THE APPLICABILITY OF SECTION 241 OF THE KU KLUX KLAN ACTS TO PRIVATE CONSPIRACIES TO OBSTRUCT OR PRECLUDE ACCESS TO ABORTION*

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INTRODUCTION

Attacks on health clinics that provide abortions have ranged from arson and bombings, which have completely destroyed a number of clinics, to disruptive harassment of clinic employees and patients. Both have the same aim: to prevent women from entering these clinics and ultimately to shut them down. Throughout the country, the tactics of anti-abortion protesters include invading clinics, blocking entrances and parking lots; telephoning clinic employees' homes threatening death and bombing of the clinics; photographing and filming patients and employees; copying and tracing license plates of patients and, in some cases, harassing them with phone calls to their homes, banging on clinic doors and windows or chanting loudly while surgery is in progress; flinging fetuses in the faces of patients trying to enter; and setting up gauntlets through which patients must pass.

These tactics are not simple expressions of opinion. They are part of concerted plans to intimidate women and close abortion and reproduction health clinics. In May, 1984, 600 abortion foes met for a three-day conference on how to close abortion clinics. Joseph Scheidler, Director of Pro-Life Action League, advocated these tactics to prevent women from going to the clinics and thus force their closing for lack of patients.[1] Scheidler's instructions are contained in his recent book.[2] In his testimony before this subcommittee on March 6, 1985, he proudly advocated trespassing into abortion clinics and refused even to condemn the bombings.[3] The incidence of violent acts against abortion clinics, family planning clinics and doctors rose 300% from 1983 to 1985.[4] In 1985, 97% of abortion providers serving 83% of all abortion pa-

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1. Donovan, *The Holy War*, 17 FAM. PLAN. PERSP. 5, 8 (1985).

2. J. SCHEIDLER, CLOSED: 99 WAYS TO CLOSE ABORTION CLINICS (1985).

3. *Oversight Hearings on Abortion Clinic Violence Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st and 2d Sess. 173 (1985) (statement of Joesph Scheidler, Director of Pro-Life Action League) 51, 57, 67-69 [hereinafter *Abortion Clinic Violence*].

4. Donovan, *supra* note 1, at 5-6.

tients experienced harassment.[5]

It is not without significance that this unprecedented wave of harassment and violence against abortion clinics and patients comes upon the heels of judicial and Congressional rejection of the anti-abortion position. The possibility of legal reversal of *Roe v. Wade*[6] was lost in 1983, first in the Supreme Court which reaffirmed the right to abortion,[7]and subsequently in the Senate which rejected a broad range of proposals for statutes and constitutional amendments designed to undermine or eliminate the right to abortion.[8]

It is thus critical at this juncture that this Subcommittee has convened Oversight Hearings on the enforcement of federal criminal civil rights remedies against these attacks on women's exercise of the fundamental right to abortion recognized in *Roe v. Wade*. This is a subject of profound importance to the lives, liberty and safety of women all over this country; it is also of tremendous significance to the maintenance of our pluralistic constitutional system.

The historical analogy between Ku Klux Klan violence against the exercise of fundamental rights by Black people and this violence against women's exercise of fundamental rights is a powerful one. After the slaveholders lost the Civil War and the liberty and equality of Black people was declared through the thirteenth, fourteenth and fifteenth amendments, pro-slavery forces turned to unparalleled violence and intimidation to block all progress toward a society premised on human dignity and racial equality. Likewise, after the Supreme Court decision in *Brown v. Board of Education*[9] almost eighty years later, which resurrected the promise of equality, opponents of integration also turned to violence and intimidation to try to stop the dream.

Today we deal with a similar phenomenon in a new context. *Roe v. Wade* declared the basic freedom of women from submission to involuntary pregnancy and childrearing; it recognized the right of women to consent — to choose — whether to bear children; the right to make a conscientious decision of the highest order — a personal decision of singular intimacy and consequence. In recognizing abortion as a fundamental constitutional right rooted in our nation's most basic traditions of personal integrity and human dignity, *Roe v. Wade* laid the cornerstone of full freedom and equality for women. Not

5. Forrest & Henshaw, *The Harassment of U.S. Abortion Providers*, 19 FAM. PLAN. PERSP. 9 (1987).

6. 410 U.S. 113 (1973) (recognizing that the right to abortion is protected as fundamental under the fourteenth amendment).

7. Responding to the Reagan Adminstration's call for the overruling of *Roe*, the Court provided the most powerful articulation of the abortion right to date. The majority opinion written by Justice Blackmun concluded:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh v. American College of Obstetricans and Gynecologists, 106 S.Ct. 2169, 2185 (1986).

8. *See Constitutional Amendments Relating to Abortion, vols. I and II: Hearings on S.J. Res. 110, Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (1983).

9. 347 U.S. 483 (1954)

surprisingly, *Roe v. Wade* has drawn both passionate support and furious opposition.

It is thus fully appropriate to look to and utilize the remedies designed in the nineteenth century to quell the waves of violence perpetrated against Black people who sought to exercise their newly won rights. Intimidation tactics and interferences with abortion are occurring more frequently in the context of crusade-like passions and yet the responses to these confrontations are inadequate remedies. On the state level, police and prosecutorial responses range from active support to tacit approval to conscientious law enforcement. But even where law enforcement is conscientious, a dilemma remains, particularly where the intimidation and interference does not involve bombing and arson to which the Bureau of Alcohol, Tobacco and Firearms (BATF) can respond. Much of the harassment consists of lesser crimes and torts of trespass, assault, harassment, invasion of privacy and destruction of property. The penalties for these acts are not substantial. What goes unpunished — and is therefore allowed to continue and to escalate — is the violation of civil rights.

I appreciate the opportunity to testify today concerning the applicability of the anti-Klan statutes, section 241 of Title 18[10] and the more recently enacted section 245 of Title 18,[11] to obstruction of abortion rights. Section 241, on its face, provides for protection of private persons who conspire to interfere with another person's exercise of "any right or privilege secured to him [or her] by the Constitution." The impediment to enforcement of section 241 against abortion clinic harassment is the Justice Department's insistence that it has no jurisdiction to proceed under section 241 because abortion is protected by the fourteenth amendment only against "state action" as opposed to purely private conduct.[12] The Department's position rests on an early but substantially eroded interpretation of section 241. While the legal authority of the Department to apply section 241 is not clearly established by the existing case law, there is ample precedent to support prosecution in the absence of state action. Beyond the question of state action, the Department's refusal to employ section 241 in this context ignores that access to abortion can be protected as part of fundamental constitutional guarantees other than the fourteenth amendment which are clearly enforceable against private interference.

