

**UCLA**

**UCLA Women's Law Journal**

**Title**

Racketeering, Anti-Abortion Protesters, and the First Amendment

**Permalink**

<https://escholarship.org/uc/item/5tn4z09z>

**Journal**

UCLA Women's Law Journal, 4(2)

**Authors**

Soule, Steven E.

Weinstein, Karen R.

**Publication Date**

1994

**DOI**

10.5070/L342017600

**Copyright Information**

Copyright 1994 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

# RECENT DEVELOPMENTS

## RACKETEERING, ANTI-ABORTION PROTESTERS, AND THE FIRST AMENDMENT

Steven E. Soule & Karen R. Weinstein\*

*While defendants may have strong convictions against the wisdom or morality of women making a voluntary decision to obtain an abortion, under our Constitution and laws there is in this country no superior, dominant ruling class of citizens who may escape the consequences of their violent and lawless behavior. Neither those who believe strongly in the "right to life" nor those who believe fervently in "freedom of choice" have any special immunity from the operation of law in our society.<sup>1</sup>*

### INTRODUCTION

In March 1993, Dr. David Gunn was shot to death by an anti-abortion activist as he arrived at the Pensacola, Florida medical clinic where he performed abortions.<sup>2</sup> This event escalated

---

\* The authors are third-year law students at the UCLA School of Law. They greatly appreciate the tireless efforts of Patricia I. Amador, Christina Bull, Peggy Chen, Adriana Estrada, Holli Payne, Mary Tesh, Hao-Nhien Q. Vu, and the staff of the UCLA Women's Law Journal.

1. *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 477 (3d Cir. 1989), *cert. denied*, 494 U.S. 1068 (1990).

2. *Abortion Protester Held in Doctor's Murder at Clinic*, L.A. TIMES, Mar. 11, 1993, at A1; William Booth, *Doctor Killed During Abortion Protest*, WASH. POST, Mar. 11, 1993, at A1. Michael Griffin was convicted of first-degree murder and sentenced to life in prison for shooting Dr. Gunn. *Activist Gets Life for Killing Abortion Doctor*, L.A. TIMES, Mar. 6, 1994, at A1 [hereinafter *Activist Gets Life*]; cf. *Anti-Abortion Activist Found Guilty in Attack*, L.A. TIMES, Mar. 26, 1994, at A24 (anti-abortion activist who shot Dr. George Tiller outside a Wichita, Kansas clinic was convicted of attempted murder). The shooting of Dr. Gunn profoundly affected abortion rights advocates and anti-abortion protesters, although some anti-abortion groups still "advocate violence against doctors who provide abortions" despite the verdict. *Activist Gets Life*, *supra*, at A18.

the battle between abortion rights proponents and opponents<sup>3</sup> that followed the Supreme Court's 1973 landmark abortion decision, *Roe v. Wade*.<sup>4</sup>

Anti-abortion groups employ a variety of tactics to protest the operation of abortion clinics across the nation.<sup>5</sup> These tactics range from peaceful demonstrations and the blockade of abortion clinic entrances to, in some cases, vandalism and actual invasion of the clinics themselves.<sup>6</sup> In the last several years, many anti-abortion groups across the country have joined forces<sup>7</sup> to

3. *Abortion Protester Held in Doctor's Murder at Clinic*, *supra* note 2, at A9 ("The shooting came at a time when abortion-rights activists have reported new tactics by opponents against clinics, including increasing use of noxious chemicals. In San Diego this week, anti-abortion activists sprayed five clinics with a foul-smelling substance, police said."); *see also* Booth, *supra* note 2, at A3 ("Abortions at the Aware Woman Clinic have dropped by almost 70% since protesters stepped up their activities here and some doctors have quit following the slaying last month of physician David Gunn, who performed abortions in Pensacola."); Penni Crabtree, *MDs Ready to Strike Back at Abortion Foes*, SAN DIEGO BUS. J., Nov. 29, 1993, at 1.

4. 410 U.S. 113 (1973) (establishing a woman's constitutional right to obtain an abortion in the first two trimesters of pregnancy).

5. Wayne Slater, *Tactics Cause Rift Among Abortion Foes*, DALLAS MORN. NEWS, July 31, 1993, at A25 ("Once seen as a model of unity, the anti-abortion movement is divided between militant factions that support civil disobedience and moderate elements that say such tactics are counterproductive.").

6. For example, in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993),

the district court . . . found [that] Operation Rescue's "rescue" tactics involved massing its members around family planning and abortion clinics to disrupt activities by trespassing on clinic grounds and physically blockading the clinics, defacing signs and destroying property. Clinics have also been firebombed and sprayed with noxious chemicals, and doctors have been subject to threats, a kidnapping, and now a murder.

Steven F. Shatz, *A License to Hunt*, RECORDER, Mar. 29, 1993, at 10; *see, e.g.*, Freedom of Access to Clinic Entrances Act of 1993, Background and Discussion, H.R. 796, 103d Cong., 1st Sess. (1993) ("A nationwide campaign of blockades, invasions, vandalism, threats and other violence is barring access to facilities that provide reproductive health services, including services arising from the constitutionally protected right to choose."); Booth, *supra* note 2, at A3; Eve W. Paul, *Abortion in America*, CONN. L. TRIB., Jan. 24, 1994, at 18 ("Anti-abortionists have recently resorted to clinic blockades, acid attacks, arson and bombing, culminating most recently in the murder of Dr. David Gunn in Florida and the shooting of Dr. George Tiller in Kansas.").

7. Anti-abortion groups are increasingly operating at a national level. For example:

Much of the violence has been organized and directed across state lines. Attorney General Janet Reno has testified that "much of the activity has been orchestrated by groups functioning on a nationwide scale, including, but not limited to, Operation Rescue, whose members and leadership have been involved in litigation in numerous areas of

orchestrate a campaign aimed at intimidating physicians,<sup>8</sup> patients, and clinic employees and forcing the closure of abortion clinics.<sup>9</sup> In some cases, these protests have become violent.<sup>10</sup> It

---

the country." The experience of many jurisdictions indicates the extent to which activists from all over the country are involved.

H.R. 796, *supra* note 6 (footnote omitted); see also Kim Cobb, *How to Grow a Revolution*, HOUSTON CHRON., Mar. 28, 1993, at A16 ("Operation Rescue has expanded its influence among anti-abortion groups by establishing a national training camp for abortion opponents willing to practice the group's aggressive protest tactics.").

8. Abortion rights groups called Dr. David Gunn's murder a symbol of the increasing harassment of doctors who do abortions, a phenomenon that has made it increasingly difficult for clinics to find doctors willing to perform the procedure. . . .

Some anti-abortion groups say harassment of physicians is now one of their most effective tactics.

"We've found the weak link is the doctor," Randall Terry, the founder of Operation Rescue, said last weekend at a rally in Melbourne, Fla.

Larry Rohter, *Doctor Is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1, B10; see also Susan Gilmore, *Sue Abortionists for Malpractice, Says Anti-Abortion Group*, SEATTLE TIMES, Oct. 8, 1993, at A1 ("In what abortion-rights advocates call a new sophistication in the anti-abortion movement, a Texas group is promoting malpractice lawsuits against doctors who perform abortions.").

9. See, e.g., *Abortion Clinic Violence, Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 99th Cong., 1st & 2d Sess. 55 (1987) (statement of Joseph M. Scheidler, Executive Director, Pro-Life Action League); James Risen, *Giving Peace a Chance; Pressed from All Sides, Operation Rescue Ponders its Next Move*, L.A. TIMES, July 19, 1993, at A1 (Operation Rescue "has traditionally sought to shut down abortion clinics through acts of civil disobedience — 'rescues' in its parlance.").

Abortion rights activists have responded to this increase in anti-abortion activity with campaigns of their own, including the mobilization and training of volunteer "clinic defense" teams, who respond to anti-abortion blockades of clinics by physically surrounding clinic entrances and keeping the anti-abortion forces from blocking clinic access. See, e.g., Bruce Stanley & Liz Willen, *Abortion Activists Train for Defense*, NEWSDAY, July 7, 1992, at 7 ("Abortion-rights advocates are training volunteers in the art of 'clinic defense' to protect women seeking abortions against Operation Rescue demonstrators.").

10. See, e.g., Susan B. Apel, *Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction*, 48 WASH. & LEE L. REV. 41, 55 (1991) (citing NATIONAL ABORTION FEDERATION, INCIDENTS OF VIOLENCE AND DISRUPTION AGAINST ABORTION PROVIDERS (1990)) (783 incidents of violence against abortion clinics occurred in the 12 years prior to 1990); *Activist Gets Life*, *supra* note 2, at A18 ("Arson, bombings, chemical attacks and break-ins have been reported at clinics [providing abortion services] nationwide."); Kathryn Balint, *5 Clinics Here Are Attacked with Acid; Anti-Abortion Activists Responsible, Police Say*, SAN DIEGO UNION-TRIB., Mar. 10, 1993, at A1; Michael Ross, *Protection for Abortion Clinics Voted by Senate*, L.A. TIMES, Nov. 17, 1993, at A1 ("More than 100 abortion clinics have been bombed or set on fire over the last decade and this year two doctors were shot by anti-abortion extremists.").

was during such a period of heightened anti-abortion activity that Dr. Gunn was murdered.<sup>11</sup>

Frustrated by the limited effect of State criminal prosecutions against anti-abortion activists who engaged in civil disobedience such as trespass and blockade of clinic entrances, abortion rights proponents also sought civil remedies to reach the anti-abortion protesters and enforce the federal right to abortion.<sup>12</sup> In *Bray v. Alexandria Women's Health Clinic*,<sup>13</sup> abortion rights attorneys brought an action under the Civil Rights Act of 1871 to enjoin protesters from blocking access to clinics.<sup>14</sup> However, the Supreme Court declined to extend the Civil Rights Act to protesters, such as those in *Bray*, who obstruct access to abortion clinics, holding that the goal of preventing abortion does not qualify as invidious discrimination against women as a class under the Act.<sup>15</sup> Abortion rights advocates also brought suits under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970.<sup>16</sup>

While RICO was originally intended to provide federal law enforcement with a tool for rooting out organized crime, the broad wording of the statute suggests that Congress counte-

11. Cobb, *supra* note 7, at A16.

12. "I've seen cases where some of these lunatics feel it's a badge of honor to go to jail for a few days," said McElroy, who was part of the legal team that won the judgment against [white supremacist Tom] Metzger. "But if you hit them in the pocket it seems to be a little different matter."

