic to provide abortion services. Anti-abortionists, however, have a constitutional right guaranteed by the first amendment to present their views to the rest of society. The purpose of this Note is to propose a framework for litigation designed to minimize or eliminate anti-abortion interference with the constitutional right of women to obtain first trimester abortions at clinics while respecting the first amendment rights of anti-abortionists and the importance of robust national debate on controversial social and political issues.

In *Roe v. Wade*,[1] the Supreme Court held that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[2] The Court recognized, however, that the abortion decision involves not only a pregnant woman's freedom to choose whether or not to bear a child, but also the state's interest in preserving and protecting both the woman's health[3] and the "potential of human life."[4] In an attempt to accommodate both the woman's and the state's interests, the Court analyzed a state's legitimate regulation of abortion in the context of the pregnant woman's specific trimester of pregnancy.[5] During the first trimester of pregnancy, the pregnant woman's right to personal privacy is the most substantial interest at stake.[6] The decision to have an abortion at this stage may therefore be made by the pregnant woman, in consultation with her physician, free of state interference.[7] During the second trimester of pregnancy, the state may "regulate

1. 410 U.S. 113 (1973).
2. *Id.* at 153.
3. *Id.* at 153-54, 162.
4. *Id.* at 159.
5. *Id.* at 163-65.
6. *Id.* at 163.
7. *Id.*

the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[8] Finally, during the third trimester of pregnancy, the state's interest in the protection of potential life becomes compelling, and the state may go so far as to proscribe an abortion during this period except when the life or health of the pregnant woman is endangered.[9]

The holding in *Roe* emphasizes the Court's recognition of a woman's fundamental right to choose an abortion during the first trimester of pregnancy, with the advice of her physician, free of outside influences. A woman cannot exercise her constitutional right to obtain a first trimester abortion, however, if a physician is prevented from providing abortion services at a medical facility. Although the *Roe* Court did not hold that a physician or a health care facility has a constitutional right to provide abortion services, it clearly sanctioned a physician's provision of such services "according to his professional judgment up to the points where important state interests provide compelling justifications for intervention."[10] In a subsequent case, the Court stated that "a physician's right to administer medical care" derives from the "patient's right to receive such care."[11] Thus, the recognition of a woman's constitutional right to obtain an abortion during the first trimester of pregnancy implies that a physician has the right to provide first trimester abortions at a health care facility.

Despite the Court's recognition of a woman's constitutional right to an abortion, the national controversy over the legality and morality of abortion continues.[12] In fact, the abortion controversy has become one of this nation's most divisive issues since the debate over the country's involvement in the Vietnam War. Those in favor of abortion view its legalization as "a vital step in the emancipation of women and and a means of relieving poverty."[13] Those opposed to abortion believe that "religious, social or moral considerations demand unconditional protection of unborn children."[14] While supporters of legalized abortion[15] argue that there is a distinction between abortion and murder, anti-abortionists deny that there are any differences between the two.[16]

The ultimate goal of anti-abortionists is the passage of an amendment to the United States Constitution which would invalidate the guidelines for legal-

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8. *Id.*
9. *Id.* at 163-64.
10. *Id.* at 165-66.
11. Whalen v. Roe, 429 U.S. 589, 604 & n.33 (1977).
12. *See* N.Y. Times, Jan. 23, 1979, § C, at 10, col. 1.
13. Bradley, *A Woman's Right to Choose*, 41 MOD. L. REV. 365 (1978).
14. *Id.* "The most important point to be understood about serious abortion opponents is that the logic of their morality on abortion does not readily admit of compromise or acceptance of the ordinary rules of pluralistic permissiveness." Callahan, *Abortion and Government Policy*, 11 FAMILY PLANNING PERSPECTIVES 275, 278 (1979).
15. Supporters of legalized abortion, as referred to in this Note, are those persons who are pro-choice in that they believe a woman should have the right to choose an abortion as an alternative to bearing an unwanted child. Pro-choicers do *not* advocate abortion as a method of birth control. The term anti-abortionist is used in this Note to refer to a person who believes abortion is a form of legalized murder.
16. *See* N.Y. Times, Jan. 23, 1979, § C, at 10, col. 1.

ized abortion established by the Supreme Court in *Roe*.[17] To achieve this goal, anti-abortionists have utilized a variety of means to attempt to convince society that legalized abortion is akin to legalized murder.[18]

Abortion clinics are a common site of anti-abortionist activities. Throughout the United States, abortion clinics have been the target of demonstrations, invasions, bombings, vandalism, disruptive acts, physical threats to personnel, and intimidation of patients.[19] In a recent study of 235 clinics, "[f]ifty-seven percent reported picketing and demonstrations at the clinic by anti-abortion groups, 29 percent by church-related organizations."[20] The Alcohol, Tobacco and Firearms Division of the United States Department of the Treasury recorded thirteen abortion clinic torchings in 1978.[21] Prior to engaging in these trespasses, anti-abortionists frequently engage in harassing activities, both outside and inside the clinic.[22] Thus, women seeking to obtain abortions at clinics are often subjected to personal abuse, ranging from physical injury to public harassment.[23] Anti-abortion activities do not always prevent women from seeking to terminate their pregnancies nor clinics from providing abortion services. In *Maher v. Roe*,[24] however, the Supreme Court held that state interference with the right to choose an abortion "need not be absolute to be impermissible" under the equal protection clause of the fourteenth amendment.[25] The anti-abortion activities of private citizens often constitute a direct interference with the rights established by *Roe v. Wade*. These private activities are governed by state trespass laws. This Note will explore both the scope of these common law protections and the extent to which women and physicians are, and should be, entitled to a measure of constitutional protection from the obstructionist activities of private citizens. The Note will begin with a discussion of the development and structure of abortion clinics and determine whether private abortion clinics must be considered public entities for the purpose of constitutional analysis. Next it will examine the use of state trespass laws and civil tort actions to redress obstructionist activities at abortion clinics. This Note

17. *See* Wall St. J., Jan. 26, 1978, at 40, col. 1.

18. In Beal v. Doe, 432 U.S. 438 (1977), Justice Marshall stated in a dissenting opinion that anti-abortionists have resorted to "every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of society." *Id.* at 455 (Marshall, J., dissenting).

19. NEWSWEEK, Mar. 13, 1978, at 33.

20. Lindheim, *Services, Policies and Costs in U.S. Abortion Facilities*, 11 FAMILY PLANNING PERSPECTIVES 283, 288 (1979).

21. N.Y. Times, Feb. 16, 1979, § B, at 1, col. 6.

22. *Id.*

23. Not only are women seeking abortions subject to harassment, but those involved in providing such services may be as well. In St. Paul, Minnesota, for example, a prominent woman on the board of Planned Parenthood received a series of threatening phone calls during a period of clinic harassment. Ms., Nov. 1978, at 60.

24. 432 U.S. 464 (1977).

25. *Id.* at 473. *Accord*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state imposition of a spousal consent requirement and a blanket parental consent provision for unmarried minors prior to the legal provision of an abortion held unconstitutional); Doe v. Bolton, 410 U.S. 179 (1973) (several procedural requirements of the Georgia abortion law limiting, but not preventing, the legal provision of abortions held to violate the fourteenth amendment).

then suggests that an action under 42 U.S.C.A. § 1985(3) is a particularly appropriate means to redress and enjoin anti-abortionist intrusions at abortion clinics, and concludes that where clinics have been the site of repeated anti-abortion obstructionist activities, these clinics, their personnel, and their patients should bring a federal claim for injunctive relief under section 1985(3) with pendent state claims for civil trespass and the intentional infliction of emotional distress.

II
THE DEVELOPMENT AND STRUCTURE OF ABORTION CLINICS

The response of existing health care facilities to the legalization of abortion in 1973 was "so limited as to be tantamount to no response at all."[26] The situation has changed little since 1973; most American hospitals do not provide abortion services.[27] Although public hospitals are subject to the constraints of the equal protection clause of the fourteenth amendment, the Supreme Court held in *Poelker v. Doe*[28] that a city which elects, "as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions" does not thereby violate the Constitution.[29] The Court relied on its reasoning in *Maher v. Roe*,[30] in which it stated that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[31] Accordingly, states which refuse to finance nontherapeutic abortions while subsidizing childbirth services have "imposed no restriction on access to abortions that was not already there."[32]

The widespread lack of response by hospitals to the legalization of abortion, along with the fact that the procedure is relatively safe and routine,[33] led

26. ALAN GUTTMACHER INSTITUTE, PROVISIONAL ESTIMATES OF ABORTION NEED & SERVICES IN THE YEAR FOLLOWING THE 1973 SUPREME COURT DECISIONS: UNITED STATES, EACH STATE AND METROPOLITAN AREA, at 11 (1975) [hereinafter cited as PROVISIONAL ESTIMATES].

27. Law, *Reproductive Freedom Issues in Legal Services Practice*, 12 CLEARINGHOUSE REVIEW 389, 395 (1978) [hereinafter cited as *Reproductive Freedom*]. There are two principal reasons for the widespread failure of hospitals to provide abortion services: doctors who are unwilling to perform abortions and hospitals whose policies may proscribe the provision of abortion services. *Id.* at 395.

28. 432 U.S. 519 (1977).

29. *Id.* at 521.

30. 432 U.S. 464 (1977). In *Maher*, the Supreme Court held that the constitutional right of privacy recognized in *Roe* in the context of a woman's abortion decision implied "no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 474.

31. *Id.* at 475.

32. *Id.* at 474. In *Maher*, the Court required that a state's denial of Medicaid payments for nontherapeutic abortions be " 'rationally related' to a 'constitutionally permissible' purpose." *Id.* at 478. While a state is not constitutionally required to provide health care services to indigents, once it "decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Id.* at 469-70.

33. A first trimester abortion is a relatively simple surgical procedure which can be safely performed in a clinic or physician's office. *Reproductive Freedom*, *supra* note 27 at 395.

to the formation of a specialized clinic system which rapidly made first trimester abortions available to large numbers of women in need.[34] By 1976, "six in 10 abortions [were] performed in freestanding nonhospital clinics, outside the mainstream of American medicine."[35] These clinics are privately owned and are not subject to a significant amount of government regulation or control.[36] Thus, access to abortion services in the United States is largely dependent on the existence of private clinics. This is evidenced by the fact that women of varying age, race, and residence rely on clinics for their abortion and contraceptive needs.[37]

III
ABORTION CLINICS AND THE FIRST AMENDMENT

Abortion clinics which are privately owned and operated are not expressly subject to the constraints of the first[38] and fourteenth amendments,[39] which

34. PROVISIONAL ESTIMATES, *supra* note 26 at 11. In Doe v. Bolton, 410 U.S. 179 (1973), the Supreme Court struck down a state statutory requirement that all abortions be performed in licensed and accredited hospitals rather than some other appropriately licensed institution. *Id.* at 194.

35. Sullivan, Tietze, and Dryfoos, *Legal Abortion in the United States, 1975-1976*, 9 FAMILY PLANNING PERSPECTIVES 116, 127 (1977). "Between the first quarter of 1973 and the first quarter of 1976, the number of abortions reported by freestanding nonhospital clinics more than doubled, while the number performed in hospitals barely increased—and, in fact, actually declined after the first quarter of 1975. . . ." *Id.* at 127. In fact, "[m]ost abortions are performed in freestanding clinics located on the East and West coasts." Nathanson and Becker, *The Influence of Physicians' Attitudes on Abortion Performance, Patient Management and Professional Fees*, 9 FAMILY PLANNING PERSPECTIVES 158, 158 (1977).