Unless the Department institutes a proceeding to establish its authority to prosecute—as it did in the height of the violence against the civil rights movement in the mid-1960's[13]—there is no other party who can seek to clarify the

10. In pertinent part, § 241 makes it criminal, "[i]f 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. . . ." 18 U.S.C. § 241 (1982).

11. In pertinent part, § 245 makes criminal the following:

> (b) Whoever, whether or not acting under color of law, by force or threat of force wilfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
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> (1) any person because [s]he is or has been, or in order to intimidate such person or any person or any class of persons from—
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> (E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance;. . . .

18 U.S.C. § 245(B)(1)(E) (1982).

12. *Abortion Clinic Violence, supra* note 3, at 134 (statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, Department of Justice) [hereinafter Toensing testimony].

13. *See infra* notes 29-57 and accompanying text.

legitimate scope of this critical remedy. The Department has not, in the past, been reluctant to act in a patently illegal manner—such as with national security wiretapping—to extend the parameters of its powers at the expense of civil rights and liberties.[14] While I would normally be wary about counseling the appropriateness of testing the unsettled boundaries of the criminal laws, in this case there is both substantial precedent supporting the legitimacy of using section 241 in this context as well as the responsibility conferred upon the national government by the thirteenth and fourteenth amendments to take affirmative action necessary to protect civil rights.

I have examined the history of these statutes as well as the decisions of the Supreme Court that have shaped their construction and use. I will discuss five bases upon which the Department of Justice is not only authorized, but is, indeed, duty-bound to prosecute harassers of abortion clinics for violation of federal civil rights. First, section 241 punishes harassment and violence which are designed to and impede women's right to interstate travel. Second, section 241 punishes private interference with fundamental rights protected by the fourteenth amendment whether or not state involvement is present. Third, even under the Justice Department's narrow reading of section 241 (requiring some form of state action where fourteenth amendment rights are at issue) the requisite degree of state involvement is normally present in these cases. Fourth, section 241 punishes private interference with the abortion right because it is a right protected against private interference by the thirteenth amendment. And fifth, section 245 (b)(1)(E) punishes private harassment which targets not only abortion patients, but also those who come to the clinics for other forms of federally funded health care.

I. THE RIGHT OF INTERSTATE TRAVEL

Let me begin by focusing on the ground for federal civil rights prosecution which FBI Director Webster has recently conceded before this Subcommittee would justify federal civil rights prosecution under section 241, whether or not state involvement is shown.[15]

In recent decisions, the Supreme Court has made crystal clear that private interference with the right of interstate travel is clearly covered by section 241.[16] The plurality wrote in *United States v. Guest*: "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union."[17] Although the Court noted that this right is not explicitly enumerated in the Constitution, "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."[18] Its roots include but are also independent of the fourteenth amendment.[19] To prove a conspiracy against the right to travel

14. *See, e.g.*, United States v. United States District Court, 407 U.S. 297 (1972).

15. *Abortion Clinic Violence, supra* note 3, at 93 (statement of Hon. William H. Webster, Director of the Federal Bureau of Investigations).

16. *See* United States v. Guest, 383 U.S. 745, 757-759, 759 n.17 (1966); Griffin v. Breckenridge, 403 U.S. 88, 105-106 (1971).

17. United States v. Guest, 383 U.S. 745, 757 (1966).

18. *Id.* at 758 (citations omitted).

19. The right to travel has been held to derive from the privileges and immunities clause of article IV. Corfield v. Coryell, 6 F.Cas. 546, 552 (No. 3,230) (CCED Pa. 1825); Paul v. Virginia, 75

under section 241, it must be shown only that "the predominant purpose of the conspiracy is to impede or prevent exercise of the right of interstate travel, or to oppress a person because of his [her] exercise of that right then whether or not motivated by racial discrimination, the conspiracy becomes the proper object of the federal law."[20] The right of interstate travel is inseparable from the purpose of the travel itself.[21]

The Supreme Court has made clear that the right to unimpeded interstate travel to obtain an abortion is a federally protected right. Striking Georgia's residency requirement, the Court held in *Doe v. Bolton*:

> Just as the Privileges and Immunities Clause, Const. Art. IV, Section 2, protects persons who enter other states to ply their trade, so must it protect persons who enter Georgia seeking the medical services that are available there.[22]

This right is indisputably protected against private interference, whether the goal of travel is abortion or work or association to advance the rights of Black people. Although the Court had previously insisted that the right to interstate travel is protected only against state interference,[23] *Guest* explicitly repudiated this position and encompassed a purely private conspiracy within the sanction of section 241.[24] The right of interstate travel thus prohibits the state from erecting a roadblock in the path of women traveling interstate to seek abortions. Interpreted in light of *Guest* and *Bolton*, section 241 prohibits private persons from doing likewise.

Interstate travel to obtain an abortion is not uncommon. For instance, in

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U.S. (8 Wall.) 168, 180 (1869); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871); United States v. Wheeler, 254 U.S. 281, 294 (1920); Dunn v. Blumstein, 405 U.S. 330, 339 (1972); Jones v. Helms, 452 U.S. 412, 418 (1981). The fifth amendment also guarantees the right to travel. Jones v. Helms, 452 U.S. 412, 422, (1981); Califano v. Gautier Torres, 435 U.S. 1 (1978). Passenger Cases, 48 U.S. (7 How.) 283 (1849). The first amendment also guarantees the right to travel. Griffin v. Breckenridge, 403 U.S. 88, 106 (1971); Aptheker v. Secretary of State, 378 U.S. 500 (1964). The privileges and immunities clause of the fourteenth amendment also guarantees the right to travel. Jones v. Helms, 452 U.S. 412 (1981); Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Edwards v. California, 314 U.S. 160, 180 (1941) (Douglas, J., concurring).