Crabtree, *supra* note 3, at 1; *see also* Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1343 (1990); Michael Kirkland, *Operation Rescue Says Clinic Blockades to Continue*, UPI, Nov. 19, 1993, available in LEXIS, News Library, UPI File ("Operation Rescue members have been arrested 72,000 times for peaceful protests . . .").

13. 113 S. Ct. 753 (1993).

14. *Id.* at 757-58; *see also* *West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir.), *cert. denied*, 144 S. Ct. 185 (1993); *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417 (W.D.N.Y. 1992); *Planned Parenthood v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991).

15. 42 U.S.C. § 1985(3) (1988) is a civil rights statute concerning conspiracies to deprive a person or class of persons of equal protection of laws or equal privileges or immunities under the law.

At least one Circuit Court reads *Bray* as allowing the application of 42 U.S.C. § 1985(3) to anti-abortion activists in some situations. *See West Hartford*, 991 F.2d at 1048.

16. 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992). For examples of such RICO suits against anti-abortion protesters, *see infra* part II.B.

nanced its use against other groups as well.<sup>17</sup> In fact, the Act has been used to prosecute a range of organizations and individuals, including white collar criminals<sup>18</sup> and terrorist groups.<sup>19</sup>

A number of courts have argued that RICO was not intended to apply in such a wide range of situations. In particular, the Second and Eighth Circuit Courts have held that RICO does not apply to groups motivated by ideology or other noneconomic motives.<sup>20</sup> The narrow decision handed down by the Supreme Court in *National Organization for Women, Inc. v. Scheidler*<sup>21</sup> rejected that interpretation of the statute, holding that a RICO cause of action may be sustained against noneconomically motivated organizations such as anti-abortion protest groups.

Our Recent Development analyzes the Court's opinion in *NOW v. Scheidler* and examines the impact it will have upon anti-abortion protesters in light of the First Amendment's protection of speech and political protest. We do not, however, address liability for RICO conspiracy. Part I reviews the procedural history of *NOW v. Scheidler* and details the Court's decision. Part II analyzes RICO and protected and unprotected First Amendment activity in light of three lower court decisions applying RICO to anti-abortion protesters. Finally, Part III discusses the potential conflict between the imposition of RICO liability and the First Amendment rights of anti-abortion protesters, concentrating upon the Court's decision in *NAACP v. Claiborne Hardware Co.* which lays out the Constitutional analysis of "hybrid" protest activity, consisting of both protected and unprotected elements. We conclude that the *Scheidler* decision does not silence any particular group; rather it allows the regulation of especially unsatisfactory means of "communication" and focuses RICO cases

---

17. See Stephen D. Brown & Alan M. Leiberman, *RICO Basics: A Primer*, 35 VILL. L. REV. 865, 866 (1990) (noting that the "use of RICO has gone far beyond its original purpose"); Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 807-14 (1990) (noting that RICO's legislative history focuses on the evils of organized crime). However, regardless of its "intent" in passing RICO, "Congress purposefully worded the statute broadly enough so that it could extend to anyone who committed the crimes enumerated in the predicate acts regardless of their motivation." Gale, *supra* note 12, at 1344.

18. See, e.g., *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980).

19. See, e.g., *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

20. See *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), cert. denied, 488 U.S. 974 (1988); *Ivic*, 700 F.2d 51. But see *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901 (1989).

21. *NOW v. Scheidler*, 114 S. Ct. 798, 801 (1994).

upon First Amendment issues rather than tangential questions of "economic motive."

I. *NATIONAL ORGANIZATION FOR WOMEN, INC. V. SCHEIDLER*

A. *Facts*

The plaintiffs, the National Organization for Women (NOW) and two women's health centers,<sup>22</sup> brought a civil RICO action<sup>23</sup> in October 1986 against defendants, anti-abortion activists, as well as the Pro-Life Action Network (PLAN), an umbrella organization of various anti-abortion groups.<sup>24</sup> The suit sought federal relief from the defendants' nationwide campaign to close medical clinics offering abortions to women. Plaintiffs alleged that the defendants "engaged in a conspiracy to close all women's health centers providing abortions through a pattern of illegal activity."<sup>25</sup> Specifically, plaintiffs alleged that defendants engaged in a pattern of illegal activities including the following:

---

22. The Delaware Women's Health Organization, Inc. (DWHO) and Summit Women's Health Organization, Inc. (SWHO) are the two plaintiff health centers. *NOW v. Scheidler*, 968 F.2d 612, 614 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994). These representative clinics brought suit on behalf of all clinics similarly situated. *Id.* at 615 n.3. Plaintiffs sought certification as a class, but the class certification issue was deferred by the District Court following its dismissal of the plaintiffs' claims under Federal Rule 12(b)(6). *Id.*

23. RICO imposes criminal and civil penalties on individuals or entities engaging in "racketeering activities." 18 U.S.C. § 1963 (criminal penalties); *id.* § 1964 (civil penalties); *id.* § 1964(c) (providing private cause of action against RICO violators). Section 1964 of RICO includes the so-called civil RICO charges which can be brought by private action; § 1963 relates to criminal charges that the United States may bring against individuals engaging in racketeering activities as defined in § 1961 of the Act.

The plaintiffs also alleged violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988), and brought several pendant state claims. *Scheidler*, 968 F.2d at 614.

24. Defendants were the Pro-Life Action Network (PLAN), a coalition of anti-abortion groups, and specifically, Joseph M. Scheidler, John P. Ryan, Randall A. Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, Monica Migliorino, Vital-Med Laboratories, Inc., Pro-Life Action League, Inc. (PAL), Project Life, and Operation Rescue.

25. *Scheidler*, 968 F.2d at 615. For examples of allegedly conspiratorial activity, see sources cited *supra* note 7, describing a nationwide campaign of anti-abortion activities. Plaintiff NOW "sought class certification for itself, its women members who use or may use the targeted health centers, and other women who use or may use the services of such centers," presumably to help prove its claim of *Scheidler*, the defendants' nationwide conspiracy. *Scheidler*, 114 S. Ct. at 802 n.3.

extortion; assault; fire bombings; physical and verbal intimidation and threats; trespass; vandalism; blockades of clinics; and arson.<sup>26</sup>

### B. Procedural History

Plaintiffs brought an action against defendants in the Northern District Court of Illinois,<sup>27</sup> alleging that, *inter alia*, defendants violated § 1962 of the RICO Act, a section prohibiting the acquisition and operation of a business with money obtained through illegal means and the operation of a business through a criminal activity.<sup>28</sup> The district court dismissed the entire case for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6).<sup>29</sup>

In order to sustain a civil action under § 1962(a)<sup>30</sup> of RICO, a plaintiff is required to show that money used to acquire an “en-

26. *Scheidler*, 968 F.2d at 615. The plaintiffs contend that between 1980 and 1990

[t]he defendants organized and carried out mob actions including no fewer than:

- 73 invasions or “blitzes” of class member clinics;
- 311 physical blockades;
- 23 acts of arson and attempted arson;
- 33 fire bombings and attempted fire bombings;
- 11 acts of destruction of clinic equipment and property;
- 8 assaults and batteries upon clinic staff and personnel;
- 84 acts of harassment;
- 383 acts of trespass upon private clinic property;
- 25 burglaries and thefts; and
- 7 extortionate acts of interference with clinics’ leases and other contractual relations.

Brief of Petitioners at 5–6, *Scheidler*, (No. 92-780) [hereinafter Petitioners’ Brief].

27. *NOW v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991), *aff’d*, 968 F.2d 612 (7th Cir. 1992), *rev’d*, 114 S. Ct. 798 (1994).

28. 18 U.S.C. § 1962(a) (1988) (prohibiting the investment of criminal money in legitimate businesses); *id.* § 1962(b) (prohibiting the maintenance or acquisition of businesses through criminal activity); *id.* § 1962(c) (prohibiting the operation of business through criminal activity).

29. *Scheidler*, 765 F. Supp. at 945.

30. Section 1962(a) provides in relevant part that:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) (1988).



terprise"<sup>31</sup> was derived directly or indirectly from racketeering activities.<sup>32</sup> Plaintiff NOW argued that defendants had indeed used money obtained through racketeering activities to acquire their enterprise, the Pro-Life Action Network (PLAN). Plaintiffs claimed that defendants received donations from anti-abortion supporters as a direct result of the publicity arising from the commission of predicate crimes defined as racketeering activity in the statute.<sup>33</sup> "It is well-known that the more outrageous and highly publicized the activities are, the more likely the RICO defendants and the enterprises are to receive large donations."<sup>34</sup>

Interpreting the statute as requiring a direct relationship between the racketeering acts and the income obtained, the district court dismissed the plaintiffs' § 1963(a) claim. The court found that the donations to defendant organizations were only an indirect result of the alleged racketeering activity, and that plaintiffs did not allege that any money was obtained from plaintiffs as a direct result of racketeering activity addressed toward plaintiffs. "Supporters of defendant organizations were not extorted, either directly or indirectly, into contributing to the organizations. While supporters may have contributed in order to promote the extortionate activities of defendants, their contributions in no way were derived from the pattern of racketeering alleged in the complaint."<sup>35</sup>

Next, plaintiffs contended that PLAN conducted the affairs of an enterprise through a pattern of racketeering in violation of § 1962(c)<sup>36</sup> of RICO. The district court read an implicit requirement into § 1962(c) that either the predicate acts of racketeering or the enterprise itself must have some profit generating motive.

---

31. 18 U.S.C. § 1961(4) states that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

32. The definition of "Racketeering Activity" in 18 U.S.C. § 1961(1) includes "conduct that is 'chargeable' or 'indictable' under a host of state and federal laws." *NOW v. Scheidler*, 114 S. Ct. 798, 803 (1994).

33. Plaintiffs claimed that defendants' predicate acts included extortion as defined in the Hobbs Act, 18 U.S.C. § 1951 (1988).

34. *Scheidler*, 765 F. Supp. at 940 (quoting Plaintiffs' RICO Case Statement at 22 (No. 86 C 7888)).

35. *Id.* at 941.