36. In late 1976, the Alan Guttmacher Institute (AGI) conducted a study of all nonhospital abortion clinics to learn more about the structure of these clinics. The AGI mailed questionnaires to 309 abortion clinics, and received 235 (75%) responses. Lindheim, *Services, Policies and Costs in U.S. Abortion Facilities*, 11 FAMILY PLANNING PERSPECTIVES 283, 284 (1979). The following information on clinic ownership was obtained:

> In 1976, 36 percent of the clinics reported that they were owned by physicians and 42 percent, that they were operated for profit by organizations and individuals who were not physicians; the remaining 22 percent reported that they were owned by nonprofit organizations and nonphysicians. In all, 26 percent of the clinics classified themselves as "nonprofit." In addition, 26 percent of the clinics were operated by an individual or group who also owned another abortion facility.

Id. at 288.

37. *Id.* at 285-86.

38. U.S. CONST. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

39. U.S. CONST. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

forbid the federal government and state governments from abridging freedom of speech. In determining whether an entity is considered to be public or private for the purpose of imposing these constitutional restraints, however, ownership is not the only consideration; the structure and function of the entity are more important than its formal ownership.[40] Two situations exist in which constitutional standards are applicable to private entities. Such standards are applicable either when there is a significant connection, or "nexus," between the government and the private entity or when the private entity has assumed a "public function" without formal government involvement.[41] Accordingly, if there is substantial governmental participation in a private clinic's activities or if the clinic is performing a primarily public function, its actions are equivalent to "state action." In such a case, a clinic is obligated by the first amendment to provide a forum for all factions of society which wish to speak on its premises. Thus, only if a clinic is a purely private entity for all purposes may its personnel refuse to allow anti-abortionists to express their views on clinic property.

A. The "Nexus" Approach

Under the nexus approach, a private entity is subject to constitutional constraints when the government has "so far insinuated itself into a position of interdependence" with the entity that the government "must be recognized as a joint participant" in the entity's activities.[42] Three factors are significant under this approach: first, the degree to which the private entity is dependent on government benefits or services; second, the existence and the extent of government regulation of the private entity; and third, the extent to which the government regulatory scheme either compels or connotes general approval of the operation of the private entity, or specific approval of its policy decisions.[43]

1. Government Benefits or Services

Financing of abortions is the most significant government benefit accorded women who use abortion clinics.[44] Following *Roe v. Wade*, most states and the

40. *See* Wolin v. Port of New York Auth., 268 F. Supp. 855, 860 (S.D.N.Y. 1967), *modified* 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968).

41. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 659 (1974) [hereinafter cited as *State Action*].

42. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

43. *See* Jackson v. The Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). The additional state action criteria enumerated in *Jackson* are discussed in the text accompanying notes 78-79 *infra*.

44. A recent study indicated that "[o]rganized family planning services are financed through federal, state and local government funds, direct patient fees, private contributions from fundraising, reimbursements from private insurance plans and in-kind contributions." Torres, *Rural and Urban Family Planning Services in the United States*, 11 FAMILY PLANNING PERSPECTIVES 109, 111 (1979). The study also indicated that "[o]nly five percent of nonmetropolitan family planning agencies provide abortion services, compared with 23 percent of metropolitan agencies." *Id.* at 110. The financing of abortion is far more restricted than that of family planning services in gen-

federal government provided Medicaid reimbursement for abortions.[45] The provision of Medicaid funding for non-therapeutic abortions enabled many indigent women voluntarily to terminate their pregnancies. In 1976, however, Congress responded to anti-abortion sentiment by passing the Hyde Amendment to the 1977 appropriations bill for the Department of Labor and the Department of Health, Education, and Welfare (HEW).[46] The original version of the Hyde Amendment limited federal financing of abortions, through the Medicaid program, to cases "where the life of the mother would be endangered if the fetus were carried to term."[47] For the fiscal year 1978, the Hyde Amendment was renewed in a slightly more liberalized form.[48] This version prohibited federal financing of abortion under the Medicaid program with three exceptions: (1) where the life of the mother would be endangered if the fetus were carried to term; (2) where such medical procedures are necessary for the victims of rape or incest, provided the crime has been promptly reported to an appropriate agency; and (3) where the mother would suffer long-lasting, physical health damage, as determined by two physicians, if the pregnancy were carried to term. This version of the Hyde Amendment was renewed for the fiscal year 1979.[49]

The restrictive guidelines of the Hyde Amendment have reduced federally financed abortions by 99%.[50] While the Hyde Amendment did not restrict state financing of abortions, many states followed the federal government's lead and withdrew state financing of abortion for Medicaid-eligible women.[51] In June 1977, moreover, the Supreme Court held in two related cases that neither the Constitution nor the Medicaid program established by Title XIX of the Social Security Act[52] requires states to provide payments for non-therapeutic abor-

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eral. In fact, "[m]any clinics are not certified to receive Medicaid reimbursement; those that are, often have serious problems actually obtaining adequate reimbursement." *Reproductive Freedom*, *supra* note 27, at 37. This Note will focus on clinics that perform Medicaid-funded nontherapeutic abortions.

45. "Federal funds had traditionally paid for half the cost of welfare abortions, with the states paying the rest." N.Y. Times, Dec. 26, 1978, § B, at 14, col. 1.

46. Act of Sept. 30, 1976, Pub. L. No. 94-439, 90 Stat. 1418 (1976).

47. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

48. Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977).

49. Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978). Congressional debate on the terms of the Hyde Amendment for fiscal year 1980 continues as this article goes to press. The Supreme Court recently agreed to hear oral arguments on a ruling by a federal district court in Illinois which declared the Hyde Amendment unconstitutional, but did not order the government to stop implementing the Amendment. Williams v. Zbaraz, 48 U.S.L.W. 3350 (Nov. 27, 1979); N.Y. times, Jan. 16, 1980, § B, at 2, col. 1. In McCrae v. Califano, No. 76C-1804 (E.D.N.Y., Jan. 15, 1980), Judge Dooling declared the Hyde Amendment unconstitutional because it violates a pregnant woman's first and fifth amendment rights by denying necessary medical assistance for the lawful and medically necessary procedure of abortion. Judge Dooling ordered government officials to resume authorizing the expenditure of Medicaid funds for legally performed necessary abortions, but delayed enforcement of the judgment 30 days to provide time for the Justice Department to appeal the decision. 48 U.S.L.W. 2492 (Jan. 29, 1980).

50. N.Y. Times, Apr. 5, 1979, § A, at 22, col. 1.

51. *Id. See also* N.Y. Times, Dec. 26, 1978, § B, at 14, col. 1.

52. 42 U.S.C. §§ 1396-1396i (1970 & Supp. 1971-76).

tions.[53] Consequently, as of September 1979, thirty-nine states, in which 70% of all Medicaid-funded abortions in 1977 were performed, had withdrawn Medicaid payments for non-therapeutic abortions.[54] In these states, government funding obviously does not transform into state action the provision of abortion services by a private clinic, because there is no government funding.

A number of states still provide Medicaid funding for non-therapeutic abortions.[55] Several circuit courts, however, have held that the mere receipt of federal funds by a private health care provider, even when coupled with state and federal tax exemptions, is not in itself sufficient to constitute state action.[56] In *Doe v. Bellin Memorial Hospital*,[57] for example, the Seventh Circuit held that the conduct of a private hospital, which receives financial support from both federal and state governments and is subject to detailed state regulation, is not state action absent a finding that the conduct at issue was affected or controlled by the governmental support or regulation.[58] *Bellin Memorial Hospital* and similar cases[59] therefore suggest that a state's provision of Medicaid funds to a private abortion clinic does not by itself constitute state action for the purposes of constitutional analysis.

2. *Government Regulation*

A nexus exists between a government and a private entity if the former extensively regulates the latter. While state regulation of abortion clinics varies greatly, *Roe v. Wade* has established specific limits applicable to the regulation of abortion providers. As noted previously, *Roe* held that a state may not regulate the provision of abortion services during the first trimester of pregnancy.[60] During the second trimester of pregnancy, state regulation of abortion procedures must be reasonably related to the protection of maternal health.[61] Extensive state regulation of abortion therefore is permissible solely during the third

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53. Maher v. Roe, 432 U.S. 464 (1977) (a state's decision to pay for childbirth but not nontherapeutic abortions does not violate the equal protection clause of the fourteenth amendment); Beal v. Doe, 432 U.S. 438 (1977) (the Social Security Act's Medicaid provision does not require states to fund nontherapeutic abortions to participate in the Medicaid program).

54. *Anniversaries*, 11 FAMILY PLANNING PERSPECTIVES 3 (1979); *see also* N.Y. Times, Jan. 16, 1980, § B, at 2, col. 1.

55. In December 1978, at least eight states, including New York, New Jersey, and California, still provided financing for all abortions. N.Y. Times, Dec. 26, 1978, § B, at 14, col. 1; *see also* N.Y. Times, Jan. 16, 1980, § B, at 2, col. 1.

56. Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976); Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973). *Contra*, Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

57. 479 F.2d 756 (7th Cir. 1973).

58. *Id.* at 761.

59. *See* cases cited in note 56 *supra*.

60. *See* text accompanying notes 5-7 *supra*.

61. *See* text accompanying note 8 *supra*.

trimester of pregnancy.[62] In *Doe v. Bolton*,[63] the Court struck down a state statutory requirement that all abortions be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) because the JCAH accreditation process "has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure."[64] The statute was therefore an "overbroad infringement of fundamental rights because it [did] not relate to the particular medical problems and dangers of the abortion operation."[65] The Court indicated, however, that at the end of the first trimester of pregnancy a state could adopt licensing standards for abortion facilities if such standards were legitimately related to a valid state objective.[66]

Many courts have interpreted the guidelines established by *Roe* and *Doe* to mean that there can be no state regulation of abortions in the first trimester, aside from the requirement that abortions be performed by licensed physicians, and that regulation in the second trimester should be aimed solely at the promotion of maternal health.[67] In *Arnold v. Sendak*,[68] a district court struck down a state abortion statute which required that all abortions be performed by a physician in a hospital or equivalent licensed health facility. The court emphasized that both "*Roe* and *Doe* expressly state that regulation by the State as to the facility in which an abortion is to be performed is the type of regulation which can only occur after the 'compelling point' or end of the first trimester . . . ."[69] The portion of the statute which required that first trimester abortions be performed in a hospital or licensed health facility was found therefore to be unconstitutional.[70] Other courts, however, interpret the restrictions of *Roe* and *Doe* to apply only to regulations aimed specifically at abortions rather than to those governing all surgical procedures and hence uphold generally applicable health regulations which encompass first trimester abortions.[71]

The Supreme Court has held that state regulation of a private entity, no matter how extensive and detailed, is not alone sufficient to make the state a "partner or even a joint venturer" in the private entity's activities.[72] In the context of private health care facilities, the federal courts have repeatedly held

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62. *See* text accompanying note 9 *supra*.
63. 410 U.S. 179 (1973).
64. *Id.* at 193.
65. *Id.* at 194.
66. *Id.* at 194-95.
67. *See, e.g.*, Friendship Medical Center Ltd. v. Chicago Board of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974); Fox Valley Reproductive Health Care Center, Inc. v. Arft, 446 F. Supp. 1072 (E.D. Wis. 1978); Mahoning Women's Center v. Hunter, 444 F. Supp. 12 (N.D. Ohio 1977); Arnold v. Sendak, 416 F. Supp. 22 (S.D. Ind.), *aff'd*, 429 U.S. 968 (1976).
68. 416 F. Supp. 22 (S.D. Ind.), *aff'd*, 429 U.S. 968 (1976).
69. *Id.* at 24.
70. *Id.*
71. *E.g.*, Abortion Coalition of Mich., Inc. v. Michigan Dep't of Public Health, 426 F. Supp. 471 (E.D. Mich. 1977).
72. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974) (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972)).

that governmental regulation of the private entity does not support a finding of state action absent a connection or involvement between the governmental regulation and the challenged activity of the private entity.[73] Whatever the degree of permissible state regulation under *Roe* and *Doe*, such regulation is insufficient, by itself, to support a finding of state action.