20. United States v. Guest, 383 U.S. at 760. In addition, to show a violation of the right to travel it is not necesary to demonstrate that travel was deterred but only that exercise of the right was penalized. Dunn v. Blumstein, 405 U.S. 330, 339-40 (*citing* Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).

21. In *Griffin*, the Court recognized the relationship between the right to travel and the broader right to be free from racial discrimination, stating that under allegations of a conspiracy to prevent use of public highways:

> [I]t is open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil right[s] workers from the state, or that they meant to deter the petitioners from associating with such persons.

403 U.S. at 106. In Ward v. Connor, 657 F.2d 45, 48 (4th Cir. 1981), *cert. denied sub nom.*, Mandelkon v. Ward, 455 U.S. 907 (1982), the court of appeals explained that interference with travel need not be the "gravamen" of a complaint, but that if said interference is "one of the objects of the conspiracy the fact that the conspiracy had other objectives is immaterial."

22. 410 U.S. 179, 200 (1973) (citations omitted).

23. United States v. Wheeler, 254 U.S. 281, 298-99 (1920).

24. *See* 383 U.S. at 759 n. 19. *Contrast* Justice Harlan's partial dissent (In his dissent from recognition that the right to travel is protected against private interference Justice Harlan canvassed the precedent to show that interstate travel was previously viewed as a protection against state interference), *with* Griffin v. Breckenridge 403 U.S. 88, 105-06 (1971) (reaffirmed that interstate travel reaches private obstruction under 42 U.S.C. § 1985(3) as well as under § 241).

1981, 101,000 women crossed state lines to obtain an abortion.[25] In some states where harassment and violence have been particularly virulent, a substantial proportion of women come from out-of-state. For example, 49% of abortion patients in the District of Columbia are non-residents;[26] in North Dakota, 53% are from neighboring states.[27] Overall, abortion clinics serve an average of 7% out-of-state abortion patients and the figure varies from clinic to clinic.[28] In addition, many clinics are located on interstate routes or on local routes that are an integral part of the interstate system.[29]

Clinic harassers thus affect the right of interstate travel for a substantial number of abortion patients as well as even greater number of women seeking family planning, fertility, and other forms of gynecological health care. Depending on the circumstances, clinic harassment may either discourage women from interstate travel, require several trips or detours, or make the exercise of the right to travel a harrowing and dangerous experience.

There is no question that the Department of Justice can utilize section 241 to prosecute those who block and impede access to most abortion clinics, because these activities are specifically designed by the perpetrators to frighten and stop women from traveling interstate to obtain abortion or other health care.[30] Although the Department has acknowledged that section 241 protects interstate travel from private interference, it has failed to take any steps to protect the travel rights of abortion patients as well as those seeking a range of health services at the targeted clinics.

II. Private Interference With Fourteenth Amendment Rights.

Recent developments in the law have resurrected the original purpose of section 241 as a federal criminal sanction against private persons who intentionally threaten or interfere with rights protected by the fourteenth amendment. While the Department of Justice does not challenge that the right to abortion is a fourteenth amendment right,[31] it takes the position that since fourteenth amendment rights are defined as prohibitions on state action, Congress lacks power to punish purely private interference with their exercise.[32] Thus, the Department contends that unless a state is involved in some way in the conspiracy to interfere with the private provision of abortion services, section 241 is not applicable.

The Department's position is grounded on nineteenth century cases that combined to bury the broad purpose of the Civil War Amendments and the statutes enacted pursuant to them. The Department's position ignores the history of section 241. It also ignores recent decisions that have recognized broad Congressional authority under section 5 of the fourteenth amendment

25. Henshaw, Bikin, Blaine & Smith, *A Portrait of American Women Who Obtained Abortions*, 17 Fam. Plan. Persp. 90, 96 (1985) [hereinafter Henshaw et. al.].

26. *Id.*

27. *Id.*

28. *Id.*

29. The indictment in *Guest* alleged a conspiracy, *inter alia*, against "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." 383 U.S. at 747 n.1.

30. United States v. Guest, 383 U.S. 745, 760 (1966).

31. *See Abortion Clinic Violence*, *supra* note 3, at 133-4. (Toensing testimony).

32. *Id.* at 134.

to redress violations of the rights the amendment protects. Congress approved the use of section 241 against private interference with the right of interstate travel, a right previously protected only against governmental action, and eroded the distinction between interstate travel as a privilege and immunity of federal citizenship and due process rights protected by the fourteenth amendment. Indeed, it is anomalous for the Department to assert that section 241 protects interstate travel against private conspiracies but not the exercise of that most personal constitutional right which motivates the travel.

The plain language of section 241 and the context of its enactment indicate an intent to encompass purely private conspiracies to deny the full range of rights protected by the Constitution and federal laws. Section 241[33] was passed to supplement the sanction already contained in the equivalent of section 242[34] which applied to a narrower range of deprivations specifically carried out "under color of law."[35]

Historians and legal scholars have documented the massive concerted private violence against Black people and others who supported their rights in the post war period. In *United States v. Price*[36] the Court summarized this history and the concerns which underlay enactment of section 241.

> The purpose and scope of the 1866 and 1870 enactments must be viewed against the events and passions of the time. The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent . . .[¶] For a few years "radical" Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man.
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> Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures . . . [¶] We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.
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> This is fully attested by the only statement explanatory of § 241 in the recorded congressional proceedings relative to its enactment. We refer to the speech of Senator Pool of North Carolina who introduced the provisions as an amendment to the Enforcement Act of 1870 . . . He urged that the section was needed in order to punish invasions of the newly adopted Fourteenth and Fifteenth Amendments to the Constitution. He acknowledged that the States as such were beyond the reach of the punitive process, and

33. Derived from § 6 of the 1870 Act, § 5508 Rev. Stats., 1874-78 , § 19 of the Criminal Code of 1909, and § 51 of the 1946 edition of 18 U.S.C.

34. Derived from § 2 of the 1866 Act, as amended by § 17 of the 1870 Act. The section was § 5510 of Rev. Stat., 1874-78; § 20 of the 1909 Criminal Code; and § 52 of the 1946 edition of 18 U.S.C.

35. *See* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967); Franz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); *see also* A. TRELEASE, WHITE TERROR, THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971).

36. 383 U.S. 787 (1966).