36. 18 U.S.C. § 1962(c) (1988) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

While not conceding that the statute included an economic-motive requirement, plaintiffs claimed that this requirement was satisfied because the defendants' activities had both decreased plaintiffs' business earnings and increased plaintiffs' cost of doing business.<sup>37</sup> The court rejected this argument, interpreting the implicit economic purpose requirement as requiring an intent by defendant to generate financial gain for the defendant, not an intent by the defendant to increase plaintiffs' costs.<sup>38</sup> Finally, the court declined to find that receipt of donations supporting a continuation of racketeering activity constituted an economic-motive for an enterprise, commenting that "the economic-motive requirement would lose all meaning should the courts consider an enterprise to be economically motivated solely because that enterprise happens to receive voluntary donations to support the continuation of racketeering activities directed toward a non-financial objective."<sup>39</sup>

While disagreeing with some of the trial court's reasoning, the Seventh Circuit Court of Appeals affirmed the dismissal of the plaintiffs' RICO cause of action.<sup>40</sup> Although the Seventh Circuit followed established precedent in finding that "although [RICO] had organized crime as its focus, [it] was not limited in application to organized crime,"<sup>41</sup> it did not believe RICO applied to the "activities of political terrorists which involve neither

---

37. Plaintiffs contended that defendants intimidated clients who would otherwise use clinic services while increasing costs related to doing business, such as costs associated with the need for additional security. *Scheidler*, 765 F. Supp. at 943.

38. *Id.*

39. *Id.* at 944. In their brief in *Scheidler*, petitioners point out that even with an economic-motive requirement read into the statute, any set of case facts can easily be manipulated to show the existence, or lack, of such a motive. In pointing out the futility of attempting to discern intent, especially the intent of an organization, petitioner queried whether defendants could rebut evidence of economic motive

by offering evidence of their personal political, religious, social and other motives, trying to demonstrate that these motives dwarf the economic incentives that their crimes provide. The courts would have to address the serious problem of how "overriding" or "significant" the economic motive need be: Does a million dollars a year establish sufficient economic motive? Does it matter that the recipient was barely scraping by before? Can an economic motive be "overridden" by a very sincere political, social or religious belief?

Petitioners' Brief, *supra* note 26, at 41.

40. The Seventh Circuit reviewed the 12(b)(6) dismissal de novo. *NOW v. Scheidler*, 968 F.2d 612, 616 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

41. *Id.* at 628 (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989)).

economic crimes nor economic motives."<sup>42</sup> The Seventh Circuit held that while economic gain need not be the sole motive of every RICO violation, the defendants' activities must be centered around the commission of economic crimes. The court appeared to view the "economic motivation" requirement as a counterbalance to the "vague, amorphous nature of the racketeering injury requirement."<sup>43</sup>

### C. Supreme Court Opinion

The Supreme Court granted certiorari to resolve a conflict among the Courts of Appeals on the putative economic-motive requirement of § 1962(c).<sup>44</sup> The Second, Seventh, and Eighth Circuits held that a RICO "enterprise" must be directed toward an economic goal,<sup>45</sup> while the Third Circuit maintained that because the predicate offense does not require an economic-motive, RICO requires no additional economic-motive.<sup>46</sup>

The Court unanimously reversed the Seventh Circuit's holding in *Scheidler*, finding that the statutory definitions of "enterprise" and "pattern of racketeering activity" did not indicate that an economic-motive was required to bring an action under § 1962(c). The Court rejected the argument that the use of the term "enterprise" in subsections (a) and (b) led to the inference of an economic-motive requirement in subsection (c).<sup>47</sup> The Court found that "enterprise" as used in (a) and (b) played a different role in the structure of those subsections than it did in subsection (c).

---

42. *Id.*

43. *Id.* at 629.

44. The Court limited its grant of certiorari to the § 1962(c) issue, thereby sustaining the District Court's dismissal of plaintiffs' antitrust claims and § 1962(a) claim. *Scheidler*, 114 S. Ct. at 802.

45. *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.) (in case of a political terrorist group, § 1962(c) did apply because the predicate racketeering acts were financially motivated, even if enterprise itself did not exist as a profit-making entity), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983) (Congressional concerns did not extend to activities of political terrorism which involve neither economic crimes nor economic motivations; Justice Department RICO Guidelines suggest that an association is not an enterprise unless it exists for purposes of an economic goal; the language of § 1962(a)-(b) which clearly require economic motive informs the meaning of the word enterprise in § 1962(c)).

46. *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

47. *Scheidler*, 114 S. Ct. at 804.

The "enterprise" referred to in subsections (a) and (b) is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a "profit-seeking" entity that represents a property interest and may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a "profit-seeking" entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity.

By contrast, the "enterprise" in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.<sup>48</sup>

The Court was also unconvinced by arguments suggesting that the congressional statement of findings accompanying RICO implied an economic-motive requirement. In this statement, Congress referred to RICO crimes as activities that "drain [ ] billions of dollars from America's economy,"<sup>49</sup> which the court of appeals interpreted as implying an economic-motive requirement throughout the Act. The Court disagreed, pointing out that "predicate acts, such as the alleged extortion, may not benefit the protesters financially but still may drain money from the economy."<sup>50</sup> The Court also commented that a statement in congressional findings was "a rather thin reed" upon which to base an economic-motive requirement.<sup>51</sup>

The Court also dismissed the Seventh Circuit's contention that the Department of Justice's RICO prosecution guidelines, providing that prosecutors should only indict associations motivated by an economic goal, supported the economic-motive requirement. The Court responded that "[w]hatever may be the appropriate deference afforded to such internal rules . . . for our purposes we need note only that the Department of Justice amended its guidelines in 1984. The amended guidelines provide that an association-in-fact enterprise must be 'directed toward an economic or other identifiable goal.'"<sup>52</sup>

---

48. *Id.*

49. *Id.* at 805 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922 (1970)).

50. *Id.*

51. *Id.*

52. *Id.* (citation omitted).

Finally, the Court found no ambiguity in the statute itself<sup>53</sup> nor any "clearly expressed legislative intent to the contrary."<sup>54</sup> They observed that Congress had the legislative ability to narrow the sweep of the statute simply by inserting the phrase "economic-motive" and "has not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive."<sup>55</sup>

Having affirmed the plaintiffs' ability to sustain a RICO cause of action without a showing that the defendant was motivated by economic considerations, the Court then remanded the case to the district court for a trial on the remaining RICO claims. The Court's holding was quite narrow: RICO contains no economic-motive requirement. The Justices did not reach any First Amendment questions in deciding the case because the respondent's First Amendment arguments did not relate to this question of the statutory construction of RICO.<sup>56</sup> However, the possible use of RICO to quell acts of social and political protests did concern Justices Kennedy and Souter, as discussed below.

## II. THE APPLICATION OF RICO TO ANTI-ABORTION PROTESTERS

*[T]hose whose conscience demands that they defy authority in ways that involve great consequences must be willing to accept some penalty. They have no right to expect to be exemplary*

---

53. According to Bruce Fein, a legal writer in Washington, D.C.:

The Court is going along with what Justice [Antonin] Scalia has been saying for a long time. Judges should rely on the words of a statute, and they shouldn't smuggle in words based on what they think Congress intended to say. We have a democratic system, and if you want Congress to amend a statute, you do it through the political process, not by having judges write words into statutes.

James H. Andrews, *Ruling Aids Pro-Choice Group*, CHRISTIAN SCI. MONITOR, Jan. 26, 1994, at 6 (alteration in original); see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-54 (1987) (Scalia, J., concurring).

54. *Scheidler*, 114 S. Ct. at 806 (quoting *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993)).

55. *Scheidler*, 114 S. Ct. at 805.

56. The majority opinion did not address any First Amendment questions.

None of the respondents made a constitutional argument as to the proper construction of RICO in the Court of Appeals, and their constitutional argument here is directed almost entirely to the nature of their activities, rather than to the construction of RICO. We therefore decline to address the First Amendment question argued by respondents and the *amici*.

*Id.* at 806 n.6.

*martyrs without suffering some degree of martyrdom. No cross, no crown. But a crown without a cross is precisely what many seem to demand as a right.*<sup>57</sup>

#### A. Justice Souter's Concurrence in *Scheidler*

In his concurring opinion, Justice Souter, joined by Justice Kennedy, noted that the RICO statute can withstand a facial First Amendment challenge without an economic-motive requirement because the economic-motive test provided a poor method for protecting First Amendment interests for two reasons.<sup>58</sup> First, while the economic-motive requirement prevented application of RICO to many protest groups, including anti-abortion groups,<sup>59</sup> it would not protect all legitimate protest groups because some of them would possess the required "economic-motives."<sup>60</sup> Second, "an economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling."<sup>61</sup> Under the economic-motive requirement, the application of RICO hinged upon factual distinctions bearing no

---

57. Joseph W. Krutch, *If You Don't Mind My Saying So . . .*, 37 AM. SCHOLAR 15, 16 (1967-68).

58. The concurrence also notes that the Court may only interpret a statute so as to avoid a First Amendment conflict when the statute's meaning is in doubt. *Scheidler*, 114 S. Ct. at 806 (Souter, J., concurring) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). In *Scheidler* the Court could not interpret RICO to avoid a possible First Amendment conflict because RICO's language is "unambiguous." *Id.*

59. *See, e.g.*, *West Hartford v. Operation Rescue*, 792 F. Supp. 161, 168 (D. Conn. 1992) (granting summary judgment against RICO claim because the defendants' "clearly expressed purpose is to stop the performance of abortions, not to make money"), *vacated*, 991 F.2d 1039 (2d Cir.), *cert. denied*, 144 S. Ct. 185 (1993).

60. *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring) ("[E]ntities engaging in vigorous but fully protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits."); *see also* Gale, *supra* note 12, at 1368-70.

61. *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring); *see also* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God — Is This the End of RICO?"*, 43 VAND. L. REV. 851, 970 (1990) (arguing that the economic-motive requirement should be eliminated because it "effectively eliminates RICO's application to organized crime-related violence that is not specifically tied to its money making endeavors; it also makes RICO's application problematic to other violence-based conspiracies, including international terrorist organizations and domestic anti-Semitic or white hate groups").

relation to the harm a defendant's actions cause society.<sup>62</sup> For example, in one case the economic-motive requirement protected a terrorist group from RICO liability,<sup>63</sup> while in another case creative pleading allowed the government to show that terrorists possessed "economic motivations."<sup>64</sup> Therefore, the economic-motive requirement involved a significant degree of uncertainty at the pleading stage, and still left legitimate protesters vulnerable to creatively pleaded RICO suits alleging tangential economic motives. Without the economic-motive test, parties need not worry about the defendant's economic activities and may instead focus on the defendant's alleged crimes and any constitutional protection the defendant's conduct should receive, thereby directly addressing First Amendment issues.

