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A RESPONSE TO SOULE AND WEINSTEIN: *NATIONAL ORGANIZATION FOR WOMEN v. SCHEIDLER* IS JUST HARD FACTS MAKING BAD LAW

Hao-Nhien Q. Vu*

INTRODUCTION

In *National Organization for Women, Inc. v. Scheidler*,[1] a unanimous United States Supreme Court held that the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970[2] does not have an economic-motive requirement. As a result, medical clinics can sue anti-abortion protesters without having to prove that the protesters had an economic motive. Because RICO provides for attorney's fees and treble damages,[3] *Scheidler* was a major victory for defenders of abortion rights, who can now use the threat of a RICO suit to prevent violent interferences[4] with a woman's constitutional right to privacy and a physician's choice to help a woman exercise that right. Anti-abortion protesters quickly claimed that *Scheidler* is inconsistent with the First Amendment, and that targets of every protest can now use RICO as a means to punish protesters for expressing their views. Scheidler himself

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I would like to thank Patricia I. Amador, Christina Bull, Emily Durkee, Adriana Estrada, Steven Soule, and other members of the *UCLA Women's Law Journal* for their patience and hard work bringing this paper to publication. However, mere mortals cannot make miracles, so surely errors remain. They're all mine.

1. 114 S. Ct. 798, 801 (1994).
2. 18 U.S.C. §§ 1961–1968 (1988 & Supp. IV 1992).
3. *Id.* § 1964(c) (1988).
4. In their briefs, NOW and other abortion-rights groups who filed as amici acknowledged that peaceful, nonviolent anti-abortion protests are protected by the First Amendment and not properly subject to RICO suits. *See, e.g.*, Reply Brief of Petitioner at 19, *Scheidler* (No. 92-780); Brief of NOW Legal Defense and Education Fund at 15–16; Brief of the National Network of Abortion Funds at 28–30.

contended, "It's a good thing Martin Luther King marched and advocated civil disobedience before this ruling, or he would have been hit with RICO too."[5] Scheidler is in no position to make such a claim, because his acts were violent acts, wholly unprotected by the First Amendment.[6]

Scheidler's hypocrisy is exposed by Steven Soule and Karen Weinstein. Their Recent Development *Racketeering, Anti-Abortion Protesters, and the First Amendment*[7] concludes that *Scheidler* correctly interprets the RICO statutory language, that violent acts cannot claim First Amendment protection, that peaceful protests are protected by the First Amendment, and that the holding in *Scheidler* does not adversely affect these peaceful protests.[8] Even where a protest campaign combines violent and nonviolent acts, which is characteristic of antiabortion protests, *Scheidler* only allows RICO to reach the violent acts without disturbing the protesters' right to engage in nonviolent protests.[9]

However, just because Scheidler was hypocritical does not mean that what Scheidler said is wrong. The fact that women's rights received protection from terrorism should not blind us to the reining in of free speech. Soule and Weinstein correctly distinguish speech that is protected by the First Amendment from speech that is not, correctly stating that Scheidler's terrorist acts were not protected. However, because the authors miss the problem of chilling speech and the doctrine of overbreadth, they incorrectly conclude that *Scheidler* is consistent with the First Amendment.

This Recent Development responds to Soule and Weinstein. Part I briefly describes *Scheidler*, emphasizing its First Amendment aspect. Part II-A examines the concept of "chilling" speech and shows that the Supreme Court has consistently held that laws which aim to punish unprotected speech but nonetheless chill protected speech are overbroad and violate the First Amendment. Part II-B applies the overbreadth doctrine to the facts of

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5. Nancy E. Roman, *Ruling on RICO Exposes Activists to Costly Lawsuits*, WASH. TIMES, Jan. 26, 1994, at A4.

6. Because the district court had dismissed the plaintiffs' case pursuant to FED. R. CIV. P. 12(b)(6) (failure to state a claim), the Supreme Court on review assumed as true the facts stated by the plaintiffs.

7. Steven Soule & Karen Weinstein, *Racketeering, Anti-Abortion Protesters, and the First Amendment*, 4 UCLA WOMEN'S L.J. 365 (1994).

8. *Id.* at 380, 391, 396–97.

9. *Id.* at 388–91.

Scheidler and shows that, by literally reading the RICO statute and refusing to imply an economic-motive requirement, the Court may have forced RICO to become overbroad and hence violative of free speech. This overbreadth risk is especially likely because of the expansive definition of "extortion" under the Hobbs Act which is incorporated in RICO. At the same time, by sanctioning the literal interpretation of RICO, the Supreme Court may have prevented lower courts from ever finding the statute overbroad. Thus, this Recent Development concludes that the Court used *Scheidler* as a vehicle to expand RICO for the benefit of the law enforcement community while avoiding alerting First Amendment advocates to the possible negative ramifications on free speech.

I. *SCHEIDLER*

National Organization for Women, Inc. v. Scheidler was a class action suit brought by the National Organization for Women and two women's health centers against anti-abortion activists, anti-abortion organizations, and a pathology testing laboratory.[10] The complaint alleged that the defendants, through a pattern of racketeering activity, conspired to drive the health centers out of business.[11] The original complaint stated one antitrust count under the Sherman Act, two RICO counts, and several pendent state claims.[12] As to the RICO counts, the alleged racketeering activities included invasions, blockades, arson, fire bombings, harassment, trespass, burglaries and thefts, destruction of clinic equipment and property, assaults and batteries upon clinic staff and personnel, and extortionate acts of interference with clinics' leases and other contractual relations.[13]

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10. 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).