3. *Abortion Clinic Policy*

The final issue to be considered under the nexus approach is whether a private clinic's conduct can be classified as state action because the state encouraged or compelled the clinic's activities.[74] The Supreme Court has stated that "a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act."[75] To establish state action, in other words, there must be a nexus between the state's involvement with the private entity and the private entity's conduct.[76]

State regulation, licensing, and funding of abortion clinics are all indicia of state involvement with private clinics. State involvement with private clinics in such a manner, however, does not indicate that the state has "sought to influence [clinic] policy reflecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits."[77] It merely reflects a state's recognition of its duty to protect the health and welfare of its citizens who desire an abortion. Thus, absent a finding that a state has encouraged or compelled the provision of abortion services by a private clinic through its involvement with the clinic, there is an insufficient nexus to establish state action.

B. The "Public Function" Approach

Under the "public function" approach, state action is present when a private entity exercises powers "traditionally exclusively reserved to the State."[78] In determining whether a private entity is exercising such powers, it is neces-

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73. *See* cases cited at note 55 *supra*. In Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976), for example, the court held that a physician's dismissal from the staff of a private hospital without prior notice and hearing constituted private action and therefore did not deprive him of due process of law. The court based its holding on the fact that there was "nothing to indicate that there was any connection between plaintiff's dismissal from the staff of the Hospital and the fact that the Hospital had received . . . public funds . . . has a tax exempt status [or] was subject to state regulation. . . ." *Id.* at 395-96. Thus, there was no nexus between the state's relationship with the hospital and the hospital's dismissal of the plaintiff to support a finding of state action. *Id.* at 396.

74. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

75. Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970).

76. Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc., 507 F.2d 1103, 1105 (9th Cir. 1974).

77. Doe v. Bellin Memorial Hosp., 479 F.2d 756, 761 (7th Cir. 1973).

78. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). *See also, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (municipal park); Terry v. Adams, 345 U.S. 461 (1953) (election); Marsh v. Alabama, 326 U.S. 501 (1946) (company town).

sary to consider the extent to which the private organization serves a public function or acts as a surrogate for the state, and whether the organization has a legitimate claim to recognition as a "private" organization in associational or other constitutional terms.[79]

An essential element of the public function approach is the "feature of exclusivity."[80] In cases where the Court has found state action under this approach, the government had vested in private groups the right to exercise a function that was an "exclusive prerogative of the sovereign."[81] In *Marsh v. Alabama*,[82] for example, the Court reversed the conviction of a Jehovah's Witness for distributing religious literature on the sidewalk of a company-owned town without a permit as required by company rule.[83] The corporation that owned the town was acting as a municipal government.[84] The Court held that a state cannot permit "a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . ."[85] In other words, citizens have a right to exercise their first amendment rights on town property regardless of whether formal title to that property belongs to a private corporation or municipality.[86]

The provision of health care, "although of admitted benefit to the community, is not a service traditionally or uniquely rendered by the State."[87] In our society, individuals have always been free to choose between public and private health care services without state interference.[88] The tradition of individual autonomy in health care decisions has been reflected in the Court's abortion decisions, which seek "to insulate the doctor-patient relationship from outside influences,"[89] especially that of the state. Moreover, since abortion clinic patients are exercising their constitutional right to privacy, abortion clinics may have a legitimate claim to recognition as a private entity due to the

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79. Jackson v. The Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). *See generally State Action*, *supra* note 41, at 659.

80. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 151 (1978).

81. *Id.* at 160.

82. 326 U.S. 501 (1946).

83. *Id.*

84. *Id.*

85. *Id.* at 509.

86. *Id.* at 507. Similarly, in Terry v. Adams, 345 U.S. 461 (1953), the Court found that the exclusion of Negroes from the primaries of the Jaybird Party, a Texas county private political organization, violated the fifteenth amendment. *Id.* The Court rested its holding on the fact that although the Jaybird Party's elections were not governed by state laws, "[t]he Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." *Id.* at 469. Thus, the Jaybird Party had assumed a public function.

87. Jones v. Eastern Maine Medical Center, 448 F. Supp. 1156, 1163-64 (D. Me. 1978).

88. The fact that abortion clinics are open to the general public is not itself sufficient to convert clinic property into public property for the purpose of exercising first amendment rights. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where the court held that owners of a private shopping center have the right to prohibit the distribution of political handbills in the privately owned interior mall. In the course of its opinion, the Court stated that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* at 569.

89. Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 BRIGHAM YOUNG L. REV. 783, 802.

need to protect their patients' constitutional rights. Consequently, the provision of abortion services by private abortion clinics is not state action under the public function approach.

The preceding analysis of the structure and function of private abortion clinics indicates that they are private entities for the purposes of constitutional analysis. Outside the confines of clinic private property, anti-abortionists have the constitutional right to inform women of their beliefs on abortion. The first and fourteenth amendments, however, only protect freedom of speech from state interference. A private clinic, therefore, has the right to refuse to allow anti-abortionists to protest abortion on clinic property. When anti-abortionists enter clinic property, their first amendment rights must yield to state trespass laws, which protect private property from uninvited intruders; similarly, while on clinic property, anti-abortionists must respect the right of privacy of clinic patients.[90]

IV
REMEDIES AVAILABLE TO REDRESS OBSTRUCTIONIST ACTIVITIES AT ABORTION CLINICS

A. Trespass Actions

1. Criminal Trespass Actions

If an abortion clinic is private property for the purposes of constitutional analysis, clinic personnel have a right to exclude anti-abortionists from clinic premises. The state may utilize its criminal trespass laws on behalf of an abortion clinic to implement this right.[91] In response to trespass actions, anti-abortionists often cite the common law defense of necessity, which has long been recognized to excuse noncompliance with the law in emergency situations.[92] The common law defense of public necessity is a limited privilege "to enter land in the possession of another"[93] when there is an imminent threat to the welfare of the entire community.[94] The common law defense of private necessity, in contrast, is a limited privilege to "enter or remain on land in the

90. *Cf.* Wolin v. Port of New York Auth., 268 F. Supp. 855 (S.D.N.Y. 1967), *modified* 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968), where the court stated that if a bus terminal is private property, demonstrators' constitutional rights to free speech must yield to the terminal owner's "right to be protected against trespass or invasion of his Constitutional right of privacy." 268 F. Supp. at 859.

91. Schwartz, *A Landholder's Right to Possession of Property Versus a Citizen's Right of Free Speech: Tort Law as a Resource for Conflict Resolution*, 45 U. CINN. L. REV. 1 (1976) [hereinafter cited as *Landholder's Right to Possession*].

92. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 24, at 125 (4th ed. 1971); State v. Rasmussen, 47 U.S.L.W. 2331 (Hennepin County Mun. Ct., 1st Div. Oct. 5, 1978).

93. RESTATEMENT (SECOND) OF TORTS § 196 (1965).

94. The privilege of public necessity permits an unauthorized entry in the event of a threat of "imminent public disaster." *Id. See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 24 (4th ed. 1971).

possession of another"[95] when necessary to protect the owner, trespasser, or a third person from serious harm.[96]

The defense of public necessity is recognized when a defendant acts to avert a danger which threatens serious harm to a substantial portion of the population if not prevented or mitigated immediately.[97] In such a case, the defendant is acting as a "champion of the public" and is not required to pay "for the general salvation."[98]

Anti-abortionists believe that abortion is a form of murder and presents an imminent threat to human life and the moral values of society.[99] The availability of a medical procedure which complies with the guidelines established by the Court in *Roe*, however, does not present the type of danger necessary to invoke the privilege of public necessity for two basic reasons. First, the *Roe* Court unequivocally held that the unborn are not persons protected by the fourteenth amendment.[100] Second, since the moral values of a society are inherently incapable of valuation, it is not possible to determine whether those values are harmed by the availability of legal abortions. Thus, the defense of public necessity cannot be used by defendants to excuse trespass on abortion clinic premises.

The defense of private necessity is similarly unavailable to defendants in criminal trespass actions although it has been accepted by one court to excuse invasions of an abortion clinic. In that case, a group of anti-abortionists were prosecuted for trespass for the invasion of the Northern Virginia Women's Medical Center (NVWMC).[101] The demonstrators were acquitted of trespassing charges based on their argument that the trespass was justified because its purpose was to save human lives.[102] Subsequently, on two separate occasions, a group of anti-abortionists invaded the NVWMC.[103] At trial, another judge acquitted all the defendants of the trespass charge and ruled that the Virginia abortion statute was unconstitutional.[104]

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95. RESTATEMENT (SECOND) OF TORTS § 197 (1965).

96. The privilege of private necessity also applies if the entry is necessary to protect the land or chattels of the owner, trespasser, or a third person. *Id.*

97. RESTATEMENT (SECOND) OF TORTS § 196, Comment a (1965) states in relevant part:

> The privilege stated in this Section is conferred upon the actor for the protection of the public. It is essential therefore that the entry be made in order to protect against or repel a public enemy, or to prevent or mitigate the effects of an impending public disaster such as a conflagration, flood, earthquake, or pestilence.

98. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 24, at 126 (4th ed. 1971).

99. *See, e.g.*, Callahan, *Abortion and Government Policy*, 11 FAMILY PLANNING PERSPECTIVES 275, 278 (1979) (anti-abortionists feel they have a moral duty to oppose abortion because they believe abortion is the wrongful taking of human life).

100. Roe v. Wade, 410 U.S. 113, 158 (1973). *See* text accompanying notes 108-16 *infra*.

101. There were several persons tried for trespass in one consolidated trial. Commonwealth of Va. v. Stine, No. 77-37242 (Fairfax General District Court, Oct. 17, 1977).

102. *Id.*; Wash. Post, Feb. 11, 1978, § B, at 3, col. 4.

103. *Id.*

104. *Id.* Again, several persons were tried for trespass in one consolidated action. Commonwealth of Va. v. Balch, No. 77-56712 (Fairfax General District Court, Feb. 10, 1978).

An analysis of the private necessity defense indicates that it was incorrectly used to excuse the anti-abortionists' trespass at the NVWMC. First, an essential element of the defense is an emergency situation.[105] The performance and procurement of first trimester abortions at abortion clinics, in accordance with the standards enunciated in *Roe*,[106] does not constitute illegal activity or endanger the lives of pregnant women. Consequently, there is no emergency situation presented by the lawful activities of an abortion clinic. Second, the private necessity defense exists solely for the purpose of protecting the actor, the possessor of the land, or third *persons*, including their land and chattels, in emergency situations.[107] Anti-abortionists can only justify their clinic trespasses as necessary to protect third persons, that is, the fetuses of pregnant women. In *Roe* the Supreme Court stated expressly that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[108] Anti-abortionists, however, strongly believe that since life begins at the moment of conception, any abortion constitutes the murder of an unborn human being.[109] In support of the private necessity defense, anti-abortionists argue that *Roe v. Wade* was based on an erroneous interpretation of the protection afforded by the fourteenth amendment, has been invalidated by current medical knowledge, and has been undermined by recent Supreme Court decisions.[110] A thorough reading of *Roe v. Wade* and subsequent Supreme Court decisions, however, illustrates the inadequacy of the anti-abortionist arguments. To begin with, the *Roe* Court carefully considered substantial precedent before it concluded that the fourteenth amendment's protections do not apply to unborn children.[111] This conclusion has not been overturned and therefore continues to preclude arguments to the contrary. Similarly, the *Roe* Court's abortion decision was based on a significant amount of historical data concerning abortion and current medical data regarding the commencement of human life.[112] The Court recognized that there was considerable controversy over "the difficult question of when life begins"[113] and stated that it was not the judiciary's function to resolve that question.[114] Rather, the Court chose to leave the question unanswered until "those trained in the respective disciplines of medicine, phi-

105. RESTATEMENT (SECOND) OF TORTS § 197, Comment a (1965) states in relevant part: "The privilege stated in this Subsection exists only where in an emergency the actor enters land for the purpose of protecting himself or the possessor of the land or a third person or the land or chattels of any such persons."