In *Scheidler* the respondents and amici stressed the possible chilling effect that RICO suits could have upon protected First Amendment activities.<sup>65</sup> Conversely, the petitioners, NOW and

---

62. Some would argue that this is as Congress intended by enacting RICO. However, the more logical argument is that Congress intended to prevent the societal harm caused by organized crime by striking at criminals' pocketbooks, rather than merely attempting to prosecute only those who derived wrongful profits.

The degree to which plaintiffs in pre-*Scheidler* anti-abortion protester cases had to plead creatively in hopes of finding an adequate economic motive illustrates the absurdity of the minor factual distinctions that were of overriding importance under the economic-motive test. *Cf. supra* note 39 (describing the difficulty of applying an economic-motive requirement to protester groups).

63. *See United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983) (reversing RICO convictions of Croatian nationalists using terror, assassination, bombings, and violence because they lacked an economic-motivation).

64. *See United States v. Bagaric*, 706 F.2d 42 (2d Cir.) (upholding criminal RICO convictions against Croatian nationalists because predicate act of extorting money provided economic-motive), *cert. denied*, 464 U.S. 840 (1983); *see also* Blakey & Perry, *supra* note 61, at 970-71 n.390 (noting that many domestic violent crime organizations support their economic activities through fraud).

65. Brief of People for the Ethical Treatment of Animals, Inc. et al. in Support of Respondents at 2-3, *Scheidler* (No. 92-780) [hereinafter PETA Brief] (the application of RICO to social and political advocates, "would have a strong chilling effect on activists whose nonviolent acts of civil disobedience might otherwise bring only minor sanctions, but who would rightly fear severe penalties under RICO"); *see also Racketeering Ruling Leaves Some Uneasy*, N.Y. TIMES, Feb. 7, 1994, at A16 (letter by Carol M. Booker, Greenpeace General Counsel) (although Greenpeace "has never condoned violence or destruction of property, [and it] does not expect the Supreme Court decision to affect its own peaceful, nonviolent protests" it does recognize "the potential for serious harm that polluters and others could inflict simply by burdening with racketeering suits those who protest their destructive activities, while First Amendment issues are still being sorted out by the lower courts"); *cf. Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (a statute reaching protected speech will chill individuals from exercising their First Amendment rights because for every individual who tests "the limits of the statute[ ], many more will choose the cautious path and not speak at all").

the clinics, emphasized that RICO seeks to punish patterns of intimidation, threatening behavior, and violence that are not protected by the First Amendment.<sup>66</sup> While not attempting to resolve this issue, the concurrence noted that “the Court’s opinion does not bar First Amendment challenges to RICO’s application in particular cases.”<sup>67</sup> Justice Souter recognized that “RICO actions could deter protected advocacy,” and wrote that lower courts should “bear in mind the First Amendment interests that could be at stake” in RICO actions.<sup>68</sup> The economic-motive requirement was a poor instrument to protect defendants’ First Amendment rights. These rights are protected independently of

---

The amici propose the following hypothetical:

[I]magine that activists opposed to vivisection have learned of a research center that is engaged in needless destruction of animals for no apparent scientific good, and that there is a complete failure to reach an accord with the research center at least to eliminate the projects that result in the needless destruction of animals. Activists then [stage] . . . a sit-in to draw public attention to the experiments, which they denounce . . . as “needless, wasteful, and cruel.” The owners of the research center sue for damages in a civil action in a federal district court with appropriate jurisdiction, and the court awards damages. If the activists decide to repeat this action or use another form of civil disobedience, should the second plaintiff be able to apply RICO to the activists?

PETA Brief, *supra*, at 8 (amici claim that these acts would constitute “extortion” under the Hobbs Act).

66. Petitioners noted that the threat of RICO suits against protesters “could very well have the effect of channeling toward lawful expressive activities those who might otherwise engage in both non-violent and violent protest tactics, thereby in fact augmenting the exercise of First Amendment rights.” Brief of the NOW Legal Defense and Education Fund et al. in Support of Petitioners, *Scheidler* (No. 92-780) [hereinafter Brief of NOW Legal Defense and Education Fund].

Protecting “marginal speech” helps guarantee that “core” First Amendment speech is fully protected and avoids overbreadth problems. However, as free-speech protection is extended to areas far from “core” political speech, “judges will react differently to these more marginal areas so that the strict scrutiny protection of core speech will be diluted if the analysis does not distinguish the core from the more penumbra varieties of speech.” GERALD GUNTHER, *CONSTITUTIONAL LAW*, 1072 n. 3 (12th ed., 1991); see also Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 315 (“First Amendment protection can be like an oil spill, thinning out as it broadens.”).

67. *Scheidler*, 114 S. Ct. at 806 (Souter, J., concurring).

68. *Id.* at 807 (Souter, J., concurring); cf. *Alexander v. United States*, 113 S. Ct. 2766, 2776 (1993) (Kennedy, J., dissenting) (noting that majority’s decision upholding seizure of books and films under RICO “undermines free speech and press principles essential to our personal freedom”); *In re Assets of Myles Martin*, 1 F.3d 1351, 1361 n.11 (3d Cir. 1993) (discussing possible First Amendment implications of book seizures under RICO).



the RICO statute;<sup>69</sup> courts must now determine exactly how these independent protections apply to RICO defendants engaged in some protected conduct.

### B. Case Law Applying RICO to Anti-Abortion Protesters

Although the Seventh Circuit dismissed the plaintiffs' RICO claims against the anti-abortion protester defendants in *Scheidler*, other circuit and district courts have decided similar cases on grounds other than the defendant's lack of an economic-motive.<sup>70</sup> These cases are valid precedent and may help predict the course of future RICO suits against anti-abortion protesters.

Circuit courts that allowed RICO suits against protesters because their opinions never imposed an economic-motive requirement<sup>71</sup> were careful to consider the protesters' First Amendment rights. For example, in *Northeast Women's Center, Inc. v. McMonagle*,<sup>72</sup> the Third Circuit approved of the district court's "careful" instructions to the jury with respect to the rights of anti-abortion protesters.

The district court told the jury, "The First Amendment of the United States Constitution guarantees the defendants a right to express their views. The defendants have a constitutional right to attempt to persuade the Northeast Women's Center to stop performing abortions. They have a constitutional right to attempt to persuade the Center's employees to stop working there and they have a constitutional right to attempt to persuade the Center's patients not to have abortions there. . . . The mere fact, also, that the defendants or some of their protests may be coercive or offensive, does not diminish the First Amendment right to protest."<sup>73</sup>

---

69. *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring) ("[L]egitimate free-speech claims may be raised and addressed in individual RICO cases as they arise."); cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (because the statute at issue regulated a substantial amount of conduct that is subject to state regulation, "whatever overbreadth may exist should [thus] be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied").

70. See, e.g., *Feminist Women's Health Ctr. v. Roberts*, No. C86-161(V)D, 1988 U.S. Dist. LEXIS 16325, at \*13 n.2 (W.D. Wash. Mar. 11, 1988).

71. See cases cited *supra* note 45.

72. 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

73. *Id.* at 1349. At least one commentator agrees with the Third Circuit's approval of the trial court's jury instructions:

[T]he *McMonagle* court insured that only unprotected conduct established a prima facie RICO claim . . . . The *McMonagle* court's method of analysis, despite agreement or disagreement with the jury's eventual verdict, demonstrates how a court may adequately balance the con-

In RICO suits against anti-abortion protesters or against abortion rights counter-protesters, courts must consider both the protesters' First Amendment rights and the constitutional rights of women seeking abortions.<sup>74</sup> The following three cases illustrate the variety of theories and factual situations that may arise in such RICO cases and show some of the different results such suits may produce. They also demonstrate that the absence of an economic-motive requirement does not guarantee that abortion rights advocates will have an easy time finding anti-abortion protesters liable under RICO.<sup>75</sup>

### 1. *Feminist Women's Health Center v. Roberts*

In *Feminist Women's Health Center v. Roberts*,<sup>76</sup> the plaintiff, the Feminist Women's Health Center ("Center"), sued the defendants<sup>77</sup> in the Western District Court of Washington for violations of RICO committed during anti-abortion protests.<sup>78</sup> Beginning on October 5, 1983, the defendants attempted to close

---

flicting First Amendment rights of civilly disobedient abortion protesters with the rights of their individual victims.

Kelly L. Faglioni, Note, *Balancing First Amendment Rights of Abortion Protestors with the Rights of Their "Victims"*, 48 WASH. & LEE L. REV. 347, 380 (1991).

It also appears that abortion rights advocates are sensitive to the anti-abortion protesters' free speech concerns:

We note here that the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

NOW v. Scheidler, 968 F.2d 612, 616 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

74. "The same constitution that protects the [protesters'] right to free speech also protects the [Clinic's] right to [provide] abortion services and the patient's rights to receive those services." *McMonagle*, 868 F.2d at 1349 (quoting trial court's jury instructions); see also Luke T. Cadigan, Note, *Balancing the Interests: A Practical Approach to Restrictions on Expressive Conduct in the Anti-Abortion Protest Context*, 32 B.C. L. REV. 835, 845-46 (1991) (noting the conflicting constitutional rights involved in anti-abortion protests).

75. Cf. William H. Freivogel, *RICO Ruling May Not Help Clinics That Much*, ST. LOUIS POST-DISPATCH, Jan. 30, 1994, at 1B, 5B (noting that abortion rights advocates still face many legal challenges in RICO suits against anti-abortion protesters).

76. No. C86-161(V)D, 1988 U.S. Dist. LEXIS 16325 (W.D. Wash. Mar. 11, 1988). This case is currently on appeal before the Ninth Circuit.

77. The plaintiffs sued eight individual protesters and an anti-abortion group, Choose Life, of which all the protesters were members. *Id.* at \*1.