> that the legislation must therefore operate upon individuals. He made it clear that "It matters not whether those individuals be officers or whether they are acting upon their own responsibility."[37]

The clear purpose of the Civil War amendments and the civil rights statutes was, however, swiftly and completely frustrated by subsequent judicial rulings which eviscerated the federal power intended by the Reconstruction Congress.[38] The Court began to constrict the scope of fourteenth amendment rights amenable to federal judicial enforcement against the states,[39] and, following the Compromise of 1877 which put Rutherford B. Hayes in the Presidency in exchange for the withdrawal of federal power from the southern states,[40] the Court began to invalidate federal civil rights laws which protected directly the newly declared civil rights of Black people on the basis that these laws exceeded Congressional authority under the fourteenth amendment.[41] These decisions confined federal power to redressing state-sponsored deprivations of fourteenth amendment rights. Both lines of cases—restricting the scope of federally protected rights under the privileges and immunities clause and requiring state action for a violation of equal protection or due process—are the basis of the Justice Department's present assertion that section 241 is inoperative against purely private conspiracies against abortion, but rather requires some form of state involvement in the deprivation charged.

Fortunately, more recent judicial developments in response to violence against the modern civil rights movement began the process of undoing these unfounded restraints on the clear and original purpose of section 241 to provide a direct federal remedy against private parties who seek to interfere with the exercise of rights guaranteed by the fourteenth amendment. While the Court has not yet squarely reached and decided the issue of the applicability of section 241 to private interference with fourteenth amendments rights, its recent decisions in *Price* and *Guest* reflect a principled trend toward recognition of the original breadth and purpose of that statute. In *Price*, which sustained an indictment against local officials and private persons for the murder of civil rights workers James Earl Chaney, Andrew Goodman and Michael Henry Schwerner, the Court held that section 241's sanction encompassed violations

37. *Id.* at 803-06 (citations omitted). The Court in *Price* specifically notes that Senator Pool is quoted only to support its holding that § 241 applies to the full range of fourteenth amendment rights. *Id.* at 805 n.19. Since public officials were co-conspirators in *Price*, the power of Congress to reach purely private interference was beyond the scope of that decision, although this power was recognized the same day by six justices in United States v. Guest, 383 U.S. at 753; *Id.* at 761 (Clark, J., concurring) and *Id.* at 774 (Brennan, J., concurring in part and dissenting in part).

38. *See* Kinoy, *supra* note 35; Franz, *supra* note 35.

39. *See, e.g.*, The Slaughter House Cases 83 U.S. (16 Wall.) 36 (1872) (drawing distinction between federal and state citizenship); Walker v. Sauvinet, 92 U.S. 90 (1875) (jury trial is not a privilege or immunity under the fourteenth amendment); United States v. Cruikshank, 92 U.S. 542, 552-56 (1875) (first amendment right to peaceably assemble does not limit state action towards its citizens, only federal action); Hurtado v. California, 110 U.S. 516 (1884)(state prosecution and death sentence for felonies without grand jury indictment does not violate the due process clause of the fourteenth amendment); Presser v. Illinois, 116 U.S. 252, 263-68 (1886)(states can pass laws that regulate the privileges and immunities of its own citizens without violating the privileges and immunities clause of the fourteenth amendment).

40. *See* Kinoy, *supra* note 35; *see also* C. VANN WOODWARD, REUNION AND REACTION (1951); K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1965).

41. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Harris, 106 U.S. 629 (1883); The Civil Rights Cases, 109 U.S. 3 (1883).

of fourteenth amendment rights as well as rights arising from the substantive powers of the federal government.[42]

The opinions in *Guest*,[43] which charged a private conspiracy against Black citizens, lay the foundation for the Justice Department to utilize these statutes against private persons. Although the majority found an adequate allegation of state "involvement" to decide the case within the traditional parameters,[44] six justices of the Court repudiated the holding of *The Civil Rights Cases* unequivocally recognizing that section 5 of the fourteenth amendment does not empower Congress to punish private deprivations of civil rights.[45]

Justice Brennan's opinion elaborates the theory, first articulated by Justice Harlan's dissent in *The Civil Rights Cases*[46] and adopted subsequently by the Court in *Katzenbach v. Morgan*,[47] that Congressional power "to enforce, by appropriate legislation, the provisions of this article" provided by section 5 of the fourteenth amendment is equivalent in breadth to that conferred by the necessary and proper clause of article I.[48] In *Morgan*, the Court held that section 5 includes power not simply to remedy violations but also to fashion remedies to achieve civil and political equality.[49] Thus, it does not matter whether the Constitution is directly violated by the acts of private conspirators whose intent is to deny protected rights; section 5 of the fourteenth amendment can be seen as authorization of section 241 of Title 18 as federal redress to assure that the guarantees of the amendment will not be nullified.

We must look next at the justifiability of the Department's distinction

42. In this regard, the Court was resolving an issue which divided the Court in United States v. Williams, 341 U.S. 70 (1951).

43. 383 U.S. 745, 761-62 (Clark, J., concurring); 383 U.S. at 781-84 (Brennan, J., concurring).

44. The indictment, which charged a conspiracy to, *inter alia*, shoot, beat, and kill Negroes, was held sufficient because one of the means of accomplishing the conspiracy was causing the false arrest of Negroes. 383 U.S. at 756. *See infra* notes 57-73 and accompanying text.

45. 383 U.S. at 761-62 (Clark, J., concurring); 383 U.S. at 781-84 (Brennan, J., concurring and dissenting). Even Justice Stewart's plurality opinion, which holds § 241 inadequate to reach purely private conspiracies, leaves open the validity of other civil rights legislation addressed to private conduct. *Id.* at 755 n. 9.

The clear indication that the Court was willing to dispense with the state action requirement under § 241 was undercut in *United Brotherhood of Carpenters & Joiners v. Scott*, 436 U.S. 825, 831-34 (1985). *Scott* interpreted 42 U.S.C. § 1985(3) as providing a narrower civil remedy against private conspiracies. In that case a bare majority resuscitated the requirement that the state be involved to prosecute conspiracy against violation of an individual's first amendment rights. The first Amendment is explicitly protected against state action. That the threshold showing for involvement is a very minimial one is discussed in notes *infra* 74-93 and accompanying text.