106. *See* text accompanying notes 6-9 *supra*.

107. *Id.*

108. 410 U.S. at 158.

109. Brief for Appellants at 10-18, Northern Va. Women's Medical Center v. Horan, No. 78-94-A (E.D. Va., filed June 23, 1978) *appeal docketed sub nom.*, Northern Va. Women's Medical Center v. Balch, No. 78-1673 (4th Cir., Sept. 27, 1978) [hereinafter cited as Brief for Appellants].

110. Brief for Appellants, *supra* note 109 at 7-34; *accord*, Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 421 F. Supp. 734, 736-38 (N.D. Ind. 1976) (Sharp, J., separate statement), *aff'd mem.*, 429 U.S. 1067 (1977).

111. 410 U.S. at 156-59.

112. *Id.* at 129-52.

113. *Id.* at 159.

114. *Id.*

losophy, and theology"[115] are able to agree on the specific time when life begins.[116] Although the evidence cited by anti-abortionists represents the opinions of several professionals,[117] it falls far short of the interdisciplinary consensus required to overturn *Roe v. Wade*. Finally, the Supreme Court has emphasized that its recent abortion decisions signal "no retreat from *Roe* or the cases applying it."[118] Thus, anti-abortionists lack any arguments sufficient to support a finding of private necessity to excuse their trespasses on abortion clinic property.

This conclusion is supported by several state trial court decisions which have rejected, as a matter of law, the private necessity defense in criminal trespass cases involving abortion clinic intrusions.[119] In *State v. Rasmussen*,[120] for example, a group of anti-abortionists charged with trespass arising from their sit-in at an abortion clinic sought to introduce evidence supporting their private necessity defense.[121] The anti-abortionists described the goal of their sit-in as a " 'nonviolent interposition to prevent the destruction of unborn children and the jeopardization of the life and health of their mothers . . . . ' "[122] The court, in rejecting the argument, held that "the only rational rule is that the legality of the abortions involved precludes the defense of necessity."[123] The court added that, even assuming a necessity exists, the defense was precluded because there are "entirely lawful alternatives that can be utilized by anti-abortion advocates."[124] This opinion reaffirms the well-established principle that "the law does not recognize as a defense [to criminal charges] that the defendants were motivated to commit their acts by sincere political, religious or moral convictions or in obedience to some higher law."[125]

In *Gaetano v. United States*,[126] the District of Columbia Court of Appeals recently reiterated this view. *Gaetano* involved the criminal liability of several anti-abortionists who staged a sit-in at a private abortion clinic and were arrested for criminal trespass.[127] At a pretrial hearing, the defendants requested to submit evidence at trial to prove they had a "bona fide belief" that their ac-

115. *Id.*
116. *Id.*
117. Brief for Appellants, *supra* note 109 at 10-18.
118. Maher v. Roe, 432 U.S. 464, 475 (1977).
119. State v. Pelikan (Dist. Ct., Md., filed July 10, 1978) noted in Brief for Appellees, Northern Va. Women's Medical Center v. Horan, No. 78-94-A (E.D. Va. June 23, 1978), *appeal docketed sub nom.*, Northern Va. Women's Medical Center v. Balch, No. 78-1673 (4th Cir. Sept. 27, 1978); State v. Fardig, (3d Jud. Dist. Ct., Anchorage, Alaska, filed Mar. 30, 1978); State v. Miller (Ct. of C.P., Conn., filed Mar. 8, 1978); State v. Arentsen, (3d Jud. Cir. Ill., filed Feb. 16, 1978); Commonwealth v. Dubel (Boston Mun. Ct., Mass., filed Jan. 12, 1978); State v. Bodner, (Crim. Ct., Md., filed Dec. 28, 1977); United States v. Balch, No. 64686-77 (Super. Ct. D.C., filed Dec. 19, 1977).
120. 47 U.S.L.W. 2331 (Hennepin County, Minn. Mun. Ct., 1st Div. Oct. 5, 1978).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. United States v. Dougherty, 473 F.2d 1113, 1138 n.54 (1972).
126. Gaetano v. United States, 406 A.2d 1291 (D.C. Ct. App. 1979).
127. *Id.* at 1292.

tions were justified and proper and to prove that their actions were necessary to save human life.[128] The trial court refused to allow the defendants to introduce evidence concerning the "existence of human life in the womb"[129] because it had already accepted the anti-abortionists' defense of bona fide belief, and because the evidence could not support an acquittal based on the private necessity defense.[130] The issue on appeal was limited, therefore, to the determination whether the proffered evidence would prove the reasonableness of the appellants' bona fide belief.[131] The court stated:

> The "bona fide belief" defense was not meant to, and does not, exonerate individuals who believe they have a right, or even a duty, to violate the law in order to effect a moral, social, or political purpose regardless of the genuiness of the belief or the popularity of the purpose.[132]

The court found that the appellants' reliance on the necessity defense was "equally misdirected" because "[u]nlike medical necessity or other emergency situations, the necessity cited by appellants cannot shield them from criminal liability for their acts."[133] In other words, even conclusive evidence "that an abortion terminates the life of the fetus . . . does not support an immediate call to action in violation of the law of the land."[134] Thus, there is ample precedent indicating that anti-abortionists cannot avoid prosecution for their trespasses on the grounds that they had a good faith belief that their actions were necessary to save human life.

2. *Civil Trespass Actions*

The common law tort of trespass to land protects the "proprietary and dignitary interests that people have in the exclusive possession of their land."[135] An individual is subject to liability to another in a civil trespass action if he intentionally "enters land in the possession of another" or "remains on the land" without consent.[136] In a civil trespass action, damage is inferred from the defendant's intrusion on the plaintiff's property.[137] A landowner can

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128. *Id.*
129. *Id.* at 1293.
130. *Id.* at 1294.
131. *Id.* at 1293.
132. *Id.* at 1294.
133. *Id.*
134. *Id.*
135. *Landholder's Right to Possession*, *supra* note 91, at 1; W. PROSSER, LAW OF TORTS § 13 (4th ed. 1971).
136. RESTATEMENT (SECOND) OF TORTS § 158 (1965) states:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
> (b) remains on the land, or
> (c) fails to remove from the land a thing which he is under a duty to remove.

137. *Id.*; W. PROSSER, LAW OF TORTS § 13, at 66 (4th ed. 1971).

therefore bring a successful trespass action against an intruder even if his property has not been damaged or he has benefited from the intrusion.[138]

A landowner has never had an absolute right to exclusive possession of his property. Just as the common law privileges of private and public necessity may excuse a criminal trespass, so too may they justify an otherwise tortious intrusion on private property.[139] The privilege of public necessity requires a landowner to bear the cost of any damage to his own property resulting from the intrusion of a party acting to protect the public.[140] The privilege is therefore complete. The private necessity defense, however, is incomplete; an intruder may be held liable for property damage if he did not act for the landowner's benefit.[141] Thus, if an intruder is on the property to protect his own interest or that of a third person, the private necessity privilege allows him to remain on the land, although he must pay for any damage he inflicts on the property.[142]

Anti-abortionists who enter private clinic property without consent of clinic personnel, and anti-abortionists who remain on clinic property after an invitation to enter has been withdrawn, are liable for civil trespass on clinic property. Moreover, liability can be imposed regardless of whether the anti-abortionists cause harm to any legally protected interest of the clinic. For the reasons outlined in the previous section, the private and public necessity defenses do not appear to be available to anti-abortionists to excuse a trespass on abortion clinic property. If the privilege of private necessity were to be recognized in a civil trespass case, however, anti-abortionists would be entitled to remain on abortion clinic property but would be liable for any damage to the premises because they were not acting for the clinic's benefit.

B. Actions for Intentional Infliction of Emotional Distress

Courts have recognized the tort of "intentional infliction of emotional distress" in recent years as a separate and distinct basis of tort liability due to the realization that "not only fright and shock, but also grief, anxiety, rage and shame" are physical injuries in that they produce serious physical and emotional consequences.[143] An individual is subject to liability for intentional infliction of emotional distress when "by extreme and outrageous conduct [he] intentionally or recklessly causes severe emotional distress to another."[144] In such a case, the individual tortfeasor is liable for the emotional distress and any bodily harm resulting from the distress.[145] Thus, a defendant is not liable

138. *Landholder's Right to Possession*, *supra* note 91, at 1.

139. *Id.* at 14; RESTATEMENT (SECOND) OF TORTS § 158, Comment e (1965).

140. *Landholder's Right to Possession*, *supra* note 91, at 14. RESTATEMENT (SECOND) OF TORTS § 196, Comment b (1965).

141. *Landholder's Right to Possession*, *supra* note 91, at 14; RESTATEMENT (SECOND) OF TORTS § 197, Comment j (1965).

142. RESTATEMENT (SECOND) OF TORTS § 197, Comment k (1965).

143. W. PROSSER, LAW OF TORTS § 12 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

144. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

145. *Id.*

for "mere insults, indignities, threats, annoyances, petty oppressions or trivialities" because such conduct is not extreme and outrageous.[146] Moreover, the law imposes liability only where the emotional distress inflicted is so severe "that no reasonable man would be expected to endure it."[147]

A defendant's conduct will be found to be extreme and outrageous if he is aware that a plaintiff is peculiarly sensitive, susceptible, and vulnerable to emotional distress because the plaintiff has a specific mental or physical condition.[148] Pregnant women who utilize abortion clinics are particularly susceptible to emotional distress following anti-abortionists' invasions of abortion clinics and demonstrations on public property adjacent to abortion clinics. In fact, the decision to abort a pregnancy is inherently stressful;[149] the presence of protesters adds considerably to that stress. Anti-abortionists are fully aware that pregnant women may be extremely upset by their exhortations. Their behavior at abortion clinics, in light of this knowledge, can be considered extreme and outrageous. Anti-abortionists who severely harass women through verbal insults designed to coerce them into foregoing their constitutional right to an abortion should therefore be subject to tort liability for the intentional infliction of emotional distress.

Limits do exist, however, to the use of this tort action. Although the limits are still largely undefined, it is clear that the defendant's conduct must be "utterly intolerable in a civilized community."[150] Moreover, if the infliction of emotional distress results from the defendants' exercise of first amendment rights, a court will not impose liability.[151] The primary purpose of the first amendment is to protect the "peaceful expression of unpopular views."[152] The Supreme Court has held, however, that the first amendment protects a captive audience from offensive speech which cannot be practically avoided.[153] As noted previously, anti-abortionists do not have a right to free speech while on private clinic property. Even if a clinic is not a private entity, however, women utilizing the clinic are, in effect, a captive audience. The first amendment does not present a bar to an action for intentional infliction of emotional distress against anti-abortionists' obstructionist acts inside clinic property. Thus, if anti-abortionists' obstructive conduct while on clinic property is so extreme and outrageous "as to go beyond all possible bounds of decency," the anti-abortionists should be subject to liability for the intentional infliction of emotional distress.[154]

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146. Public Finance Corp. v. Davis, 66 Ill. 2d 85, 89-90, 360 N.E.2d 765, 767 (1976).

