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# Recent Developments: Bray v. Alexandria Women's Health Clinic: Blocking Access To Abortion Clinics Is Not Violative Of The Civil Rights Conspiracy Statute

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**Bray v. Alexandria Women's Health Clinic: BLOCKING ACCESS TO ABORTION CLINICS IS NOT VIOLATIVE OF THE CIVIL RIGHTS CONSPIRACY STATUTE.**

In *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), the United States Supreme Court, in a 5-4 decision, held that obstructing a woman's access to an abortion clinic does not give rise to a federal cause of action under 42 U.S.C. § 1985(3) (1988). In so holding, the Court concluded that the goal of preventing abortions behind the demonstrations did not establish an invidious discriminatory intent towards women in general, and the incidental effect of the demonstrations on a woman's right to interstate travel was insufficient to establish a conspiracy to deprive women of their constitutionally protected right. Moreover, the Court concluded that preventing abortions did not constitute a purely private conspiracy.

The Respondents (hereinafter "Pro-Choice") were abortion clinics and supporting organizations who sought to protect a woman's right to have an abortion. Petitioners (hereinafter "Operation Rescue") were Operation Rescue, an organization that opposed abortion, and six individuals who sought to protect the rights of the unborn by staging anti-abortion demonstrations.

In the United States District Court for the Eastern District of Virginia, Pro-Choice applied for a permanent injunction to enjoin Operation Rescue from demonstrating and blocking the entrances of abortion clinics. The district court held that preventing a woman who sought an abortion or other abortion-related services from accessing an abortion clinic violated her constitutional right of interstate travel under 42 U.S.C. § 1985(3) (1988). In so holding, the court granted the injunction and ruled in favor of Pro-Choice on its state law claims of nuisance and trespass. The Court of Appeals for the

Fourth Circuit affirmed and the Supreme Court granted certiorari.

The United States Supreme Court began its analysis by reviewing two previously adjudicated cases wherein it established the required elements of a § 1985(3) private conspiracy claim. First, a plaintiff must show "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [was] behind the conspirators' action." *Bray*, 113 S. Ct. at 758 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Second, the private conspiracy must have been "aimed at interfering with rights that are protected against private, as well as official encroachment." *Bray*, 113 S. Ct. at 758 (citing *Carpenters v. Scott*, 463 U.S. 825, 833 (1983)).

As to the first element, the Court noted that it had never before had occasion to define or set the parameters of what constituted a "perhaps otherwise class-based invidiously discriminatory animus." *Bray*, 113 S. Ct. at 759. Relying on the theory of stare decisis, Pro-Choice asserted that the animus behind the opposition to abortion was analogous with the intent to discriminate against a particular class of individuals, such as racial discrimination. The Court rejected such a correlation and the perceived conclusion of the district court that opposition to abortion was considered discrimination against the "class" of women who sought abortions. *Id.* The Court noted whatever the exact meaning of "class" was under *Griffin's* expansive definition, the term undoubtedly indicated more than a class of people who shared in a desire to participate in conduct that the § 1985(3) defendant disfavored. *Id.* Moreover, the Court stated that simply defining "class" as those who engaged in conduct with which the defendant interfered would permit an exorbitant amount of plaintiffs to bring a federal cause of action, and in essence, convert § 1985(3) into a general federal tort statute, something the animus requirement was implemented to prevent. *Id.*

The Court recognized, how-

ever, that Pro-Choice's argument was not limited solely to women seeking abortions, for Pro-Choice alleged that class-based discrimination existed against women in general. *Id.* The Court declined to address whether women in general was a qualifying "class" under the *Griffin* definition because Operation Rescue's actions did not reflect an animus towards women "because they are women." *Id.* Rather, recognizing that the "animus" requirement does not mandate a finding of malicious motivation, the Court asserted that "at least a purpose that focusses upon women by reason of their sex" must be established. *Id.* Finding that even that minimal requirement was not met, the Court stated the purpose behind the demonstrations was the physical intervention between women seeking abortions and the unborn victims, not women as a class. *Id.* at 760.