78. *Id.* at \*2-\*4. The court refused to read an economic-motive requirement into RICO. *Id.* at \*13 n.2.

down the plaintiff Center<sup>79</sup> by picketing, forming a gauntlet through which those entering the clinic must pass, obstructing the center's parking lot with cars, and trespassing on Center property.<sup>80</sup> In addition, the clinic received a bomb threat on September 22, 1983,<sup>81</sup> and one of the defendants set fire to the clinic on three occasions.<sup>82</sup> The plaintiffs alleged that the defendants "conducted their enterprise through a pattern of racketeering activity including arson, bomb threats, trespass, coverup [and extortion]."<sup>83</sup>

The plaintiffs were largely unsuccessful and the court granted many of the defendants' motions for summary judgment because of basic technical flaws and inadequacies in the evidence supporting the allegations. The plaintiffs' allegation that the defendants were involved in an "enterprise" under RICO that engaged in both protected acts of expression and unprotected activity survived the defendants' summary judgement challenge.<sup>84</sup> However, the plaintiffs were less successful in showing that the defendants committed the requisite predicate acts under RICO. For example, the court found no evidence to support the allegation that the defendants were involved with the bomb threat called in to the clinic.<sup>85</sup> Likewise, although one defendant admitted to setting three fires in the clinic, he claimed he acted alone and the plaintiffs could produce only weak circumstantial evidence showing that the other defendants knew of the arson and encouraged the arsonist.<sup>86</sup> The plaintiffs' claim of trespass as a predicate offense failed the basic RICO requirement that predicate State offenses triggering RICO must carry a penalty of more than one year in jail.<sup>87</sup> However, the plaintiffs' claim that the defendants committed extortion survived the defendants' motion for summary judgment.<sup>88</sup>

---

79. *Id.* at \*2-\*3 ("Defendants have all acknowledged that they oppose abortion on religious grounds and that they wished to see the clinic closed.").

80. *Id.* at \*3.

81. *Id.* at \*3-\*4.

82. *Id.* at \*4. The third fire destroyed the clinic. *Id.*

83. *Id.* at \*14.

84. *Id.* at \*13.

85. *Id.* at \*14.

86. *Id.* at \*16.

87. *Id.* at \*14.

88. The court found that plaintiffs proffered evidence creating "genuine issues of material fact" as to whether the defendants

intended to create fear in the clinic's staff and patients and to result in the clinic's closure. The evidence regarding trespasses, gauntlet-style

## 2. *Northeast Women's Center v. McMonagle*

Abortion rights advocates successfully applied RICO to anti-abortion protesters in *Northeast Women's Center, Inc. v. McMonagle*.<sup>89</sup> The Northeast Women's Center ("Center") sued twenty-six abortion protesters for RICO violations allegedly committed during anti-abortion protests between 1984 and 1986. The defendants, accompanied by other protesters, stormed the clinic on four separate occasions. They knocked down employees, blocked access to rooms, tossed medical supplies onto the floor, and damaged medical equipment.<sup>90</sup> The protesters also regularly blocked entrances to the Center, pounded on the windows of employees' cars, physically harassed patients, and created noises which placed patients under stress during medical procedures.<sup>91</sup>

The district court found the defendants liable for extortion under the Hobbs Act and the Third Circuit affirmed the district court's findings: "The 'right' on which the Center's case was predicated was the right to continue to operate its business. The Center's extortion claim was that Defendants used force, threats of force, fear and violence in their efforts to force the Center out of business."<sup>92</sup> The Hobbs Act violations served as the predicate offenses under RICO and the district court awarded the plaintiffs \$887 for damage to the medical equipment.<sup>93</sup> Under RICO this

---

picketing, hangup telephone calls or calls making false appointments and blocking ingress to and egress from the clinic or its parking lots may serve, insofar as it applies to the . . . defendants, as evidence that these defendants committed the predicate offense of extortion under the Hobbs Act.

*Id.* at \*20.

89. 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

90. *Id.* at 1345.

91. *Id.* at 1346.

92. *Id.* at 1350.

93. *Id.* at 1347. The Third Circuit held that:

The RICO requirement of injury is met by evidence of injury to plaintiff's business *or* property. The Center claimed that it suffered tangible injury to its medical equipment during the forcible entry which was part of the alleged pattern of extortionate acts designed to drive it out of business. RICO requires no more.

*Id.* at 1349. The district court also awarded the plaintiffs approximately \$90,000 in punitive and compensatory damages for trespass. *Id.* at 1347.

RICO states that "[a]ny person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1988).

award was trebled to \$2661.<sup>94</sup> In addition, the plaintiffs also received \$64,946.11 in attorney's fees and costs under RICO's fee shifting provision.<sup>95</sup>

The judge clearly instructed the jury as to the defendants' First Amendment rights.<sup>96</sup> The result shows that the jury carefully separated the defendants' protected speech and unprotected extortion and limited the damages to compensation for conduct directly caused by violent, unprotected actions. The Circuit Court found

[t]he jury's award of damages under RICO was based on the destruction of the Center's medical equipment during one of the incidents of forcible entry into the Center. This award establishes that the jury found that Defendants' actions went beyond mere dissent and publication of their political views.<sup>97</sup>

The result was narrowly tailored and clearly only held defendants liable for unprotected behavior. It is doubtful that imposition of liability for the willful destruction of clinic equipment while trespassing could deter activities fully protected by the First Amendment. Individuals who purposefully damage another's property while trespassing do so with full knowledge that they are breaking the law.

### 3. *Town of West Hartford v. Operation Rescue*

In *West Hartford v. Operation Rescue*,<sup>98</sup> the Second Circuit rejected the plaintiff's claims that anti-abortion protesters com-

---

94. See 18 U.S.C. § 1964(c) (1988).

95. See *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 470 (3d Cir. 1989), cert. denied, 494 U.S. 1068 (1990); see also 18 U.S.C. § 1964(c) (allowing victorious RICO plaintiffs to collect "a reasonable attorney's fee"). On appeal, the defendants argued that the attorney fee award was "not 'rationally related' to the plaintiff's RICO damages." 889 F.2d at 470. The Third Circuit affirmed the trial court's attorney fee award. *Id.* at 477.

96. See *supra* text accompanying note 73; cf. *McMonagle*, 868 F.2d at 1345 (stating that the "lawsuit was brought alleging illegal and tortious activity by Defendants that went beyond Defendants' constitutional rights of speech and protest").

97. *McMonagle*, 868 F.2d at 1349.

98. 915 F.2d 92 (2d Cir. 1990). The facts and result of *Brookline v. Operation Rescue*, 762 F. Supp. 1521 (D. Mass. 1991), are very similar to those of *West Hartford*.

The Town charges that the defendants organized and carried out a series of sit-ins, clinic invasions and blockades at local abortion clinics. Prior to each protest, the defendants informed Town officials that if the Town permitted the protest to go forward without interference, the defendants would in turn limit the number of protests and thus limit the expense to the Town of policing the protests. If the Town interfered with the protests, however, the Town would incur resistance and

mitted extortion under the Hobbs Act — a RICO predicate offense — and therefore dismissed the plaintiff's RICO claim for lack of subject matter jurisdiction. This case involves familiar facts: anti-abortion protesters picketed, distributed leaflets, attempted to persuade patients not to enter the clinic, blocked entry to the clinic, and entered the clinic, thereby preventing the treatment of patients.<sup>99</sup> Hundreds of anti-abortion protesters were arrested during two "takeovers" of the clinic.<sup>100</sup> The district court granted the plaintiff's request for a preliminary injunction barring the defendants from entering or remaining on the Center's property.<sup>101</sup> The federal court's injunction was based on a pendant State law claim because RICO does not provide for injunctive relief.<sup>102</sup> The defendants indirectly attacked the injunction by seeking dismissal of the RICO claim for lack of subject matter jurisdiction, because the State law claim was in federal court only due to the RICO claim.<sup>103</sup>

The Town's novel theory of extortion proved vulnerable to even a subject matter attack. Plaintiff contended that the defendants' activities were "designed to 'extort' from the Town (1) a softened response to future protest activities, and (2) the reduction or abandonment of charges against those arrested in connec-

---

severe expense in carrying out arrests and court processing of the protesters. The Town alleges that this conduct constitutes extortion chargeable under the Hobbs Act, 18 U.S.C. § 1951. It further alleges that the defendants engaged in a pattern of such extortionate conduct within the meaning of the RICO act, which caused economic injury to the plaintiff actionable under 18 U.S.C. § 1964(c).

726 F. Supp. at 1522–23. The *Brookline* court explicitly followed *West Hartford* in holding that "upon these facts, a plaintiff town cannot establish either the pattern of underlying racketeering acts of extortion . . . or the requirement . . . that it has been 'injured in [its] business or property.'" *Id.* at 1523.

99. *West Hartford*, 915 F.2d at 94.

100. *Id.*

101. *Id.* at 93.

102. *West Hartford v. Operation Rescue*, 726 F. Supp. 371, 376–78 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990).

103. The standard for a 12(b)(1) motion to dismiss is higher than that for a 12(b)(6) motion to dismiss. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (holding that a case involves no federal question if the federal cause of action is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"); see also *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70–71 (1978) (noting that a court should dismiss a cause of action for lack of federal jurisdiction only if it is patently without merit).

In *West Hartford*, the court found that the plaintiff's RICO claim failed this "minimal, yet unyielding, jurisdictional standard." 915 F.2d at 100, 104.

tion with the protests."<sup>104</sup> The court rejected several theories designed to support these allegations and held that the plaintiff did not properly allege that the defendants injured the plaintiff's "business or property" by their resistance to police efforts to clear the protesters from the Center.<sup>105</sup> It also rejected plaintiff's tenuous theory of indirect extortion.<sup>106</sup> Finally, even had the Town shown a violation of the Hobbs Act, it could not have collected damages under RICO because it could show no injury to its business or property. The court held that expenses the plaintiff incurred in dealing with the protesters, such as overtime pay, are not recoverable under RICO.<sup>107</sup> The court dismissed the plaintiff's RICO claim as "meritless."<sup>108</sup> The plaintiff's RICO claims failed without any need for the anti-abortion protesters to seek the First Amendment's protection.

### III. RICO AND THE FIRST AMENDMENT

*It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. . . . But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.*<sup>109</sup>

While the existing case law on RICO and anti-abortion protests is instructive, it does not fully address the range of First Amendment issues that will inevitably arise in such cases.<sup>110</sup> The above cases show that RICO may be finely tailored to specific illegalities committed during anti-abortion protests and that it

---

104. *West Hartford*, 915 F.2d at 101.

105. *Id.* at 102 ("the term 'property' cannot plausibly be construed to encompass altered official conduct"). Plaintiff Town claims that the defendants' following acts constitute extortion under the Hobbs Act: "resisting arrest, refusing to identify themselves at arraignment, falsely claiming the use of excessive force during arrest, and threatening to renew their demonstrations." *Id.* at 106 (Kearse, C.J., dissenting). It appears doubtful these acts constitute "the wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2) (1988).

106. *West Hartford*, 915 F.2d at 102. The plaintiff claimed the anti-abortion protesters indirectly extorted the Town because the Town was unable to impede the protesters' efforts to extort the Center.