147. *Id.*; RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

148. RESTATEMENT (SECOND) OF TORTS § 46, Comment f (1965); W. PROSSER, LAW OF TORTS § 12, at 58 (4th ed. 1971).

149. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976).

150. RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1967).

151. Collin v. Smith, 578 F.2d 1197, 1205-06 (7th Cir. 1978).

152. Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

153. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city can refuse to allow political advertising on city transit vehicles so that users are not involuntarily subjected to political propaganda).

154. RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965).

V
A PROPOSED REMEDY: INJUNCTIVE ACTIONS UNDER 42 U.S.C.A. § 1985(3)

Congress enacted 42 U.S.C.A. § 1985(3) to implement the fourteenth amendment by providing a civil remedy for deprivations of civil rights by private conspirators.[155] For several reasons, a section 1985(3) cause of action is particularly appropriate to redress invasions of abortion clinics by anti-abortionists. First, the right to choose an abortion is a fundamental right which stems from the United States Constitution.[156] Section 1985(3) is designed to provide a federal remedy for conspiracies to deprive citizens of federally guaranteed rights. Although the constitutional right to privacy had not yet been fully recognized when section 1985(3) was enacted, it is the type of civil right which the statute was designed to protect.[157] Second, the federal courts have traditionally been more receptive than the state courts to civil rights actions.[158] As noted earlier, the Fairfax General District Court dismissed trespass charges against anti-abortionists on the grounds that their actions were excused by the private necessity defense.[159] While the case involved a trespass charge rather than an allegation of a civil rights violation, the case's result reflects the reluctance of many state courts to recognize certain fundamental rights. Third, a section 1985(3) action may provide injunctive relief in addition to the recovery of damages.[160]

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155. 42 U.S.C.A. § 1985(3) (1976) states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [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, occasioned by such injury or deprivation, against any one or more of the conspirators.

[Although 42 U.S.C. § 1985(c) is the official version of the statute, most people refer to the statute as § 1985(3). This is the unofficial (U.S.C.A.) version. In keeping with common usage, we have used the U.S.C.A. citation. Eds.]

156. Roe v. Wade, 410 U.S. at 153.

157. The constitutional right of privacy was first generally recognized in the twentieth century. *See* cases cited in *Roe*, 410 U.S. at 152-53. By contrast, the civil rights statutes were enacted in the late nineteenth century. *See* note 155 *supra*.

158. In Monroe v. Pape, 365 U.S. 167 (1961), the Court stated that the Ku Klux Klan Act (referring to the original enactment of section 1985(3)) was passed partially "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.* at 180.

159. *See* text accompanying notes 101-04 *supra*.

160. *See* text accompanying notes 267-80 *infra*.

A. *The Need for State Action*

On its face, section 1 of the fourteenth amendment protects civil rights against state action.[161] Section 5 of the fourteenth amendment, the enforcement clause, provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[162] The fourteenth amendment has traditionally been interpreted as "erect[ing] no shield against private conduct, however discriminatory or wrongful."[163] It is possible, however, for private citizens to engage in practices which deprive other citizens of the right to freely exercise their civil rights. Thus, in determining whether section 1985(3) is an appropriate statute to redress anti-abortionist obstructionist activities at abortion clinics, it is first necessary to determine whether section 1985(3), if used to redress the violation of fourteenth amendment rights by a purely private conspiracy, is a valid exercise of congressional power pursuant to the enforcement clause.

When the Supreme Court first interpreted section 1985(3) in *Collins v. Hardyman*,[164] it construed the statute to reach only persons acting under color of state law.[165] Subsequently, in *United States v. Guest*,[166] the Supreme Court reviewed 18 U.S.C. § 241, the criminal analogue to section 1985(3).[167] The indictment in *Guest* alleged a conspiracy to harass blacks and deprive them of their civil rights.[168] Justice Stewart, writing for the Court, held that section 241 reaches violations of fourteenth amendment rights; however, since the indictment contained an express allegation of state action, he found that the case did not require a "determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause."[169] In two separate opinions, however, six Justices offered their view that the enforcement clause grants Congress the power to enact legislation to punish purely private conspiracies to interfere with fourteenth amendment rights.[170] In *Griffin v.*

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161. *See* U.S. CONST. amend. XIV, § 1, note 39 *supra*.

162. U.S. CONST. amend. XIV, § 5.

163. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted).

164. 341 U.S. 651 (1951) (The statute construed was the Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13 (codified at 8 U.S.C. § 47(3), an earlier enactment of 42 U.S.C.A. § 1985(3))).

165. *Id.*

166. 383 U.S. 745 (1965).

167. 18 U.S.C. § 241 (1976) states:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

168. 383 U.S. at 747-48.

169. *Id.* at 756.

170. Justice Clark, in an opinion joined by Justices Black and Fortas, stated that the enforcement clause "empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.* at 762 (Clark, J., concurring). Justice Brennan, in an opinion joined by Chief Justice Warren and Justice Douglas, stated that

Breckenridge,[171] the Supreme Court reconsidered the need for state action in a section 1985(3) cause of action. Justice Stewart, speaking for the Court, held that state action was not a requisite foundation for a section 1985(3) cause of action.[172] Since the rights infringed in that case, however, were protected by the thirteenth amendment and the constitutional right to interstate travel,[173] Justice Stewart found that the allegations in the complaint did not require a "consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment."[174] The Supreme Court, therefore, declined to trace out the "constitutionally permissible periphery" of section 1985(3).[175] In the words of one commentator, the Supreme Court "invited lower courts to supply a rationale for allowing or denying the regulation of purely private action through the Fourteenth Amendment."[176]

Several circuit courts have upheld congressional authority to regulate private action under the enforcement clause of the fourteenth amendment.[177] Sup-

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"§ 5 authorizes Congress to make laws that . . . protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection." *Id.* at 782 (Brennan, J., concurring).

171. 403 U.S. 88 (1971).

172. *Id.* at 96-97.

173. *Id.* at 105-06.

174. *Id.* at 107 (footnote omitted).

175. *Id.* at 107.

176. Note, *Defining the Scope of the Enforcement Clause of the Fourteenth Amendment—Murphy v. Mt. Carmel High School*, 26 DEPAUL L. REV. 682, 684 (1977) [hereinafter cited as *Defining the Scope of the Enforcement Clause*]. The Court's most recent opinion involving 42 U.S.C.A. § 1985(3) was Great Am. Fed. Sav. & Loan Assoc. v. Novotny, 442 U.S. 366 (1979). The issue presented in *Novotny* was "whether a person injured by a conspiracy to violate § 704(a) of Title VII of the Civil Rights Act of 1964 is deprived of 'the equal protection of the laws, or of equal privileges and immunities under the laws' within the meaning of § 1985(c) [*sic*]." *Id.* at 372 (footnote omitted). The majority opinion, joined by six Justices, stated that section 1985(3) "*creates* no rights. . . . [but] is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined in the section." *Id.* at 375 (emphasis in original). The Court's narrow holding was that "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c)." *Id.* at 378. Justice Stevens, in a concurring opinion, stated that "while § 1985(c) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State." *Id.* at 384-85. In a dissenting opinion Justice White, joined by Justices Brennan and Marshall, stated that "[b]ecause § 1985(c) provides a remedy for *any person* injured as a result of deprivation of a substantive federal right, it must be seen as itself creating rights in persons other than those to whom the underlying federal right extends." *Id.* at 390 (emphasis in original). In sum, only Justice Stevens expressly rejected the use of section 1985(c) to redress a private conspiracy to deprive a class of fourteenth amendment rights. There is still, therefore, no definitive Supreme Court holding on the issue. In general, the Second, Third, Eighth, and possibly the Fifth Circuits have given a broad construction to the enforcement power. *See* note 177 *infra*. The First and Ninth Circuits have noted the conflict but have avoided ruling on the issue. *See, e.g.*, Lopez v. Arrowhead Ranches, 523 F.2d 924, 927 n.2 (9th Cir. 1975); Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). The Fourth and Seventh Circuits have narrowly construed the enforcement power. *See* note 188 *infra*.

177. *See, e.g.*, Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Westberry v. Gilman Paper Co., 507 F.2d 206, *vacated as moot*, 507 F.2d 216 (5th Cir. 1975); Action v. Gannon, 450 F.2d

port for this position can be gleaned from a comparison of the Court's opinions in *Guest* and *Griffin*. In *Guest*, Justice Stewart stated:

> Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.[178]

As noted, however, six Justices did consider the scope of congressional power under the enforcement clause and found it broad enough to redress a violation of fourteenth amendment rights by private conspiracies.[179] Only Justice Harlan stated that Congress is not empowered by section 5 of the fourteenth amendment to punish private persons who conspire to interfere with the fourteenth amendment rights of citizens.[180] Five years later, in *Griffin*, Justice Stewart stated:

> A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. . . . Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal privileges and immunities under the law," whatever their source.[181]

This statement is an indication that Justice Stewart was leaning toward the broad view of congressional authority pursuant to the enforcement clause expressed by the six Justices in *Guest*. The Eighth Circuit compared these two decisions in *Action v. Gannon*[182] and opined that the *Griffin* Court had deliberately left the door open for a re-examination of the position expressed by the two separate opinions in *Guest* on the scope of congressional power pursuant to the enforcement clause.[183] In attempting to gauge the Court's current position, the *Action* court stated that "[t]he Fourteenth Amendment and § 1985(3), construed in *Griffin*, are too closely related with respect to date of passage, authorship, and purpose"[184] to conclude that the Supreme Court would reject the broad view of congressional power pursuant to the enforcement clause ex-

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1227 (8th Cir. 1971); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971); Reichardt v. Payne, 396 F. Supp. 1010 (N.D. Cal. 1975), *modified sub nom.*, Life Ins. Co. of N. America v. Reichardt, 591 F.2d 499 (9th Cir. 1979); Brown v. Villanova Univ., 378 F. Supp. 342 (E.D. Pa. 1974); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973).

178. 383 U.S. at 755 (footnote omitted).
179. *See* note 164 *supra*.
180. 383 U.S. at 771-74 (Harlan, J., concurring).
181. 403 U.S. at 97.
182. 450 F.2d 1227 (8th Cir. 1971).
183. *Id.* at 1236.
184. *Id.*

pressed by the majority of the Justices in *Guest*.[185] In *Reichardt v. Payne*,[186] a California district court reasoned that since Justice Stewart concluded in *Griffin* that section 1985(3) was meant to reach all deprivations of equal protection of the law, he limited the scope of the statute not by the nature of the violated constitutional right, but by a requirement that the conspiracy be motivated by class-based invidious discrimination.[187]

Those courts which argue that Congress may not regulate private action under the fourteenth amendment rely on Justice Stewart's comment in *Guest* that the "Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*."[188] This argument is buttressed by the questionable significance of the separate opinions in *Guest*.[189] The six opinions, taken together, do not establish a precedent as three Justices were merely declaring their personal opinions while concurring in the result and three Justices were similarly declaring a personal opinion while dissenting.[190]

In *Dombrowski v. Dowling*,[191] the Seventh Circuit stated that "although *Griffin* makes it perfectly clear that some purely private conspiracies among defendants are proscribed by § 1985(3), *Griffin* did not purport to delineate the scope of the rights secured by the statute."[192] The *Dombrowski* court then drew a distinction between the interests of the plaintiff which section 1985(3) protects and the conduct of the defendants which section 1985(3) proscribes.[193] Under this analysis, section 1985(3) prohibits private conspiracies in various contexts. For example, a group of persons may not conspire to deprive an individual of his right to interstate travel. Since the fourteenth amendment only protects an individual from state action, the *Dombrowski* court found that section 1985(3) does not prohibit private conspiracies which deprive an individual of his fourteenth amendment rights.[194] In other words, the basic premise of this analysis is that the acts prohibited by section 1985(3) are not coextensive with the rights which the statute protects.