More importantly here, the *Scott* criteria, developed for § 1985(3) litigation should not be automatically transferred to § 241 which authorizes federal criminal prosecution. In the civil context, there are more likely to be state tort remedies available against private parties. By contrast, the state prosecutor and not the victim controls the criminal process. If § 241 is not available against private parties in the absence of active state involvement, there is no possibility of effective public sanction in these circumstances, explicitly envisioned in the debates of § 241—where state criminal remedies are inadequate or not adequately enforced.

46. "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 the danger." 383 U.S. at 783 n.8 (quoting *The Civil Rights Cases*, 109 U.S. 3, 54 (1883) (Harlan, J., dissenting).

47. 384 U.S. 641, 650-51 (1966).

48. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

49. To the extent that Oregon v. Mitchell, 400 U.S. 112 (1970) may have narrowed *Morgan*, it does not affect § 241 as applied to deliberate interference with the right to abortion.

between interstate travel as a right protected against private action under section 241 and fourteenth amendment rights as unprotected. It is significant that the right of interstate travel has not until recently been protected against the acts of private parties.[50] The decisions of the Court in *Guest* and *Griffin* thus rejected the same argument about the scope of section 241 with respect to the right to travel protected by provisions in the Constitution other than the fourteenth amendment that the government makes here with respect to the abortion right.[51] These cases are further indication of the trend toward rejecting any state action limitation on section 241.

The other basis for distinguishing interstate travel and the right to abortion is that the former is considered to be a privilege and immunity of federal citizenship, while the latter is grounded in liberty protected against state action by the due process clause. This distinction was first articulated in *The Slaughterhouse Cases*,[52] which began the burial of federal power embodied in the fourteenth amendment and drastically limited the coverage of both the privileges and immunities and due process clauses. The distortion of the fourteenth amendment that *The Slaughterhouse Cases* wrote into the law for almost a century is revealed by earlier decisions interpreting the privileges and immunities clause as encompassing those privileges and immunities which are in their nature fundamental.[53]

This dichotomy between privileges and immunities and due process liberty has been consistently eroded for almost fifty years. Through the doctrine of selective incorporation of the rights protected by the first eight amendments into the fourteenth, as well as the recognition of implied substantive due process rights, the Court has largely repudiated the narrow approach of *The Slaughterhouse Cases*. The basis for incorporation of these rights under the rubric of due process is that they are fundamental rights guaranteed by federal citizenship.[54] Fundamentality also was the basis that the Court relied on in *Guest* for treating private interference with interstate travel as encompassed by section 241.[55] Surely, it can't be said today that first or fourth amendment rights, or the right of privacy itself, are any less fundamental to our notion of federal citizenship than interstate travel.

The dichotomy is thus an anachronism, born of purposefully truncated constitutional interpretation that has been repudiated in other contexts by the Court. The privileges and immunities clause of article IV, section 2, upon which interstate travel is grounded in part, declared the obligation of the states

50. *See supra* note 24 and accompanying text.

51. *Compare* Justice Harlan's exhaustive dissent in *Guest* refusing to extend § 241 to private conspiracies against interstate travel. 383 U.S. at 762-774 *with* Toesing testimony, *supra* note 12.

52. 83 U.S. (16 Wall.) 36 (1872). *See, e.g.*, Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 CORN. L.Q. 467, 469 (1966).

53. *See, e.g.*, Corfield v. Coryell, 6 Fed. Cas. 546 (Cir. Ct. E.D. Pa. 1823); United States v. Hall, 26 Fed. Cas. 79 (Cir. Ct. S.D.Ala. 1871); United States v. Mall, 26 Fed. Cas. 1147 (Cir. Ct. S.D.Ala. 1871). *See also* O'Neill v. Vermont, 144 U.S. 323, n. 22 at 363, 370 (dissenting opinions); Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

54. Rights have been incorporated into the due process clause because they are "of the very essence of a scheme of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937), or part of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Hurato v. California, 110 U.S. 516, 535 (1884), or "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts 291 U.S. 97, 105 (1934).

55. *See infra* notes 15-28 and accompanying text.

to respect the rights of citizens. The fourteenth amendment does the same for due process liberty. Neither addresses the issue of private interference because the power to redress it is implicit in the existence of the federal right.[56]

In sum, there is no longer any valid basis for distinguishing between one kind of federal right and another under section 241. The fact that the Supreme Court has not yet had an opportunity to consider squarely this question in a case brought under section 241 does not mean that the Department of Justice is justified in refusing to give it an opportunity to do so. Under section 241, no one else has the power to bring suit. If the fact that there is a historical cloud on the scope of section 241 can justify the Department's inaction, section 241 would have remained a dead-letter. The prosecutions of the *Price* and *Guest* conspirators for the murders of three civil rights workers were instituted notwithstanding an earlier divided opinion on the question of the applicability of section 241 to fourteenth amendment rights.[57] In regard to the present-day violence against abortion clinics, *Guest* indicates that six justices supported a literal and, therefore, expansive reading of section 241. Under the circumstances it is the duty of the Department to test the reach of its protection against private interference with the fundamental fourteenth amendment right to abortion.

III. STATE INVOLVEMENT UNDER 18 U.S.C. SECTION 241

While I disagree with the Department that there must be state involvement with the conspiracy in order to invoke section 241, the requisite involvement can be shown in a number of cases. The cases described before this committee indicate varying degrees of state involvement. Moreover, the legislative history of section 241 indicates that a direct federal remedy was intended at least to counteract a state's failure to ensure adequate protection against attacks on fourteenth amendment rights.[58] In all cases, the Department of Justice has the same obligation to investigate whether there is state involvement as it does to discover the elements of any federal crime.

The Supreme Court has made clear that state involvement need only be minimal. In *Guest*, Justice Stewart's plurality decision for the three judges who ruled that state action was present made clear that "the involvement of the State need [not] be either exclusive or direct," but can be "peripheral, or . . . only one of several co-operative forces leading to the constitutional violation."[59]

In *Guest* the indictment charged that the deprivation of rights was accomplished "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."[60] The plurality ruled that this allegation removed any necessity for "determination of the threshold level that

56. *See, e.g.*, Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 113-14 (1966).