The Court after reaching the aforementioned conclusion stated for Pro-Choice to sustain its allegation that a discriminatory intent existed against women as a class, it must prove either: (1) that it could reasonably be presumed that the opposition to abortion reflected a sex-based intent, or (2) regardless of intent, that a class-based animus could be determined solely by the effect of the demonstrations. *Id.* at 760. The Court found neither proposition could be supported. *Id.*

Regarding the first proposition, the Court noted that certain activities incite great opposition, and if those activities were targeted and undertaken exclusively or predominantly by a specific class of individuals, an intent to discriminate against that class could be presumed. *Id.* The Court concluded, however, it was illogical to presume that the opposition to abortion was an opposition towards women in general because there are numerous common and refined reasons for opposing abortion other than hatred towards women as a class. *Id.* The Court found because women and men are on both sides of the abortion issue, abortion protests were not divided along gender lines or geared

towards women as a class. *Id.*

Holding that there was no sex-based intent behind the demonstrations, the Court stated the success of Pro-Choice's claim rested with the second proposition. *Id.* To succeed, the Court stated, Pro-Choice had to show that irrespective of Operation Rescue's intent, there in effect existed a discriminatory intent against women as a class because abortion is an undertaking engaged in solely by women. *Id.* Citing two previously adjudicated cases, the Court held such a proposition was not supportable. *Id.*

In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that because women only are able to bear children is not conclusive that every legislative classification concerning pregnancy was a sex-based classification. *Id.* The Court reached a similar conclusion in *Feeney v. Personnel Administrator of Mass.*, 442 U.S. 256 (1979), wherein the Court held in order to establish that class-based discrimination existed under the Equal Protection Clause, it must be shown that a defendant chose or reaffirmed his course of action at least in part because of its adverse effects on the intended group. *Bray*, 113 S. Ct. at 760. The Court concluded that the *Feeney* principle was applicable to the "class-based, invidiously discriminatory animus" requirement of § 1985(3) because the Equal Protection Clause is inherent in the class-based animus requirement. Moreover, it is particularly applicable because the Court had previously held that the disfavoring of abortion was not "ipso facto" sex discrimination. *Id.* In so holding, the Court rejected the validity of the second proposition.

The Court, in further attempting to define the scope of the *Griffin* holding, next looked at the denotation given to the words "invidiously" and "discriminatory" in the context of "there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus." *Bray*, 113 S. Ct. at 761 (citing *Griffin*, 403 U.S. at 102). The Court stated no matter what side of

the fence one falls on the goal behind, the demonstrations did not deserve the harsh description and derogatory association which accompanies racism. *Id.* To hold that it did, the Court stated, would be contrary to its previous holding that electing childbirth over abortion was proper and a sensible reason to warrant the allocation of public funds. *See Maher v. Roe*, 432 U.S. 464, 474. This proposition would also further conflict with Congress' discrimination of abortion through its refusal to provide financial support to women seeking abortions. *See Harris v. McRae*, 448 U.S. 297, 325. *Bray*, 113 S. Ct. at 762.

Finding that Pro-Choice failed to meet the *Griffin* animus requirement, the Court addressed the second element of proving a § 1985(3) claim. The Court stated that in order to succeed on a § 1985(3) private conspiracy claim, the claimant must prove that there was an intent to deprive a person of a right guaranteed against private impairment. *Bray*, 113 S. Ct. at 762 (citing *Carpenters*, 463 U.S. at 883). The Court held that no such motive existed for Operation Rescue's abortion protests. *Bray*, 113 S. Ct. at 762.

In making its argument, Pro-Choice relied upon the constitutional right of interstate travel, which had in some contexts been held to be protected against private interference, as grounds for establishing the existence of a § 1985(3) private conspiracy. The Court held the fact that a considerable amount of women travel across state lines to obtain an abortion, did not alone establish a connection between the demonstrations and a woman's constitutional right to interstate travel. *Bray*, 113 S. Ct. at 762. Drawing upon the "invidiously discriminatory animus" requirement of *Griffin*, the Court created a requirement for establishing a conspiracy. The claimant must prove that a person's actions were "aimed at," and not merely incidentally affecting a person's constitutionally protected right. *Id.* In this case, the Court held this requirement was not met. In fact, the requirement could not conceivably be

met because Pro-Life's opposition to abortion did not even remotely correlate to interstate travel. Rather, Operation Rescue solely opposed the act of abortion, and it was irrelevant to them whether the abortion was performed after interstate travel. *Id.* at 763.