185. *Id.*

186. 396 F. Supp. 1010 (N.D. Cal. 1975), *modified sub nom.*, Life Ins. Co. of N. America v. Reichardt, 591 F.2d 499 (9th Cir. 1979).

187. *Id.* at 1018. In *Novotny*, Justice White similarly noted that § 1985(3), as enacted, "did not limit the scope of the rights protected but added a requirement of certain 'class-based, invidiously discriminatory animus behind the conspirators' actions'. . . ." Great Am. Fed. Sav. & Loan Assoc. v. Novotny, 442 U.S. 366, 389 n.5 (White, J., dissenting, *quoting* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

188. 383 U.S. at 755 (quoting United States v. Williams, 341 U.S. 70, 92 (1951) (Douglas, J., dissenting) (emphasis in original). *See, e.g.*, Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Weiss v. Willow Tree Civic Assoc., 467 F. Supp. 803 (S.D.N.Y. 1979); Dreyer v. Jalet, 349 F. Supp. 452 (S.D. Tex. 1972), *aff'd per curiam*, 479 F.2d 1044 (5th Cir. 1973); El Mundo, Inc. v. Puerto Rico Newspaper Guild, Local 225, 346 F. Supp. 106 (D.P.R. 1972).

189. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 241 (1971).

190. *Id.* Moreover, there has been a change in the Court's composition since *Griffin* and *Guest* and the Burger Court is far less fond of constitutional innovation. *See id.*

191. 459 F.2d 190 (7th Cir. 1972).

192. *Id.* at 194.

193. *Id.* at 194-96.

194. *Id.* at 196.

The Supreme Court examined the scope of congressional power under the enforcement clause of the fourteenth amendment from a different point of view in *Katzenbach v. Morgan*.[195] In that case, the Supreme Court articulated a broad view of congressional authority under the enforcement clause, upholding section 4(e) of the Voting Rights Act of 1965, which was enacted to prevent states from using English literacy tests to deprive native born Puerto Ricans of the right to vote.[196] Justice Brennan, speaking for the Court, stated:

> By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause . . . . Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.[197]

Several commentators, in analyzing *Katzenbach*, have developed rationales for the Court's decision which also support the view that Congress has the power to forbid private acts of discrimination under the fourteenth amendment. Professor Burt argues that although the Court has sought means to devise remedies for private discriminatory acts, it is constrained by the fact that it cannot "independently proscribe some private discrimination without its proclaimed principle expanding to proscribe all discrimination."[198] Congress, in Burt's view, is less burdened by principled constraints. Since Congress operates by majority vote, it is better able to devise an appropriate adjustment between the values involved in freedom of association and those related to protection from discrimination.[199] The *Katzenbach* Court, therefore, may have been recognizing the legislature's superior capacity to reach state laws or private conduct pursuant to its power under the enforcement clause of the fourteenth amendment.[200] Professor Cox, in analyzing *Katzenbach*, also developed a rationale for its result which can be used to uphold the existence of congressional power to reach private acts under the enforcement clause.[201] According to Cox, rights arising from a relationship with the United States government imply an obligation on private parties not to interfere with the receipt of benefits from the federal government. Analogously, a right to equal protection against the state might imply an obligation on private parties not to interfere with that right.[202]

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195. 384 U.S. 641 (1966).

196. *Id.*

197. *Id.* at 650-51. Justice Brennan then added his controversial "deference theory"; as long as the Court can "perceive a basis" upon which Congress relied in enacting legislation to enforce the fourteenth amendment, the Court will defer to congressional judgment. *Id.* at 653. For an interesting discussion of Justice Brennan's opinion in *Katzenbach*, see Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1230-31 (1978).

198. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 112.

199. *Id.*

200. *Id.*

201. Cox, *The Supreme Court 1965 Term*, 80 HARV. L. REV. 91, 102-04 (1966).

202. *Id.* at 113. An example of a right arising from a relationship with the United States govern-

These arguments, while they may be persuasive, are not conclusive authority.[203] Just as the opinions of the lower courts and scholarly commentators are conflicting, so too are the interpretations of the legislative history of the fourteenth amendment.[204] Courts and commentators who argue that Congress can only regulate discrimination by the state rely on an implication drawn from the first reported draft of the fourteenth amendment.[205] The original proposal read:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property.[206]

Had this draft been adopted, Congress clearly would have been granted broad power to reach private conduct.[207] Its rejection may therefore reflect a decision to limit the enforcement power to the regulation of state action.[208] Notwithstanding rejection of the first draft, however, there is ample authority for the proposition that Congress did not intend to restrict the enforcement power to regulation of state action.[209] J. tenBroek has written:

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ment may be found in Logan v. United States, 144 U.S. 263 (1892), in which the Court upheld a right to be protected against violence while in the custody of a federal officer.

203. In fact, in Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Brennan explained that his judicial deference theory is based on the factfinding abilities of Congress. *Id.* at 240, 247-49 (Brennan, J., dissenting and concurring). Justice Brennan stated that Congress is the appropriate forum in which to pursue, under the enforcement clause, "an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists. . . ." *Id.* at 248. If Congress finds that such a factual basis does not exist, it may act pursuant to section 5 of the fourteenth amendment to remove the discrimination by appropriate means. *Id.* If there is a conflict between the judgments of the state legislature and Congress, the Supremacy Clause requires that the judgment of the federal finding of fact prevail. *Id.* at 249. Justice Brennan's explanation, while providing a rationale for *Katzenbach*, does not directly support the existence of congressional power to proscribe private discrimination pursuant to the enforcement clause.

204. *See Defining the Scope of the Enforcement Clause*, *supra* note 176 at 690-92; *see also* Griffin v. Breckenridge, 403 U.S. 88, 99-102 (1971); Action v. Gannon, 450 F.2d 1227, 1236-37 (8th Cir. 1971).

205. *See* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS L. J. 331 (1967); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949); *Defining the Scope of the Enforcement Clause*, *supra* note 176, at 691.

206. CONG. GLOBE, 39th Cong., 1st Sess. 813 (1866).

207. *Defining the Scope of the Enforcement Clause*, *supra* note 176, at 691.

208. *Id.*

209. *See, e.g.*, H.E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1908); J. TENBROEK, EQUAL UNDER LAW 233 (1965) (originally published as THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT); Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Congressional Determination*, 40 U. CIN. L. REV. 199 (1971); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

> While section 1 of the Fourteenth Amendment was thus declaratory and confirmatory, section 5 corrected the one great constitutional defect, the one pressing want which years of systematic violation of men's natural rights had demonstrated. It gave Congress power to protect those rights. The violations and denials most often mentioned were, of course, those occurring under state laws and carried on by state officials. These were the sources, the perpetrators, of flagrant, commonly observed, and systematic invasions of those rights. But the absence of and need for protection against private invasions were adverted to almost as frequently.[210]

Despite a lack of dispositive authority, strong policy considerations support the recognition of congressional power to prevent private discrimination under section 5 of the fourteenth amendment. As Justice Stewart recognized in *Griffin*, private persons are quite capable of depriving other individuals of the equal protection of the laws.[211] While the greatest threat to individual freedom originated in the government, "today such liberties are sometimes threatened by the power of labor unions, business corporations, and other organizations."[212] In contemporary society it is necessary for the law to secure individual freedom and equality against threats from both private and governmental sources.[213] The federal government should assume the responsibility for protecting individuals who exercise their civil rights, because these rights derive from the United States Constitution and should be equally preserved throughout the nation.[214] Moreover, as Justice Brennan stated in *Guest*, section 5 should not be read to reduce legislative power to enforce the fourteenth amendment to that of the judiciary.[215] The legislature is peculiarly capable of tailoring remedies to those situations where they are most needed to redress the deprivation of constitutional rights.[216]

In *Griffin*, the Supreme Court recognized that the major problem with this approach is the serious constitutional objection against interpreting section 1985(3) as a "general federal tort law."[217] Such a law has the potential to upset the delicate balance between federal and state jurisdiction[218] and to impose an

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210. J. TENBROEK, *supra* note 209, at 233.

211. 403 U.S. at 96-97.

212. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 245 (1971).

213. *Id.*

214. *See id.* at 243.

215. United States v. Guest, 383 U.S. 745, 783 (1966) (Brennan, J., concurring in part and dissenting in part).

216. It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [§ 5], to clothe Congress with power and authority to meet that danger.

Id. at 783, n.8 *quoting* Civil Rights Cases, 109 U.S. 3, 54 (1883) (Harlan, J., dissenting).

217. Griffin v. Breckinridge, 403 U.S. 88, 102 (1971).

218. The state courts are courts of general jurisdiction. The federal courts, by contrast, are courts of limited jurisdiction. Article III, § 2 of the United States Constitution explicitly delineates

unmanageable burden on the Supreme Court. Concern over this potential problem, however, should not totally preclude the use of section 1985(3) to prevent private conspiracies to interfere with constitutional rights when clearly warranted. Enforcement of section 1985(3) must be circumscribed to preserve and protect individual rights of association and state autonomy. With experience, however, the proper limits on the statute can and should be drawn. The imposition of a limit through the requirement of state involvement with the conspirators is not necessary. In fact, such a requirement may lead to uneven enforcement of the law by conditioning congressional power to prevent private conspirators from acting to deprive individuals of their constitutional rights on whether or not a court can construe a complaint to include peripheral state involvement in the private conspiracy.

The preceding analysis indicates that there are strong policy reasons for the recognition of congressional authority, pursuant to the enforcement clause, to punish private conspiracies to interfere with civil rights. If a court holds that section 1985(3) cannot be constitutionally applied to private conspiracies because the fourteenth amendment only prohibits state action, however, there may be an independent rationale for extending section 1985(3) to private conspiracies. In *Griffin*, Justice Stewart found that section 1985(3) was a valid exercise of congressional power to enforce the fundamental right of interstate travel.[219] Similarly, section 1985(3) may be construed as a valid exercise of congressional power to protect a woman's fundamental right to choose an abortion. Although the constitutional right to privacy is not explicitly mentioned in the Constitution, it is analogous to the constitutional right of interstate travel in that both are fundamental to the concept of personal liberty created by our Constitution. In *Roe v. Wade*, the Court noted that a zone of privacy has been recognized in such diverse constitutional sources as the penumbras of the first amendment, the fourth amendment, the fifth amendment, the ninth amendment, and in the concept of liberty guaranteed by the first section of the fourteenth amendment.[220] It therefore is apparent that the right of privacy is fundamental and permeates the entire Bill of Rights. A woman's right to choose an abortion during the first trimester of pregnancy, which right is encompassed by the right of privacy, strongly deserves constitutional protection. It should be shielded from private interferences in a manner similar to the safeguards afforded the federal right of interstate travel in *Griffin*.

B. The Elements of a Section 1985(3) Action

Assuming that a section 1985(3) action can be brought against wholly private conspiracies to deprive individuals of their fourteenth amendment rights, it is necessary to determine whether concerted obstructionist activities at abor-

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the perimeters of the jurisdiction of the federal courts. The lower federal courts have *no* jurisdiction unless it is granted by a congressional statute pursuant to Article III. WRIGHT, LAW OF FEDERAL COURTS § 7 (3d ed. 1976).