107. *Id.* at 103.

108. *Id.* at 104 (plaintiff's RICO claims suffered from "severe inadequacies").

109. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941) (Frankfurter, J.).

110. For a sample of the First Amendment issues commentators find relevant to RICO cases, see Califa, *supra* note 17, at 821-24; Faglioni, *supra* note 73, at 382-45; Gale, *supra* note 12, at 1370-74.

may be difficult for RICO plaintiffs to avoid dismissal or summary judgment, but they do not yet provide the clear guidelines necessary to ensure that the threat of RICO does not chill protesters from exercising their constitutional rights.<sup>111</sup>

#### A. *Protected and Unprotected Protest Activities*

Protest activity may be divided into three groups: (1) protest actions, such as peaceful picketing and the distribution of leaflets, fully protected by the First Amendment; (2) civil disobedience involving illegal but nonviolent actions unprotected by the First Amendment, such as trespass; and (3) organized efforts to intimidate and threaten others that are unprotected by the First Amendment.<sup>112</sup> In general, protesters sued under RICO may argue that their activities consist entirely of activities falling within the first and second categories. They may specifically seek immunity from RICO by arguing that: (1) serious breaches of the law are only committed by a few fringe elements unsanctioned by the rest of the demonstrators;<sup>113</sup> and (2) some predicate acts under RICO are nonetheless protected by the First Amendment.<sup>114</sup> The following two sections address these First Amendment concerns.

---

111. See generally Hao-Nhien Q. Vu, Recent Development, *A Response to Soule and Weinstein: National Organization for Women v. Scheidler Is Just Hard Facts Making Bad Law*, 4 UCLA WOMEN'S L.J. 399 (1994).

112. Brief of NOW Legal Defense and Education Fund, *supra* note 66, at 14-15. The First Amendment protects the freedom of speech and assembly, U.S. CONST. amend. I, as well as actions classified as "symbolic speech," *United States v. O'Brien*, 391 U.S. 367 (1968). Civil disobedience does not qualify for First Amendment protection because "the purposeful violation of an otherwise valid law is what generally differentiates civil disobedience from forms of dissent such as picketing or holding a public march, activities that are considered lawful and that do have the protection of the First Amendment." Barbara J. Katz, Comment, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904, 905 (1985).

113. The Supreme Court rejected the application of the Hobbs Act in a case involving collective bargaining because a broad definition of extortion would cover all overtly coercive conduct in the course of an economic strike . . . . The worker who threw a punch on a picket line, or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years' imprisonment and a \$10,000 fine.

*United States v. Enmons*, 410 U.S. 396, 410 (1973).

114. Some RICO predicate acts, such as extortion and wire fraud, 18 U.S.C. § 1961(1)(B) (1988), need not involve violence and may involve various forms of speech. Defendants may argue that any nonviolent symbolic act should be protected. *Cf. Cadigan*, *supra* note 74, at 895 ("Courts would do well to remember the foremost importance of free speech in our society and only prohibit that which has the potential of harming others.").



### B. *The Court's Treatment of "Hybrid" Protests*

Many protests at abortion clinics may be termed "hybrid" protests consisting of a combination of protected speech and unprotected activities. For example, some of the protests may be limited to peaceful pickets on public land, peaceful discussions with patients, and the distribution of literature, while every few weeks the protesters enter the clinic, push employees and damage clinic equipment. At the very least: "The [F]irst [A]mendment should protect protesters to the extent that they do not harass the patients and clinic staff and to the extent that they leave open access to the clinic."<sup>115</sup> However, violent actions such as bombing, murder, and arson are just as clearly unprotected by the First Amendment.<sup>116</sup> Also, many illegal actions, while unprotected by the First Amendment, are insufficient to trigger RICO liability.<sup>117</sup> In "hybrid" protests involving protected and unprotected activities, the protected activities "in a context of violence can lose [their] significance as an appeal to reason and become part of an instrument of force."<sup>118</sup>

Nothing in the First Amendment prevents the imposition of liability for the consequences of violent conduct. But courts may not impose liability for protected conduct. Therefore, in situations involving "hybrid" protests, courts may only find defendants liable for damages "directly and proximately caused" by wrongful, unprotected conduct.<sup>119</sup> The leading case on such "hybrid" protests is *NAACP v. Claiborne Hardware Co.*,<sup>120</sup> in which the Supreme Court held that liability for damages arising out of activities containing some protected speech deserves special scrutiny: "[T]he presence of activity protected by the First Amend-

---

115. Gale, *supra* note 12, at 1371.

116. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (the "First Amendment does not protect violence"); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (violent demonstrations lose First Amendment protection); *see also* *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2541 n.1 (1992) (cross burning punishable as arson, criminal damage to property, and a terroristic threat).

Some anti-abortion protests become violent. *E.g.*, Ross, *supra* note 10, at A1 ("What were once peaceful protests have escalated into acts of force and terror . . .") (quoting Senator Barbara Boxer); *see also* sources cited *supra* notes 6 and 10.

117. *See, e.g., infra* text accompanying note 138.

118. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).

119. *Claiborne Hardware*, 458 U.S. at 918 ("Only those losses proximately caused by unlawful conduct may be recovered.").

120. 458 U.S. 886 (1982) (8-0 decision).

ment imposes restraints on [1] the grounds that may give rise to damages liability and . . . [2] the persons who may be held accountable for those damages.”<sup>121</sup> A few instances of violence or intimidation do not taint an otherwise peaceful and constitutionally protected protest.<sup>122</sup> In *Claiborne Hardware* the Supreme Court found that ten instances of violence<sup>123</sup> in a seven year boycott of white businesses were insufficient to allow the imposition of liability upon the protesting organizations for money the boycott cost white businesses.<sup>124</sup>

The *Claiborne Hardware* Court also held that factual findings that support allegations that violent acts proximately caused a plaintiff’s losses must not be “insubstantial findings of fact screening reality.”<sup>125</sup>

A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be char-

121. *Id.* at 916–17.

122. The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the collective effort.

*Id.* at 933. The Court also disapproved of the Mississippi Supreme Court’s statement that, “[i]f any of these factors — force, violence, or threats — is present then the boycott is illegal.” *Id.* at 895 (quoting *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (1980)); see also *Meadowmoor Dairies*, 312 U.S. at 293 (“[T]he right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force.”).

123. The trial court listed ten instances of violence associated with the boycott. Of these, four instances were definitely connected with the boycott, four were probably connected with the boycott, and two were even less certainly connected with the boycott. The lower court opinion held that these incidents “‘strikingly’ revealed the ‘atmosphere of fear that prevailed among blacks from 1966 until 1970.’” *Claiborne Hardware*, 458 U.S. at 904.

However, the Supreme Court found that the plaintiffs did not uphold their burden of proof that the violent incidents were the proximate cause of the plaintiffs’ lost business from the boycott. The Court noted that five of the incidents occurred in 1966 and the other five were undated, *id.* at 906, and that the plaintiffs “failed to demonstrate that business losses suffered in 1972 — three years after this lawsuit was filed — were proximately caused by the isolated acts of violence found in 1966.” *Id.* at 923. The plaintiffs failed to distinguish between business losses caused by the constitutionally protected aspects of the boycott and losses caused by coercion backed by violence and threats. The Court found it “inconceivable that a boycott launched by the unanimous vote of several hundred persons succeeded solely through fear and intimidation.” *Id.* at 922.

124. Of course, the individuals committing the violent acts were still responsible for the civil and criminal consequences of their actions.

125. *Meadowmoor Dairies*, 312 U.S. at 293.

acterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must [1] be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, [2] that carefully identify the impact of such unlawful conduct, and [3] that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.<sup>126</sup>

Specifically, the plaintiff must prove "special facts" indicating pervasive violence and intimidation in order to meet its burden of proof.<sup>127</sup> In *McMonagle*,<sup>128</sup> the defendants were held civilly liable for trespassing on the plaintiff's property and damaging the plaintiff's equipment.<sup>129</sup> This liability passes the *Claiborne Hardware* test because the clinic proved a tangible injury that could not possibly have resulted from protected First Amendment activity.<sup>130</sup> This is the type of "precise regulation" and causation the *Claiborne Hardware* Court mandated.

In *Claiborne Hardware*, the Mississippi Supreme Court's ambiguous findings that the boycott was successful because many

126. *Claiborne Hardware*, 458 U.S. at 933-34.

127. [I]f "special facts" such as those presented in *Meadowmoor Dairies* "appeared in an action for damages after picketing marred by violence had occurred," they might "support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered."

*Id.* at 923 n.64 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 731-32 (1966)).

In *Meadowmoor Dairies* the Court found that the defendant's union demonstrations involved over fifty instances of "pervasive" violence including: explosive bombings, stench bombings, arson, severe beatings, and the destruction of property. *Meadowmoor Dairies*, 312 U.S. at 291-92. The case involved

"intimidation of the customers of the plaintiff's vendors by the commission of acts of violence," and the [Illinois] supreme court justified its decision because picketing, "in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character."

*Id.* at 294 (quoting findings of state court master).

128. *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989); *see supra* part II.B.2.

129. *McMonagle*, 868 F.2d at 1347.

130. It is doubtful the clinic could prove, for example, that it should recover damages under RICO for lost business caused by the protesters' illegal acts. Such losses are caused by a combination of fully protected picketing and unprotected intimidation and violence. However, due to the virtual impossibility of separating these components, it is unlikely that a RICO plaintiff could bear the burden — imposed by *NAACP v. Claiborne Hardware Co.* — of proving the losses were proximately caused only by unprotected activity.

African-American citizens were intimidated by threats of social ostracism and vilification did not meet the “precision of regulation”<sup>131</sup> required by the First Amendment.<sup>132</sup> The Supreme Court cautioned lower courts to be wary of claims that violence and threats taint protest campaigns involving protected activities, warning them: (1) not to focus on the violent activities; and (2) to require a high level of proof before admitting such claims.

The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees.<sup>133</sup>

### C. *Civil Disobedience Versus Organized Campaigns of Intimidation*

The few cases applying RICO to anti-abortion protests demonstrate that in order to trigger RICO civil liability protesters must engage in violent, destructive activities or intimidation supported by the threat of violence.<sup>134</sup> Abortion rights advocates

131. “No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, ‘precision of regulation’ is demanded.” *Claiborne Hardware Co.*, 458 U.S. at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

132. *Id.* at 920–24.

133. *Id.* at 934.