Moreover, the Court also rejected Pro-Choice's constitution violation argument for a second, independent reason. *Id.* The Court recognized that the constitutional right of interstate travel does not transform a state tort into a federal offense simply because the act was directed against interstate travelers. Furthermore, the Court noted that the right to interstate travel protected travelers from the "erection of actual barriers" and "being treated differently" when traveling across state lines. *Id.* In applying the aforementioned, the Court found the only barrier to movement as a result of the demonstrations was at the abortion clinics which it concluded hindered exclusively intrastate travel. *Id.* As such, the Court stated unless the restrictions were applied in a discriminating and intentional manner against citizens of other states there was no infringement on women's right of interstate travel. *Id.*

Pro-Choice also contended that the demonstrations infringed upon a woman's right to abortion. *Id.* at 764. While the Court recognized that the right of abortion was undoubtedly "aimed at" by the demonstrations, the Court refused to acknowledge that a § 1985(3) claim existed. The Court based its conclusion on its previous holding that § 1985(3) did not apply to private conspiracies which were "aimed at" a right protected solely against state interference. Instead that section applied only to conspiracies which were aimed at rights protected against private, as well as official, interference. *Id.* In so holding, the Court noted there are only a handful of rights which are protected from both private and official interference, such as the Thirteenth Amendment rights of interstate travel and freedom from enslavement. As such, the Court refused to add the right of abor-

tion to that exclusive list especially in light of its earlier unwillingness to include the more explicitly protected constitutional right of free speech. *Id.*

In *Bray*, the United States Supreme Court clarified its current position on abortion and in so doing, rejected Pro-Choice's latest attempt to permanently enjoin Pro-Life demonstrators from blocking the entrances to abortion clinics. The Court found there was no latent conspiracy against women as a class behind the demonstrations, and further refused to recognize that a woman's constitutionally protected right of interstate travel was infringed upon by such demonstrations. While this decision is an apparent victory for Operation Rescue, the full impact of this decision may never materialize given the two recent shootings that injured one abortion doctor and killed another, coupled with the retirement of Justice White, who joined the majority in this opinion.

- John M. Oliveri

### ***Georgia v. McCollum*: CRIMINAL DEFENDANTS MAY NOT USE PEREMPTORY CHALLENGES TO DISCRIMINATE ON THE BASIS OF RACE.**

In *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), the United States Supreme Court held that defendants in criminal cases may not use peremptory challenges to discriminate against potential jurors on the basis of race. In so ruling, the Court expanded its prohibition of racially discriminatory uses of peremptory strikes beyond the State and private litigants to encompass criminal defendants.

On August 10, 1990, two caucasian defendants were charged with the aggravated assault and simple battery of two African-Americans. Prior to jury selection, the prosecutor moved to prohibit the respondents from using peremptory challenges to discriminate against potential African-American jurors. Both the trial court and the Supreme Court of Georgia concluded that criminal defendants, unlike civil litigants and criminal prosecutors, were permitted to exercise peremptory strikes to racially discriminate, and thus keep African-Americans from serving on the jury. The United States Supreme Court granted certiorari to consider whether the prohibition against using peremptory strikes in a racially discriminatory manner applied to criminal defendants, as well as to the State and civil litigants.

The Court began its analysis by considering whether such use of peremptory challenges by criminal defendants inflicts the same harm on the juror and the community discussed in the *Batson* prohibition on discriminatory peremptory challenges by the prosecution. *Id.* at 2353 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)). In concluding that similar harm would arise from the use of racially discriminatory peremptory strikes by criminal defendants, the Court noted that public discrimination undermines public confidence in the courts and the system as a whole. *Id.* at 2354. Furthermore, the

Court stressed the importance of public trust in the judicial system to maintain peace in the community, especially in race-related cases. *McCollum*, 112 S. Ct. at 2354. Whether the discrimination was exercised by the State or the defense, the Court concluded that the resulting antagonistic feelings towards the justice system were the same. *Id.*

The Court next addressed whether the use of peremptory challenges by criminal defendants constituted state action under the Equal Protection Clause, because state action is required under the Fourteenth Amendment in order to give rise to a Constitutional violation. *Id.* The Court first looked to its analysis in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2082 (1991), which inquired into whether strikes arose from a right or privilege of state authority. *McCollum*, 112 S. Ct. at 2354. Observing that both the right to exercise the strikes and their scope were defined by state law, the Court determined that the use of peremptory challenges was a state right or privilege. *Id.* at 2355.

The Court next considered whether the defendants could be viewed as state actors, so that their actions would be considered state actions under the Equal Protection Clause. *Id.* The Court utilized the three prong analysis established in *Edmonson* which examined the following: (1) the extent to which the actor relied on governmental assistance and benefits, (2) whether the actor was performing a traditional governmental function, and (3) whether the injury caused was aggravated in a unique way by the incidents of governmental authority. *Id.* (citing *Edmonson*, 111 S. Ct. at 2083).

Concluding that the defendants were state actors, the Court applied the three prong test and noted that the criminal defendants had substantially relied on governmental assistance and benefits. *McCollum*, 112 S. Ct. at 2355. In addition, the pervasive nature of the government's involvement in jury selection through state statutes enabled the peremptory challenge system to ex-