219. 403 U.S. at 105-06.

220. Roe v. Wade, 410 U.S. 113, 152 (1973).

tion clinics present the requisite elements for making out a cause of action under that statute. In *Griffin*, the Supreme Court set forth the four elements necessary for a section 1985(3) action: first, a conspiracy; second, a purpose of depriving a person or persons of the equal protection of the laws or of equal privileges and immunities under the laws; third, an act in furtherance of the conspiracy; and fourth, an injury to or deprivation of the rights of the complainant.[221]

1. A Conspiracy

A conspiracy is a "combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act. . . ."[222] Conspiracy is a crime which requires a specific intent; in other words, the participants in a conspiracy must agree to commit an illegal act. Section 1985(3) prohibits private conspiracies to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws. In *Roe*, the Court unequivocally held that the right of privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action [or] in the Ninth Amendment's reservation of rights to the people," encompasses a woman's decision whether or not to have an abortion[223] and is a "fundamental" right.[224] The equal protection clause protects the exercise of fundamental rights by any class of persons.[225] Thus, a conspiracy to deprive women of their constitutional right to a first trimester abortion is a conspiracy to deprive those women of the equal protection of the laws.

Anti-abortionists invade abortion clinics in order physically to prevent women from securing first trimester abortions, or to harass women so that they decline to exercise their constitutional right to choose to have an abortion.[226] Should a group of anti-abortionists agree to engage in concerted obstructionist activities at abortion clinics with the intention of depriving clinics and their patients of the constitutional rights to provide and secure first trimester abortions, the anti-abortionists' agreement would be likely to constitute a conspiracy of the type prohibited by section 1985(3).

2. Class-based Animus

The *Griffin* Court required that for a section 1985(3) cause of action to be found, the conspirators must have been motivated by a "racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . ."[227] The Court,

221. 403 U.S. at 102-03.
222. BLACK'S LAW DICTIONARY 280 (5th ed. 1979).
223. 410 U.S. at 153.
224. *Id.* at 155-56.
225. A regulation which limits a fundamental right must be justified by a "compelling state interest" and the regulation must be "narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155.
226. *See* text accompanying notes 18-23 *supra*.
227. 403 U.S. at 102.

however, expressly refused to decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under section 1985(3).[228] Since *Griffin*, the majority of federal courts which have addressed the issue have held that section 1985(3) is not limited to racially motivated conspiracies, and may encompass conspiracies directed towards members of other defined classes.[229] There is, however, no generally accepted definition of a section 1985(3) class. One of the most specific definitions of a section 1985(3) class was advanced by the Fifth Circuit, which stated that, at the least, an "intellectual nexus" or common understanding must exist between the particular plaintiff and the other members of the alleged class.[230]

While no court has expressly decided the issue,[231] a class of women desirous of obtaining first trimester abortions clearly share an intellectual nexus in that they all are pregnant and want to terminate their pregnancies. Moreover, the class appears to meet the definitions advanced by those other courts which have attempted to delineate the contours of a section 1985(3) class. First, the class consists of women who have at stake a fundamental constitutional right. In *McLellan v. Mississippi Power and Light Co.*,[232] the court pointed out that civil rights are closely allied with fundamental rights, and that recent congressional enactments indicate a prohibition of discrimination based on color, religion, national origin, and sex as well as race.[233] In that case, the court found that bankrupts were an inappropriate section 1985(3) class, noting that the Supreme Court had refused to prohibit discrimination against bankrupts or to declare the right to bankruptcy a fundamental right.[234] The court, however, specifically contrasted the Supreme Court's ruling that the right to file a petition in bankruptcy was not a fundamental right with the Court's extension of fundamental rights to include abortion.[235] Thus, the *McLellan* court intimated that

228. *Id.* at 102 n.9.

229. *E.g.*, Weise v. Syracuse Univ., 552 F.2d 397 (2d Cir. 1975) (class of women alleging sex discrimination); Westberry v. Gilman Paper Co., 507 F.2d 206, *vacated as moot*, 507 F.2d 215 (5th Cir. 1975) (class of environmentalists); Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973) (class based on religion and national origin); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (class of supporters of political candidates); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972) (white family harassed by neighbors but unprotected by police); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (class of employees advocating racial equality); Curran v. Portland Super. School Comm., 435 F. Supp. 1063 (D. Me. 1977) (class of women alleging sex discrimination); Bradley v. Clegg, 403 F. Supp. 830 (E.D. Wis. 1975) (class of striking teachers); Reichardt v. Payne, 396 F. Supp. 1010 (N.D. Cal. 1975), *aff'd in pertinent part sub nom.* Life Ins. Co. of N. America v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (class of women alleging sex discrimination).

230. Westberry v. Gilman Paper Co., 507 F.2d 206, *vacated as moot*, 507 F.2d 215 (5th Cir. 1975). *Westberry* was vacated as moot, and withdrawn "so that it will spawn no legal precedents," 507 F.2d at 216. Its definition of a class for section 1985(3) purposes, however, is still "valid in light of *Griffin*." Means v. Wilson, 522 F.2d 833, 840 (8th Cir. 1975).

231. The first such action is currently pending in the Fourth Circuit. Northern Va. Women's Medical Center v. Horan, No. 78-94-A (E.D. Va., filed June 23, 1978), *appeal docketed sub nom.*, Northern Va. Women's Medical Center v. Balch, No. 78-1673 (4th Cir., Sept. 27, 1978).

232. 545 F.2d 919 (5th Cir. 1977).

233. *Id.* at 932.

234. *Id.* at 932-33.

235. *Id.* at 932 & n.78.

section 1985(3) protects a class of persons who share a fundamental right to obtain an abortion. Second, women seeking to obtain first trimester abortions are a clearly defined class who are injured because of their status as members of that class. In *Cameron v. Brock*,[236] the Sixth Circuit held that "§ 1985(3)'s protection reaches clearly defined classes, such as supporters of a political candidate."[237] A similar definition was stated in *Lopez v. Arrowhead Ranches*,[238] where the Ninth Circuit found that alleged discrimination directed against both citizen and legally admitted alien farm workers by farmers who hired illegal alien farm workers was not sufficiently class-based to fall within section 1985(3) because that section "is restricted to injuries inflicted upon the victim because of his status as a member of an identifiable class. . . ."[239] Third, a class of pregnant women share a common characteristic prior to the obstructionist actions of anti-abortionists at abortion clinics and therefore meet the definitions of a section 1985(3) class advanced by the Seventh Circuit in *Askew v. Bloemker*.[240]

In sum, a private conspiracy motivated by an invidiously discriminatory animus against women desiring first trimester abortions should be sufficiently class-based to come within section 1985(3). As the previous discussion indicates, section 1985(3) actions have been dismissed for failure to demonstrate a class-based animus, despite the existence of a class, when the animus was not directed at the plaintiffs because of their class membership[241] or when the plaintiff class members shared no relevant characteristics prior to the conspirators' actions.[242] Neither reason is applicable to the case of women seeking first trimester abortions. Anti-abortion obstructionist activities are directed not at all pregnant women but at a class of pregnant women who have decided to terminate their pregnancies. In addition, members of a class of women seeking first trimester abortions share several characteristics prior to the actions of anti-abortionists, including their pregnancies and the desire to terminate them.

3. An Act in Furtherance of the Conspiracy

Anti-abortionist obstructionist acts at abortion clinics[243] are intended to prevent first trimester abortions and therefore constitute acts in furtherance of a conspiracy to deprive pregnant women of their constitutional rights to obtain abortions. The Fifth Circuit has adopted an "independent illegality" test under

236. 473 F.2d 608, 610 (6th Cir. 1973).

237. *Id.* at 610.

238. 523 F.2d 924 (9th Cir. 1975).

239. *Id.* at 927.

240. 548 F.2d 673 (7th Cir. 1976). The Askews' claimed a deprivation of civil rights when their home was searched by federal drug enforcement agents in a search for a suspected criminal. *Id.* at 675. The court stated that there was no class for section 1985(3) purposes as the "[p]laintiffs' class members shared no common characteristics prior to the defendants' action." *Id.* at 678.

241. *E.g.*, Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974) (class of newspaper dealers injured because of their activities in attempting to maintain a dealer association, not because they were newsdealers).

242. Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976); Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975).

243. *See* text accompanying note 19 *supra*.

which the conspirators' conduct must constitute an independent violation of state law in order to be actionable under section 1985(3).[244] Although this requirement has been criticized as logically and doctrinally unsupportable,[245] many obstructionist activities at abortion clinics would often meet the stringent independent illegality test. The anti-abortionists' activities may either constitute violations of state trespass laws,[246] or give rise to an action for civil trespass[247] or the intentional infliction of emotional distress.[248]

4. Injury

The next element in an action under section 1985(3) is the requirement that the plaintiff be "injured in his person or property" or "deprived of having and exercising any right or privilege of a citizen of the United States."[249] Both of these elements are present in the context of the invasion of an abortion clinic.

Injury to clinic property from an intentional trespass can be inferred as a matter of law.[250] Physical and emotional injury to clinic patients as a result of anti-abortionists' invasions is also likely. Many women are so harassed by anti-abortionists' activities that they delay scheduled abortion procedures.[251] Any delay in obtaining an abortion " 'adds a small but definite increase in the risk of morbidity and mortality to the pregnant woman.' "[252] Thus, any woman induced to postpone an abortion procedure has effectively suffered a physical injury. Moreover, substantial emotional injury to clinic patients is likely to result from pro-life invasions of abortion clinics.[253]

Not only do obstructionist activities at abortion clinics constitute an injury to clinic property and to the mind and body of clinic patients, but such activities also deprive women of their constitutional right to obtain a first trimester abortion. The constitutional right to privacy, which encompasses the right to obtain an abortion, embodies a lifestyle choice, the individual's right "to exercise control over the most personal aspects of his or her life."[254] In *Maher v. Roe*,[255] the Supreme Court stated that the fundamental right recognized in *Roe*

244. McLellan v. Mississippi Power and Light Co., 545 F.2d 919, 925-26 (5th Cir. 1977).

245. Note, *Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co.*, 90 HARV. L. REV. 1721, 1723-27 (1977).

246. *See* text accompanying notes 91-134 *supra*. Moreover, even if a group of pro-abortionists were acquitted of state criminal trespass charges, that acquittal "concludes no issues as to civil liability" of the pro-abortionists in a section 1985(3) cause of action. 1B MOORE'S FEDERAL PRACTICE ¶ 0.418, at 2704 (2d ed. 1974).

247. *See* text accompanying notes 135-42 *supra*.

248. *See* text accompanying notes 143-49 *supra*.

249. Griffin v. Breckenridge, 403 U.S. 88, 103 (1971) (construing 42 U.S.C. § 1985(3)).

250. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 13 (4th ed. 1971).

251. NEWSWEEK, March 13, 1978, at 33.

252. N.Y. Times, Oct. 2, 1979, § B, at 14, col. 6 (statement of Dr. Willard Cates, Jr. of the National Center for Disease Control in Atlanta).

253. *See* text accompanying note 149 *supra*.

254. Wilkinson and White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. QUARTERLY 563, 564 (1977). In *Roe*, "the right not to procreate [gained] firm recognition as a lifestyle decision." *Id.* at 578.

255. 432 U.S. 464 (1977).