134. The First Amendment does not protect violence, *see supra* note 116, extortion, *see infra* note 142, or explicit threats, *see infra* note 157, but many coercive tactics are protected by the First Amendment. *See, e.g., Claiborne Hardware*, 458 U.S. at 910 (“offensive” and “coercive” speech is protected by the First Amendment); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“[S]o long as the means are peaceful, the communication need not meet standards of acceptability.”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”); *Faglioni, supra* note 73, at 366 (“The First Amendment will protect expression designed to have an offensive or coercive effect as long as the manner of expression remains peaceful.”); *see also R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2559 (1992) (White, J., concurring) (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (protecting flag burning); *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (protecting “offensive” speech in part because of the value of the inexpressible emotions raised by certain language).

For example, in *Claiborne Hardware*, “store watchers” wrote down the names of African-American individuals who violated a boycott against Anglo-American businesses and published the names in a newspaper, 458 U.S. at 903–04. Those persons “were branded as traitors, . . . called demeaning names, and socially ostracized.”

allege that anti-abortion protesters commit a variety of criminal offenses that may serve as predicate offenses under RICO.<sup>135</sup> Many of these individual predicate offenses — such as bombing, arson, kidnapping, or murder — do not receive First Amendment protection.<sup>136</sup>

Anti-abortion protesters are commonly charged with, and convicted of, trespass for refusing to leave property owned by clinics.<sup>137</sup> However, under § 1961(1)(a), trespass cannot trigger RICO liability unless it carries a penalty of more than one year in prison. This prevents trespass alone from constituting a predicate offense for RICO under § 1961(1)(A).<sup>138</sup>

Extortion is also a predicate act under RICO.<sup>139</sup> The Hobbs Act<sup>140</sup> forbids any act that “obstructs, delays, or affects commerce . . . by robbery or extortion.”<sup>141</sup> In the abortion context this requires that the defendants “engaged in acts intended to create fear in the clinic’s staff and patients and to result in the clinic’s closure.”<sup>142</sup> Evidence of extortion may include patterns

cized.’ ” *Id.* at 904 (quoting Petition for Cert. at App. 19b, *Claiborne Hardware* (No. 81-202)). The Supreme Court held that this conduct was fully protected by the First Amendment. *Id.* at 925–26.

135. *See, e.g.*, sources cited *supra* notes 6, 10, and 26. Private civil RICO plaintiffs bear two primary pleading burdens: (1) alleging that the defendant violated RICO’s substantive provisions, including commission of the requisite predicate offenses, 18 U.S.C. § 1962 (1988); and (2) alleging that the plaintiff was “injured in his business or property by reason of a violation of section 1962.” *Id.* § 1964(c).

136. *See, e.g.*, *Feminist Women’s Health Ctr. v. Roberts*, No. C86-161(V)D, 1988 U.S. Dist. LEXIS 16325, at \*14–\*17 (W.D. Wash. Mar. 11, 1988).

137. *See Cobb, supra* note 7, at A16 (“Most arrests at Operation Rescue events result from trespass charges.”).

138. *See, e.g., Feminist Women’s Health Ctr.*, 1988 U.S. Dist. LEXIS 16325, at \*14 (“[P]laintiffs have failed to show that trespass may serve as a predicate offense under § 1961(1) since defendants could not have been charged with a trespass offense carrying a penalty of more than one year.”).

139. Extortion under either Federal law, 18 U.S.C. § 1961(1)(B) (1988) (Hobbs Act extortion is a RICO predicate offense), or State law, *id.* § 1961(1)(A) (state law extortion is a RICO predicate offense if punishable by imprisonment for more than one year), may be a RICO predicate offense.

140. 18 U.S.C. § 1951 (1988).

141. *Id.* § 1951(a). The actual effect upon interstate commerce may be very minor and may be potential or probable. *See United States v. Hoelker*, 765 F.2d 1422, 1424 (9th Cir. 1985); *United States v. Bagnariol*, 665 F.2d 877, 894 (9th Cir. 1981). In addition, the extortionist need not actually benefit, either directly or indirectly, from her actions. *See United States v. Green*, 350 U.S. 415, 418–20 (1956).

142. *See Feminist Women’s Health Ctr.*, 1988 U.S. Dist. LEXIS 16325, at \*20. Anti-abortion activists have been convicted of criminal violations of the Hobbs Act. In *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983), Don Anderson, a member of the “army of God” an anti-abortion group, was convicted of two counts of violating the Hobbs Act — conspiracy and attempt to obstruct, delay, and affect

of misdemeanors — including trespass, harassing phone calls, and blockades of clinics<sup>143</sup> — that would not be predicate acts under RICO if taken individually. While these acts may constitute predicate RICO offenses without including overt violence, they are sufficiently different from peaceful picketing so as to put protesters on notice that they may be held criminally liable for their actions.<sup>144</sup> Furthermore, even a few acts of violence play a major role in the patterns of intimidation and harassment anti-abortion protesters intentionally create around the clinics and hospitals they blockade. The aggregate of the protester's actions may create an atmosphere of fear similar to that created by criminals engaging in more traditional violent crime and extortion.

However small the percentage of violent acts, narrowly defined, to know that one is part of a targeted group is to live with fear. Speaking of the violence perpetrated against women in this culture, Catharine MacKinnon compares it to the function of lynching:

Consider the data on lynching. The percentages are one thing, but the fact that Black people walk through life knowing that at any point that can happen to them . . . is as crucial and as central a point. It is how racism works as terrorism.

A simple trespass, a slight interference with a supposed money-grubbing abortionist's property rights does not, then, capture the reality of [anti-abortion protesters'] activities. Patients and clinic workers are being threatened and harassed, at a minimum, and in some instances, subjected to direct physical violence. In virtually all instances, they are victimized by the climate of violence that breeds fear.<sup>145</sup>

---

interstate commerce through extortionate means — after he forcibly abducted an Illinois doctor and his wife because the doctor was associated with a facility that performed abortions.

The Hobbs Act has also been applied to civil rights activists. See *United States v. Mitchell*, 463 F.2d 187, 191 (8th Cir. 1972) (noting that protected First Amendment activity could not sanctify activist's extortionate threats).

143. *Feminist Women's Health Ctr.*, 1988 U.S. Dist. LEXIS 16325, at \*20; see also *supra* note 88.

144. RICO liability may never be imposed unless the plaintiff proves the defendant committed at least two crimes. *Brown & Leiberman*, *supra* note 17, at 865.

145. *Apel*, *supra* note 10, at 57 (citing Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 *BUFF. L. REV.* 11, 29 (1985)); cf. *supra* note 88.

This "climate of fear" is a common by-product of anti-abortion protests and "direct action." For example:

Every morning before Kathy Gunkel unlocks the doors of Monmouth County's only abortion clinic, she conducts a drill.

In the words of one abortion provider victimized by anti-abortion threats and intimidation, "we're in a war zone."<sup>146</sup> Such organized campaigns of physical intimidation and fear should not be protected under the guise of First Amendment freedom.

This raises potential problems for protesters engaged in patterns of civil disobedience involving illegal acts unprotected by the First Amendment which are nonetheless peaceful. For example, anti-abortion protesters charge that "sit-ins" during the 1960s would have constituted extortion under the Hobbs Act.<sup>147</sup>

---

She checks the perimeters. She looks for anything out of the ordinary, like a strange bag or an odd package. When she's satisfied that everything is normal, she goes inside and starts to work.

Gunkel is one of many New Jersey abortion clinic workers who say they feel nervous about the potential violence each day holds, from bomb scares to death threats. And they worry that women who want abortions will suffer as a result of the violence.

Ellen Gamerman, *Clinic Law Leaves N.J. Activists Divided*, STATES NEWS SERV., Nov. 14, 1993, available in LEXIS, News Library, SNS File; see also *The MacNeil/Lehrer NewsHour: Thou Shalt Not Kill?* (Educational Broadcasting and GWETA television broadcast, Mar. 16, 1993), available in LEXIS, News Library, Script File [hereinafter *Thou Shalt Not Kill?*](statement of Dr. Buck Williams, the only abortion provider in South Dakota) ("[Question:] do you feel your life is at risk? [Answer:] I've felt that way for a number of years . . . I've got a bullet proof vest on order. I've changed the size of the pistol that I carry. We've taken a number of security precautions.").

In fact, anti-abortion activists have succeeded in intimidating doctors, patients, and clinic workers and have forced the closure of many abortion clinics. See Penni Crabtree, *Med Schools, Interns Cut Back on Abortion Training*, SAN DIEGO BUS. J., Mar. 29, 1993, at 3, 29 ("The national trend toward downplaying abortion training in medical education is backdropped against an escalating climate of violence by anti-abortion forces against women's health clinics." Due to this climate of violence, "83 percent of the U.S. counties do not have abortion providers." Anti-abortion protesters cite this statistic as evidence "that harassment of doctors and the medical schools that train them is an effective tactic."); Diane M. Gianelli, "*This is the War Room Here: Abortion Providers Boost Security After Slaying*", 36 AM. MED. NEWS., Apr. 5, 1993, at 1, 24 ("The increase in harassment and violence is really shaking up [abortion] providers." The head of the national Coalition of Abortion Providers "knows of at least four physicians who've quit performing abortions since Dr. David Gunn's slaying."); *Thou Shalt Not Kill?*, supra (business at a clinic whose workload is composed of less than five percent abortions, "is down 40 percent because protestors picket outside the hospital nearly every morning").

146. *Thou Shalt Not Kill?*, supra note 145 (statement by Dr. Buck Williams, the only abortion provider in South Dakota).

147. According to Joseph Scheidler, the head of the Pro-Life Action League and a defendant in *NOW v. Scheidler*, "'It's a good thing Martin Luther King marched and advocated civil disobedience before [*NOW v. Scheidler*], or he would have been hit with RICO too.'" Nancy E. Roman, *Ruling on RICO Exposes Activists to Costly Lawsuits*, WASH. TIMES, Jan. 26, 1994, at A4; see also Andrews, supra note 53, at 6 (according to Jim Henderson, one of Operation Rescue's attorneys, the ruling in *NOW v. Scheidler* "would have made the racketeering statute applicable against lunch-counter sit-ins during the 1960s").