57. *See* United States v. Williams, 341 U.S. 70 (1951) in which four justices held § 241 inapplicable to the fourteenth amendment. *Id.* at 73. Justice Black concurred with the plurality without reaching this question. *Id.* at 85. Justice Frankfurter in the majority and the four dissenters found § 241 applicable. 341 U.S. at 87 (Douglas, J., dissenting).

58. *See supra* notes 34-36 and accompanying text.

59. 383 U.S. 745, 755-56 (citations omitted).

60. *Id.* at 748 n.2.

state action must attain in order to create rights . . ."[61] The plurality in *Guest* made clear that state involvement is present if the prosecutor can show "active connivance by agents of the State in making of the "false reports," or other conduct amounting to official discrimination . . ."[62] It left open the question whether non-discriminatory state involvement is sufficient.

The recent decision in *United Brotherhood of Carpenters & Joiners v. Scott*[63] indicates that it would be. *Scott* held that to state a cause of action under the related civil remedy provided by section 1985(3) of Title 42, a plaintiff must show only that "the State was *somehow* involved in *or affected by* the conspiracy" or "that the *aim of the conspiracy* is to influence the activity of the State."[64]

This is a broad test for state involvement. It does not call for connivance or collusion on the part of the state. The private conspirators' intent, not that of the state actors, is dispositive.

Harassment tactics commonly used against the clinics involve the state sufficiently to meet the *Scott* criteria. For example, almost 50% of the large clinics experience bomb threats[65] which require the authorities to evacuate the clinic to ascertain whether there is any danger.[66] Even where the police response intends to be beneficial as opposed to antagonistic to the clinic, the police are used, albeit innocently, as an instrument of the conspiracy to disrupt and delay abortions. The same is true of other frequently used tactics such as blocking patient access or trespassing into the clinics. Moreover, as a general matter there is no question but that the aim of harassment is to influence the activity of the state in a variety of ways. Harassment is designed not only to close the clinics but to present abortion as illegitimate or, at least, dangerously controversial. The aim is to influence state and local law enforcement, legislators and administrators in a wide range of activities. Harassment can be a factor—implicit or explicit—in decisions on whether to permit the opening of a second clinic or grant a zoning variance as well as on whether to vote in the legislature for more restrictions.

There are examples in the testimony before the committee of clinic harassment and violence where local officials have been involved actively or tac-

61. *Id.* at 756.

62. *Id.* at 756-57.

63. 463 U.S. 825 (1983).

64. *Id.* at 830. (emphasis added). *Scott* thus makes clear that the degree of state involvement required to support a claim under 1985(3) is wholly distinct from the increasingly stringent standard imposed by the Court on the basis of the "under color of law" requirement of 42 U.S.C. § 1983 of the fifth amendment. For state action purposes, state involvement in cooperation with regulation or financing of or assistance to a private enterprise is not sufficient to convert it into an official one. *See, e.g., San Francisco Arts & Athletics v. Olympic Comm.*, 107 S.Ct. 2971, 2984-87 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004, 1011 (1982); *Randell-Baker v. Kohn*, 457 U.S. 830, 840 (1982); *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974). Even *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), which has been substantially eroded though not overruled, requires a more substantial allegation of state involvement than called for by *Scott*.

65. Forrest and Kaufman, *supra* note 5, at 10.

66. *Abortion Clinic Violence, supra* note 3 (Joan Babbot, Executive Director, Planned Parenthood of Connecticut, testifying on the disruptive effects of bomb searches which required police investigation). This conspiratorial tactic parallels the false reports of criminal activity leading to arrest in *Guest*, 383 U.S. 745, see *supra* notes 15-28 and accompanying text. It should be noted that the indictment in *Guest* dod not charge the arresting authorities with knowing collusion in false arrest.

itly in supporting the private conspiracy. The history of harassment and firebombings which forced the Everett Feminist Women's Health Center to close last year is one threaded with both active involvement and deliberate inaction. Tragically, it demonstrates that the failure to enforce existing criminal sanctions against individuals engaging in intimidation encourages the escalation of violence against the clinics.

According to the testimony before this Subcommittee,[67] anti-abortion picketers began by taunting, video-taping and recording license plates, blocking the parking lot entrance and forcing women through a gauntlet to the clinic entrance. Hate calls, bomb threats and the dangerous jamming of clinic phones were common. Patients and abortion rights activists escorting them to the clinic were physically assaulted. The police were unresponsive and the police chief prohibited off-duty officers from being hired to protect the clinic on the theory that the police had to remain "neutral."

The City Council permitted the Knights of Columbus to hold a demonstration blocking the entrance to the clinic during operating hours. Two weeks later the clinic was firebombed. The police responded to the arson by publicly suggesting that the clinic staff did it. Even after the clinic obtained a temporary restraining order from the state court, officials did nothing to enforce it or to otherwise protect the clinic. The clinic was bombed a second time and again there was no official condemnation or investigation. Finally, the BATF became involved and the Everett police identified the suspect, a persistent clinic picketer who "did it for the glory of God."[68]

It is clear that there was active official involvement here, but also that official refusal to act gave picketers a green light to escalate their tactics. In Everett and other cases,[69] the private conspiracy was aided and encouraged by official refusal to enforce the laws and denial of equal protection to clinic staff and patients. When the police fail or refuse to provide protection against harassment, the Justice Department has a heightened obligation to enter.

The Republican supporters of section 241 — and indeed of the other federal civil rights remedies[70] — identified state neglect or inability to enforce the laws against those who seek to violate rights, as a central concern both of the Fourteenth Amendment and of section 241.[71] Senator Pool, the sponsor of the bill, made the only explanatory statement in the Congressional proceedings regarding its enactment, equated the failure to protect civil rights as an official denial of equal protection of the laws:

[U]nder the Fourteenth Amendment to the Constitution "no State shall . . .

67. *See Abortion Clinic Violence, supra* note 3, at 598 (prepared statement of Betty Maloney, Radical Women).

68. *Id.* at 604.

69. In El Monte, California, the Clinica Eva has been picketed for nine months while police stand back and insist that the clinic staff disrupt their work to make citizen's arrests. Even when a picketer forced her way into the recovery room and photographed the patients, a citizen's arrest had to be made and the District Attorney refused to press charges. *Id.* at 606. Mary Bannecker testified before this Committee on March 6, 1985 that the local sheriff refused to enforce a state court injunction against harassment. *Id.* at 6.

70. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961).

71. Indeed, it is too frequently forgotten that even Justice Bradley's truncated interpretation of the fourteenth amendment as operating only against state action recognized that state failure to provide equal protection would justify federal intervention. The Civil Rights Cases, 109 U.S. 3, at 14. *See also* Kinoy, *supra* note 34.

> deny to any person within its jurisdiction the equal protection of the laws." There the word "deny" is used . . . in contradistinction to the first clause, which says, "No state shall make or enforce any law" . . . That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these [fourteenth amendment] rights.
>
> If a state by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.[72]

The same position was urged in the House by Congressman Garfield who spoke for the moderate Republican position on the scope of federal power.[73] For the Thirty-Ninth Congress, inaction would not excuse, but rather implicate the State in private violence against the exercise of rights. It placed upon the Department of Justice a duty to investigate and prosecute section 241 violators in the analogous circumstances of today.

IV. ABORTION AS A RIGHT PROTECTED BY THE THIRTEENTH AMENDMENT

An independent ground for including the right to abortion within the coverage of section 241 flows from the nature and sources of the abortion right itself. The cases hold, and the Department acknowledges, that rights that have been recognized as protected against the acts of private persons are punishable under section 241 absent any state involvement. Among the amendments that have been held to provide direct protection against private conduct is the thirteenth.

The right to abortion — though explicitly grounded in the fourteenth amendment in *Roe v. Wade* — derives from a panoply of fundamental rights and their penumbras — including bodily integrity, personal privacy and autonomy, and the right to expression, association and to follow one's belief's.[74] At the core of the right to abortion — as well as the right to seek contraception and other forms of reproductive health care provided by the clinics under attack[75] — are the absolutely basic rights of bodily integrity and freedom from involuntary servitude, which is safeguarded against private interference.

The very first case cited in *Roe v. Wade* as a source of the privacy is *Terry v. Ohio*,[76] which established "the inestimable right of personal security" as the essence of the fourth amendment.[77] Refusing to require a plaintiff to submit to a medical examination at the behest of the defendant, *Union Pacific Railroad v. Botsford*[78] emphatically held that "[n]o right is held more sacred, or is more

72. United States v. Price, 383 U.S. 787, 811, 819. (Appendix to the Opinion of the Court.) *See also* Cong. Globe, 41st Cong., 2d Sess., pp. 3611-3613 (Remarks of Senator Pool of North Carolina on sponsoring § § 5,6, and 7 of the Enforcement Act of 1870).

73. R. HARRIS, THE QUEST FOR EQUALITY, 47-48 (1960).

74. Roe v. Wade, 410 U.S. 113, 152-53, 209-15 (Douglas, J., concurring).

75. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

76. 392 U.S. 1 (1968) (*noted in* Roe v. Wade, 410 U.S. 113, 152).

77. Doe v. Bolton, 410 U.S. 179, 215 (Douglas, J. concurring).

78. 141 U.S. 250 (1891). Subsequent to *Botsford*, the Federal Rules of Civil Procedure provided explicit authority for a party in litigation to obtain court orders compelling an adversary to submit to a physical examination. Fed. R. Civ. P. 35(a). Nonetheless, it is both obvious, and crucial to point

carefully guarded by the common law, than the right of every individual to the possession and control of his own person free from all restraint or interference of others, unless by clear and unquestionable authority of law."[79] The Court's refusal to compel this intrusion was based on the absence of rights in one person to invade or compromise the bodily integrity of another.

Later decisions in abortion cases further illustrate the character of the right to abortion as one protected against private parties. In *Planned Parenthood of Central Missouri v. Danforth*,[80] the Supreme Court was asked to sustain a statute requiring spousal consent to abortion. The contention was that a husband has a right to prevent an abortion because of his personal interest in future offspring. The Court rejected this argument on two grounds: (1) that the State, having itself no power to interfere with an abortion in the first trimester, could not delegate a veto power to the husband; and (2) that the personal interest of the husband cannot prevail over the decision of the wife, for it is the woman who must undergo nine months of pregnancy to bear the child.[81]

Danforth thus demonstrates that the decision to abort is protected against private — even intimate — parties. Subsequent cases have tested this proposition even further in the context of husbands seeking to enjoin their wives from having an abortion. In these *purely private* disputes, the courts have refused to grant injunctions.[82]

The implicit premise of these decisions, including *Roe v. Wade* itself, is one that is fundamental to our constitutional scheme. It is the principle that one cannot coerce the labor or personal service of another, even if the labor or personal service was initially voluntary.[83] It is the principle that was born in the transition from feudal to modern society with the abandonment of villeinage and that underpinned Lord Mansfield's decision refusing to recognize slavery on English soil.[84] And, it is the principle that was denied during African slavery in this country, but was embodied for all people in the thirteenth amendment.[85]

The legislative history and judicial construction of the thirteenth amendment make clear that the prohibition on involuntary servitude is not confined to its most brutal manifestation, African slavery. Rather it was viewed as a universal charter of freedom from the degradation of forced labor and has

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out that, as with breach of contract, the law cannot require specific performance but at most, impose sanctions for the failure to submit. Fed. R. Civ. P. 37(b)(2).

79. 141 U.S. 250, 251.

80. 428 U.S. 52 (1976).

81. *Id.* at 71.

82. *See* Hagerstown Reproductive Health Services v. Fritz, 295 Md. 268, 454 A.2d 846 (1983), *cert. denied*, 463 U.S. 1208 (1983); Coleman v. Coleman, 57 Md. App. 755, 471 A.2d 1115 (Md. Ct. of Spec. App. 1984); Planned Parenthood of R.I. v. Board of Medicinal Review, 598 F.Supp. 625, (R.I.D.C., 1984); Doe v. Doe, 365 Mass. 536, 314 N.E. 2d 128 (1974)(estranged husband).

83. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS,§ 16.5, (2d ed. 1977); 4 POMEROY, EQUITY JURISPRUDENCE, pp. 276-79; The Case of Mary Clark, 1 Blackf. 122 (Ind. 1821)(refusal to compel, under state constitutional provision banning involuntary servitude, performance of indenture for personal service that was orginally voluntary).