"protects the woman from unduly burdensome interference [by the state] with her freedom to decide whether or not to terminate her pregnancy.[256] As noted, the Court has stated that this interference "need not be absolute to be impermissible."[257] Thus, if we assume that a section 1985(3) action can be brought against private conspiracies to interfere with civil rights, the burden caused by the interruption of clinic services and harassment of patients is actionable under section 1985(3) whether or not anti-abortionists ultimately succeed in wholly depriving clinic patients of their constitutional rights.

C. Appropriate Plaintiffs

The appropriate plaintiffs in an action for relief under section 1985(3) are the abortion clinic, clinic personnel, and clinic patients. Under traditional standing rules, a plaintiff cannot invoke the jurisdiction of a federal court unless he alleges "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[258] A federal court will grant standing to a plaintiff if he alleges an injury in fact and if the court determines that the plaintiff is a proper proponent of the legal right which he asserts.[259] There are cases, however, in which a court will grant third party standing to a plaintiff. There are three conditions a plaintiff must meet for a finding of third party standing. First, the activity which the plaintiff wishes to pursue must be closely tied to the right he is asserting for a third person.[260] Second, the plaintiff must be almost as effective a proponent of that right as the third person.[261] Third, the third party must face "some genuine obstacle" in asserting his own rights.[262]

Clinic patients clearly have standing to challenge anti-abortion activities which interfere with their constitutional right to obtain an abortion. Additionally, abortion clinics and their personnel appear to meet the requirements for a grant of third party standing to assert the rights of clinic patients. The Supreme

256. *Id.* at 473-74.

257. *Id.* at 473. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court found invalid several partial state restrictions on a woman's abortion decision. The Court held that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." *Id.* at 69. Moreover, the Court held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." *Id.* at 74. The Court emphasized that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.*

258. Baker v. Carr, 369 U.S. 186, 204 (1962).

259. In Singleton v. Wulff, 428 U.S. 106 (1976), the Court stated that in order to have standing, plaintiffs must allege (1) " 'injury in fact,' that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction," and (2) "as a prudential matter," plaintiffs must be the "proper proponents of the particular legal rights on which they base their suit." *Id.* at 112.

260. *Id.* at 114-15.

261. *Id.*

262. *Id.* at 115.

Court has held that providers of abortions may challenge any interference which directly affects them.[263] Abortion clinics have standing to assert the constitutional claims of their patients because there is an extremely close relationship between an abortion clinic and its patients. The right of a pregnant woman to secure an abortion is "inextricably bound up" with the ability of an abortion clinic to provide one.[264] The desire to protect their privacy and avoid further mental distress may deter many pregnant women from seeking injunctive relief against anti-abortionist activities under section 1985(3).[265] In addition, the short duration of a pregnancy, in contrast to the time necessary to litigate a claim, may render a section 1985(3) action technically moot before it is litigated.[266] A woman who is no longer pregnant when her section 1985(3) action comes before the court may still be found to have a live controversy, however, if she is a member of a class of women, some of whom are still pregnant, because the issue is " 'capable of repetition yet evading review.' "[267] Abortion clinics should be able to act as representatives for their patients as well as for abortion clinics as a class.[268] Thus, when anti-abortionists invade abortion clinics and harass their patients, third party standing should be granted to abortion clinics and clinic personnel to enable them to assert their own rights as well as the constitutional rights of their patients.

D. Appropriate Relief

State trespass laws punish an intruder after a trespass has occurred. Unfortunately, such laws cannot prevent the occurrence of a trespass except by possibly deterring future offenders. State district attorneys, furthermore, have the discretion to enforce state criminal laws and may decide not to enforce strictly such laws against anti-abortionists who disrupt abortion clinics.[269] Civil

263. Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976) (physicians who perform abortions or supervise abortion clinics have standing to challenge the constitutionality of a state abortion law); Doe v. Bolton, 410 U.S. 179, 188-89 (1973) (physicians who are consulted by pregnant women and perform abortions have standing to challenge the constitutionality of a state abortion law).

264. *See Singleton*, 428 U.S. at 114-15 (physicians who perform nonmedically indicated abortions have standing to challenge as unconstitutional a Missouri abortion statute which excludes such abortions from the purposes for which Medicaid benefits are available to needy persons, on behalf of their women patients).

265. *See id.* at 117.

266. *Id.* A case becomes moot when changes during the course of the litigation deprive the plaintiff of the necessary stake in the outcome to support his standing to sue. In *Roe*, the Court concluded that "[p]regnancy provides a classic justification for a conclusion of nonmootness" because when "pregnancy is a significant fact in the litigation . . . the pregnancy will come to term before the usual appellate process is complete." 410 U.S. 113, 125 (1973).

267. *Singleton*, 426 U.S. at 117, *quoting* Roe v. Wade, 410 U.S. 113 (1973). The *Roe* Court stated that "[p]regnancy provides a classic justification for a conclusion of nonmootness" because it is truly " 'capable of repetition yet evading review.' " 410 U.S. at 125, *quoting* Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

268. *Singleton*, 428 U.S. at 117-18 (little loss in effective advocacy by allowing physician, rather than class of women, to assert rights of individual woman who is no longer pregnant).

269. *See* Wash. Post, Feb. 11, 1978, § B, at 3, cols. 4 & 6. The prosecutor in the NVWMC case implied that he would not prosecute anti-abortionists for future trespasses at the clinic and advised the clinic to bring a civil trespass action in the future.

trespass actions and tort actions are similar to state trespass laws in that they can only provide redress after a wrong has been committed and are not effective deterrents.

Anti-abortionists rarely harass and invade a particular clinic on a single occasion; they typically invade a clinic several times along with numerous demonstrations and other obstructive acts.[270] Thus, even the maximum enforcement of state criminal and civil laws may not adequately protect an abortion clinic from anti-abortionist activities. Similarly, subsequent prosecution cannot remedy serious interference with a woman's fundamental right to choose an abortion free from outside influence. Consequently, injunctive relief is necessary to prevent anti-abortion obstructionist activities which interfere with both the choice and provision of abortions.

Injunctive relief under section 1985(3) is a particularly appropriate remedy for the invasion of abortion clinics by anti-abortionists. Although section 1985(3) expressly provides only for an award of damages for a violation of civil rights,[271] courts have held that injunctive relief is appropriate under the statute.[272] In fact, in *Mizell v. North Broward Hospital District*,[273] the Fifth Circuit stated that federal courts have inherent power to issue injunctions in actions "brought under Section 1985, even though that section refers in precise terms only to a suit for damages."[274] If an injunction to prevent anti-abortion obstructionist activities at abortion clinics is obtained under section 1985(3), however, it must be limited so as not to infringe on the first amendment rights of the demonstrators.[275]

The first amendment does not grant anti-abortionists the right to use abortion clinic premises as a forum for the exercise of free speech rights. The first amendment also does not protect words which are lewd, obscene, profane, libelous, or insulting,[276] nor does it grant demonstrators the right to block traffic, cordon off a street, or block ingress or egress from abortion clinics.[277] Thus, invasions of abortion clinics and physical acts which prevent access to such clinics are not protected by the first amendment. Anti-abortionists, how-

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270. *See, e.g.*, N.Y. Times, Feb. 16, 1979, § B, at 1, col. 6 (eight to ten anti-abortion demonstrations at abortion clinic before a man with a can of gasoline and torch set it on fire). *See also* N.Y. Times, Oct. 31, 1979, § B, at 2, col. 5 (anti-abortion groups admit to demonstrating outside abortion clinics but claim they would never set such clinics on fire).

271. 42 U.S.C.A. § 1985(3) expressly provides for monetary damages. *See* note 145 *supra*.

272. *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (court held that district court had discretion to frame an injunction enjoining organizers from disrupting religious services, but this discretion did not extend to depriving demonstrators of their first amendment rights). *See also* Brief for Appellees at 18-19, Northern Va. Women's Medical Center v. Horan, No. 78-94-A (E.D. Va., filed June 23, 1978) *appeal docketed sub nom.* Northern Va. Women's Medical Center v. Balch, No. 78-1673 (4th Cir., Sept. 27, 1978).

273. 427 F.2d 468 (5th Cir. 1970).

274. *Id.* at 473.

275. *See* discussion of Action v. Gannon, note 272 *supra*.

276. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

277. *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

ever, have a constitutional right to picket peacefully,[278] demonstrate,[279] and distribute leaflets on the public streets[280] outside an abortion clinic. Current constitutional doctrine therefore requires that an injunction to prevent anti-abortionist activities under section 1985(3) be carefully circumscribed so as not to infringe on free speech rights.

E. Appending a State Tort Claim to a Section 1985(3) Claim

As the previous discussion indicates, two problems are connected with bringing a section 1985(3) action to enjoin obstructionist activities at abortion clinics. First, a federal court may find that section 1985(3), as applied to wholly private conspiracies, is not a valid exercise of congressional power pursuant to the enforcement clause.[281] Second, an injunction under section 1985(3) cannot be so broad as to infringe on the first amendment rights of anti-abortionists.[282] Activities protected by the first amendment may nonetheless cause emotional distress to clinic patients.[283]

Plaintiffs in a section 1985(3) action should therefore append state tort causes of action for civil trespass and intentional infliction of emotional distress to their federal claim. As the federal and state claims all "derive from a common nucleus of operative fact,"[284] a federal court should find that it has the power to exercise pendent jurisdiction over the state claims.[285] A federal court should exercise its discretion in such a case because the state claims are closely tied to the federal policy expressed in section 1985(3).[286] If a federal court grants pendent jurisdiction but fails to grant injunctive relief under section 1985(3), it can still grant relief on the pendent state claims.[287]

VI
CONCLUSION

A woman's fundamental right to choose an abortion before the stage of viability depends upon her ability to obtain an abortion free from governmental or private interference. Repeated anti-abortion demonstrations at abortion clinics and invasions of the clinics burden and harass patients who are exercising

278. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Thornhill v. Alabama, 310 U.S. 88 (1940).

279. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).

280. *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

281. *See* text accompanying notes 164-94 *supra*.

282. *See* text accompanying notes 272-80 *supra*.

283. *See* text accompanying notes 148-49 *supra*.

284. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

285. *Id.*

286. *Id.* at 727.

287. *Id.* at 728 (federal court will proceed to decide pendent state claim after federal claim fails if original federal issues were not remote or minor part of trial).

their constitutional rights. In many cases of clinic harassment, anti-abortionists effectively preclude the exercise of the constitutional rights to provide and secure abortions. The decision whether or not to terminate a pregnancy is deeply personal. It is crucial, therefore, that she be free to make that decision with a maximum amount of information about its implications and minimum amount of coercion. It is also crucial that anti-abortionists' constitutional right peacefully to express their views on abortion to the rest of society be protected. In the context of anti-abortion activities at abortion clinics, the anti-abortionists' right to freedom of expression ultimately conflicts with a pregnant woman's right to privacy. The reconciliation of these two interests is essential to the maintenance of the proper balance between individuality and life as an integral member of a democratic society.

If anti-abortionist activities are allowed to continue without regulation, they will substantially burden the constitutional right established by *Roe v. Wade*. Accordingly, the federal courts should provide appropriate guidance in order to preserve and protect a woman's fundamental right to choose an abortion without infringing on the first amendment rights of anti-abortionists. The availability of a section 1985(3) injunction proscribing invasions of abortion clinics would provide a first step in fashioning a set of remedies for women and clinics whose constitutional rights are threatened. A successful action under section 1985(3), in conjunction with successful tort actions for intentional infliction of emotional distress and trespass, might deter future demonstrations at abortion clinics. More importantly, however, a successful section 1985(3) action would indicate both to women seeking abortions and to anti-abortionists that the federal courts are prepared to protect women who desire to exercise their constitutional right to obtain an abortion.

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