Such "sit-in" protesters were often convicted of trespassing, but rarely committed acts involving the "wrongful use of actual or threatened force, violence, or fear"<sup>148</sup> and thus did not engage in criminal extortion.<sup>149</sup> Some commentators argue that the threat of RICO liability will "chill" protests by many "direct action" protesters, such as animal rights activists, gay rights advocates, and radical environmentalists.<sup>150</sup> The Hobbs Act could potentially reach protected activity, and speech, if applied loosely to "direct action" protesters. However, in deciding Hobbs Act claims, courts consider the impact of "direct action" protests upon the protesters' targets in addition to examining the protesters' actions. Protesters' actions may produce very different results in different contexts. For example, anti-abortion protesters' nationwide campaigns, different from many types of "direct action" protests, create fear in individual women seeking reproductive health services.<sup>151</sup> For example, one commentator characterizes crimes such as trespass committed during anti-

---

148. 18 U.S.C. § 1951(b)(2). It is important to note, however, that the victim's fear need not be fear of bodily harm. *United States v. Capo*, 791 F.2d 1054 (2d Cir. 1986); *United States v. Agnes*, 753 F.2d 293 (3d Cir. 1985) (apprehension of economic loss qualifies as "fear" under the Hobbs Act).

In upholding a similar federal extortion law against an overbreadth challenge the Ninth Circuit wrote that:

Because the statute in the present case is limited to extortionate threats, it does not regulate speech relating to social or political conflict, where threats to engage in behavior that may be unlawful may nevertheless be part of the marketplace of ideas. [*United States v. Gilbert*, 813 F.2d [1523,] 1531 [(9th Cir. 1987)]; see [*United States v. Velasquez*, 772 F.2d [1348,] 1357 [(7th Cir. 1985)]. The "intent to extort" requirement of section 876 guarantees that the statute reaches only extortionate speech, which is undoubtedly within the government's power to prohibit. See *United States v. Quinn*, 514 F.2d 1250, 1268 (5th Cir. 1975) ("It may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which [has] no protection at all."), cert. denied, 424 U.S. 955, 96 S. Ct. 1430, 47 L.Ed.2d 361 (1976).

*United States v. Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988) (alteration in original).

149. John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77, 81-83 (1991) (describing peaceful civil disobedience of African-Americans during civil rights movement); Marion A. Wright, *The Sit-in Movement: Progress Report and Prognosis*, 9 WAYNE L. REV. 445, 450 (1963); see also *Bell v. Maryland*, 378 U.S. 226, 227-28 (1964) (involving peaceful sit-in in restaurant).

150. See, e.g., Vu, *supra* note 111, at 409-10.

151. For example, targeting a large cosmetic company for "direct action" is different from targeting a group of individual women seeking health services and facing very difficult personal choices.



abortion protests as offenses against women: "At a minimum, courts must look behind a 'trespass' or other innocuous label and perceive [anti-abortion protesters'] activities for what they are—a crime of significance, a harm against persons, and more particularly, against a group of persons traditionally denied power."<sup>152</sup>

Finally, civil disobedience by its very nature involves intentional breaches of the law.<sup>153</sup> Seeking to escape punishment for civil disobedience, "represents a feeble effort to emasculate basic principles of civil disobedience, and simply stated, is invalid. [Such an] actor wants the best of both worlds; to disobey, yet be absolved of punishment for disobedience."<sup>154</sup>

Non-violent, non-threatening protests will not trigger RICO liability,<sup>155</sup> and, while the First Amendment has not been successfully employed as a defense to Hobbs Act extortion,<sup>156</sup> some

152. Apel, *supra* note 10, at 74.

153. BLACK'S LAW DICTIONARY 245 (6th ed. 1990) defines civil disobedience as "[a] form of lawbreaking employed to demonstrate the injustice or unfairness of a particular law and indulged in deliberately to focus attention on the allegedly undesirable law." See also *United States v. Malinowski*, 472 F.2d 850, 857 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973).

154. *Malinowski*, 472 U.S. at 857 (affirming defendant's conviction for supplying false or fraudulent information to the IRS in his effort to protest the Vietnam War). Consider the following excerpt from a similar case:

Among philosophers and religionists throughout the ages there has been an incessant stream of discussion as to when, if at all, civil disobedience, whether by passive refusal to obey a law or by its active breach, is morally justified. However, they have been in general agreement that while in restricted circumstances a morally motivated act contrary to law may be ethically justified, the action must be *non-violent* and the actor must *accept the penalty* for his action. In other words, it is commonly conceded that the exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law.

... If these defendants were to be absolved from guilt because of their moral certainty that the war in Vietnam is wrong, would not others who might commit breaches of the law to demonstrate their sincere belief that the country is not prosecuting the war vigorously enough be entitled to acquittal? Both must answer for their acts.

*United States v. Moylan*, 417 F.2d 1002, 1008-09 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (footnote omitted) (emphasis added) (quoted in *Malinowski*, 472 F.2d at 957-58).

155. Cf. Brief of NOW Legal Defense and Education Fund, *supra* note 66, at 16 ("That RICO has been applied against Operation Rescue but not the National Conference of Catholic Bishops is no accident but a function of the two organizations' substantially different methods of dissent.").

156. See, e.g., *United States v. Cerilli*, 603 F.2d 415 (3d Cir.) (no First Amendment protection in case involving political contributions), *cert. denied*, 444 U.S. 1043 (1979); *United States v. Mitchell*, 463 F.2d 187, 191-92 (8th Cir. 1972) (extortionate threats made by civil rights activist not protected), *cert. denied*, 410 U.S. 969 (1973);

threatening language may be protected.<sup>157</sup> In addition, courts react differently to defendants who pursue legitimate aims that are different from traditional extortion.<sup>158</sup> RICO suits against political protest groups will force courts to place protest groups sued under RICO on a continuum ranging from international and domestic terrorists<sup>159</sup> to “direct action” protesters to the those engaging in marches, pickets, or symbolic speech protected by *O’Brien*<sup>160</sup> that enjoy the First Amendment’s full protection. Violent groups will receive virtually no protection<sup>161</sup> for their violent, destructive, or intimidating acts.<sup>162</sup> Groups falling between these two extremes will receive some First Amendment protection but may be held liable for some unprotected activities as well. Apportioning liability in these cases will not be easy, but the test in *Claiborne Hardware* provides guidance in evaluating

---

United States v. Baudin, 486 F. Supp. 403 (S.D.N.Y. 1980) (threat to publisher not protected).

157. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Supreme Court held that “fighting words” do not receive First Amendment protection. However, “the Court has not sustained a conviction on the basis of the fighting words doctrine since *Chaplinsky*.” GUNTHER, *supra* note 66, at 1073 (italics added); cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech directed to inciting imminent lawless action that is actually likely to produce such action is unprotected).

158. For example, in *United States v. Enmons*, 410 U.S. 396 (1973) (5–4 decision), the Court held that Hobbs Act extortion did not reach the defendant’s use of violence to achieve legitimate union objectives. The Court reasoned that because extortion is the wrongful obtaining of property by the use or threat of violence, force or fear, 18 U.S.C. § 1951(b)(2), there is no wrongful taking of an employer’s property when an employee seeks the wages to which she is entitled in compensation for services. *Enmons*, 410 U.S. at 400.

Although *Enmons*’ reasoning does not translate directly to the anti-abortion protest context, and lower courts have narrowly interpreted this exception, see *United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991) (“*Enmons* has not been extended beyond its own facts”), *cert. denied*, 112 S. Ct. 2945 (1992), it does indicate that courts will temper the harsh application of statutes to situations involving behavior that is not stereotypically criminal.

159. *Blakey & Perry*, *supra* note 61, at 971 n.390 (“Domestic terrorist groups, which include neo-Nazi, Ku Klux Klan, and other violent racist and anti-Semitic organizations, commit crimes including armed robbery, synagogue bombings, murder, and arson.”).

160. *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (setting forth a four-part test for the First Amendment protection of symbolic conduct).

161. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547 (1992) (holding cross burning punishable under state law so long as statute does not single out for punishment those who express views on specific disfavored topics).

162. *Blakey & Perry*, *supra* note 61, at 971 n.390 (“Criminally, RICO is used effectively against a wide range of terrorist type activity in the United States. RICO is, as yet, largely unimplemented civilly against violent crime groups.”) (citations omitted).

these "hybrid" cases. As noted above, this test imposes strict factual and causal requirements on plaintiffs seeking to hold defendants liable for unprotected conduct linked to protected conduct.

CONCLUSION: FUTURE APPLICATIONS OF RICO TO  
ANTI-ABORTION PROTESTS

*Civilization is nothing else but the attempt to reduce force to being the last resort.*<sup>163</sup>

In its current form, RICO may apply to many activities undertaken by anti-abortion protesters, and may apply to some activities undertaken by abortion rights counter-protesters.<sup>164</sup> Although RICO was not originally intended to cover ideological protests, the plain language of RICO is broad enough to encompass such protests when accompanied by violent and threatening behavior.<sup>165</sup> Moreover, unlike the more traditional RICO defendants, ideological protesters enjoy some degree of First Amendment protection. First Amendment precedent continues to protect protesters from overbroad and oppressive applications of RICO.<sup>166</sup> RICO does not, and indeed cannot, apply to non-violent, non-threatening protests even if protesters repeatedly break minor laws. Likewise, RICO cannot hold protesters or organizations of protesters liable for entire protest campaigns when only a portion of the protest involves violent, unprotected actions. Current First Amendment precedent adequately protects anti-abortion protesters from unjust applications of RICO, especially because individuals on both sides of abortion disputes may claim constitutional protection for all or portions of their activities.<sup>167</sup>

---

163. W.H. AUDEN & LOUIS KRONENBERGER, *THE VIKING BOOK OF APHORISMS* (1962) (quoting Spanish writer Jose Ortega y Gasset, 1881-1955), *quoted in THE QUOTABLE LAWYER* 284 (David S. Sharger & Elizabeth Frost eds., 1986).

164. *See, e.g.*, Diane M. Gianelli, *Abortion Foes Say They Get Threats, Too*, AM. MED. NEWS (Am. Med. Ass'n, Chicago, Ill.), Apr. 5, 1993, at 24 (noting assaults upon anti-abortion protesters and the firebombing of an anti-abortion group's office).

165. *See sources cited supra* note 17.

166. Plaintiffs who bring non-meritorious RICO suits against protesters in order to harass defendants and force them to spend money on legal fees may be dealt with by Rule 11. *But see* Califa, *supra* note 17, at 846 (arguing that in cases involving conduct likely protected by the First Amendment the plaintiffs bear a higher pleading burden than in ordinary RICO cases). *See, e.g.*, *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991) (cited favorably by Justice Souter in his concurrence in *Scheidler*).

167. *See supra* note 73.