84. *See* Summersett v. Stuart (70 How. St. 1771), *discussed in* The Case of James Sommersett, a Negro, in A. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 333-368 (1978).

85. American Broadcasting Co. v. Wolf, 52 N.Y.2d 394, 402; 438 N.Y.S.2d 482, 485 (1981), (*citing* Arthur v. Oakes, 63 F. 311, 317 (1894).

been applied to free people from ostensibly contractual but effectively coerced labor.[86] Labor even by contract has been held to be involuntary where a person has no way to avoid continued service.[87]

Suppose, for example, that a singer contracts to do an opera series and wants to back out in the middle of the run, with seven months to go. The opera company may have a right to damages for violation of the contract, but it has no power to coerce her to specifically perform the agreement. Nor can it "punish [her] as a criminal if [she] does not perform the service or pay the debt."[88] If failing in court, the company should compel her to perform, she may have a claim against the company under the thirteenth amendment for involuntary servitude.

Pregnancy and the labor of childbirth are also work. This is work of the most intimate, continuous kind, which, without abortion, a woman cannot elect to stop. Pregnancy and childbirth involve vast physical changes in a woman's body and potentially severe pain and discomfort. They involve degrees of risk to life and health from the grave to the minor; from the predictable (such as for a woman with severe hypertension) to the unpredictable, for which there is no early warning system. Women undertake voluntary pregnancies cognizant of these risks and burdens. When chosen, when a child is desired, pregnancy may be hard but nonetheless a labor of love. When forced, pregnancy is an intolerable, dehumanizing form of servitude.[89]

The current effort to reverse *Roe v. Wade* would thus make women the only class of persons denied, as a matter of law, the fundamental right to consent to labor. Those who use force and violence, initiation and invasion of privacy to impede women's access to abortion clinics are, like the conspirators in *Guest* who blocked the access of Black people to state-run accommodations, seeking to deny to women the right to be free of all the badges and incidents[90] of reproductive servitude.

For many years, the law, religion and social habit conspired to conceal the reality of pregnancy as work. Under coverture, which was the legal subservience of wife to husband, childbearing was a wifely duty.[91] Earlier Supreme Court decisions speak of the divine mission of women; pregnancy is extolled as the natural and indeed mysterious power of women at the same

86. The thirteenth amendment declares a "universal civil freedom for all persons, of whatever race, color, or estate under the flag." Bailey v. Alabama, 219 U.S. 219, 240-241 (1911). The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). For legislative history, see Cong. Globe, 39th Cong., 1st Sess., 314-23, 474-81 (1866).

87. United States v. Shackney, 333 F.2d 475, 486 (1964). *See also* Clyatt v. United States, 197 U.S. 207 (1905); Hodges v. United States, 203 U.S. 1, 20 (1906) (Harlan, J., dissenting).

88. Bailey v. Alabama, 219 U.S. 219, 244 (1911).

89. Feminist theories and theologians also situate the abortion right in the right of bodily integrity and the freedom against involuntary servitude. *See, e.g.*, B. HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION (1983); R. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTION FREEDOM (1984); E. WILLIS, ABORTION: IS A WOMAN A PERSON? in A. SNITOW, C. STANSELL, & S. THOMPSON, eds., POWERS OF DESIRE (1983). The fact that the recipient of the service of pregnancy is a potential life as opposed to an actual human being weakens rather than strengthens any argument for exception to the still absolute rule against forced servitude. *See, e.g.*, Thompson, *A Defense of Abortion*, 1 Phil. & Pub. Aff. 47 (1971); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); McFall v. Shimp, 127 Pitts. Leg. J. 14 (1978).

90. Jones v. Mayer, 392 U.S. 409 (1968).

91. *See, e.g.*, Doe v. Doe, 365 Mass. 536, 314 N.E. 2d. 128 (1974).

time as it is the basis for discrimination.[92] Until recently, men were routinely excluded from participation in childbirth, shielding them from witnessing its burdens and pain.

Roe v. Wade and its progeny implicitly recognized that pregnancy is work of the most intimate and personal dimension and that, like all other people, women must have a right to consent to that undertaking. For a woman to be denied this elemental and otherwise universal right by the state or by a private conspiracy would be to reduce her to less than a person. In being compelled to labor, not for oneself but for a master would be to brand her as inferior to all others, to "produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery . . . [particularly] under a government like ours which acknowledges a personal equality . . ."[93] If a husband or lover who feels a personal involvement in the abortion decision has no right to interfere with a woman's decision because that would deny the integrity and humanity of her person, surely a stranger in a assaultive gauntlet has none.

V. Section 245 (B)(1)(E) Empowers the Justice Department to Prosecute Clinic Harassers

Section 245(b)(1)(E) provides for criminal penalties against threatened or successful intimidation or interference because a person is "participating in or enjoying the benefits of any program or actively receiving federal assistance." This statute applies to this context because abortion clinics are, with rare exception, multiservice facilities, which treat both abortion patients and others seeking a wide range of family planning and health services. In any case of harassment, the Department of Justice can inquire whether any of the patients served by the facility can receive benefits for the services received through federal programs. Since anti-abortion harassment is directed not simply at stopping individual women from having abortions, but also at closing down the clinic as a multiservice facility,[94] all women using the clinics are the targets of harassment.

Conclusion

There are in my opinion ample and diverse legal grounds for the Civil Rights Division of the Justice Department to prosecute under section 241 and section 245 private conspiracies which seek to impede women from obtaining abortions and to disrupt, indeed, shut down reproductive health clinics. There is also ample and frightening reason to believe that without federal intervention, the violence and harassment will continue to escalate. For the Civil Rights Division to decline to use section 241 in the face of this danger to women and to our constitutional scheme is one among mounting examples of hostile disregard for the protection and enforcement of civil rights. It is critical that this Committee has chosen to focus national attention on this dangerous abdication of responsibility, to the end that women may one day exercise this most fundamental personal right in peace.

92. Bradwell v. State, 83 U.S. 130 (1873); Muller v. Oregon, 208 U.S. 412 (1908). *See also* Gedulig v. Aiello, 417 U.S. 484 (1974).

93. The Case of Mary Clark, 1 Blackf. 122, 124.

94. *See Abortion Clinic Violence, supra* note 3, at 52 (Scheidler testimony); Donovan *supra* note 1, at 5.