11. *Id.* at 938.

12. *Id.* The Sherman Act is codified at 15 U.S.C. §§ 1-7 (1988 & Supp. IV 1992).

13. Brief of Petitioner at 6, NOW v. Scheidler, 114 S. Ct. 798 (1994) (No. 92-780). The list of activities alleged to the district court also includes activities that appear to relate only to the antitrust count:

> [P]laintiffs' second amended class action complaint alleges, *inter alia*, that defendants . . . destroyed clinic advertising, coordinated telephone campaigns to tie up clinic lines, set up appointments under false pretenses to keep legitimate patients from making appointments, and established competing pregnancy testing and counseling facilities in the vicinities of the clinics.

Scheidler, 765 F. Supp. at 938–39.

The district court dismissed all federal counts for failure to state a claim upon which relief can be granted,[14] thereby also dismissing the state claims for lack of pendent jurisdiction.[15] In particular, the district court held that to state a RICO claim under 18 U.S.C. § 1962(c), the alleged racketeering activity must be economically motivated.[16] The Seventh Circuit affirmed the dismissals on all the counts.[17] The United States Supreme Court refused to review the dismissal of the antitrust count, but granted certiorari to decide whether RICO requires that racketeering acts be economically motivated.[18]

Section 1962(c) in the RICO chapter states:

> 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.[19]

The term "racketeering activity" is defined in § 1961 as certain enumerated conducts, including extortion, that are "chargeable under [s]tate law and punishable by imprisonment for more than one year," or "indictable" under an enumerated list of federal offenses, including extortion as defined in the Hobbs Act.[20] These offenses are known as "predicate offenses" which, if carried out in a pattern, would form the basis for a RICO claim.

Thus, the narrow issue for review was whether § 1962(c) included an unwritten requirement that the alleged racketeer and the predicate acts be economically motivated.[21] An affirmative

14. FED. R. CIV. P. 12(b)(6).

15. *Scheidler*, 765 F. Supp. at 944–45.

16. *Id.* at 943.

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

18. NOW v. Scheidler, 113 S. Ct. 2958 (1994) (order granting certiorari). Prior to the Court's final decision, there had been a circuit split on whether RICO implied a requirement that the racketeers have an economic motive. *See* Soule & Weinstein, *supra* note 7, at 374.

19. 18 U.S.C. § 1962(c) (1988).

20. *Id.* § 1961(1) (Supp. IV 1992) (citing, inter alia, *id.* § 1951 (1988)). Soule and Weinstein argued that this list assures that minor offenses will not be the basis for any RICO claim. Soule & Weinstein, *supra* note 7, at 388, 391–93. *But see infra* notes 70–72 and accompanying text.

21. *Scheidler*, 114 S. Ct. at 801. The anti-abortion protesters, of course, framed the issue much differently. For example, co-defendant Randall Terry, founder of Operation Rescue, framed the question as "[w]hether the federal RICO statute, 18 U.S.C. § 1962(c) and (d), applies to social protest activities undertaken with a complete absence of any mercenary purpose." Brief of Respondent Terry at i, *Scheidler* (No. 92-780).

answer would shield all purely ideologically motivated actors from RICO suits, civil or criminal. By framing the issue as one of statutory interpretation, the answer came too easily: "Nowhere in either § 1962(c), or in the RICO definitions in § 1961, is there any indication that an economic motive is required."[22] Indeed, the language of § 1962(c) and the definitions in § 1961 do not contain anything like "economic motive."

However, statutory language, even when unambiguous, should not end the inquiry. The Court pointed out that the First Amendment question was not considered because it was not part of the question presented for review.[23] This decision is inconsistent with the normal rules of interpreting statutes: If a statute is ambiguous, the court must interpret it in such a way as to render the statute constitutional.[24] If the statute is unambiguous but may dictate an unconstitutional result, the court may uphold it only by reading in some saving interpretation.[25] If a statute has unambiguous language and cannot be saved, the court may not skirt the constitutional issue but must simply void the law.[26] Because RICO is unambiguous but overbroad, the Court should have either voided the law or implied an economic-motive requirement to save it.

The *Scheidler* Court never considered the First Amendment issue. The only First Amendment discussion is in Justice Souter's concurring opinion, which did not fully discuss the overbreadth doctrine. Justice Souter first stated that the unambiguity of the statutory language precludes the constitutional issue. In addition, Justice Souter stated that, even supposing that the First Amendment were to be examined, the outcome would still be the same for the following three reasons. First, an economic-motive requirement "would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear

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

23. *Id.* at 806 n.6.

24. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 62 (1932).

25. For example, in New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964), the Court read into the New York libel law an implied requirement that a public official must prove the defendant made the false statement with knowledge of its falsity or with reckless disregard for its truthfulness. In Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506–07 (1985), the Court refused to void an anti-obscenity law but instead severed the unconstitutional clause from the rest of the law.

26. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332–34 (7th Cir. 1985) (finding that Indianapolis's anti-pornography law could not be saved), *aff'd mem.*, 475 U.S. 1001 (1986).

chilling."[27] Second, an ideological group may still "fail" the economic-motive test because "even protest movements need money."[28] Third, "[a]n economic-motive requirement is . . . unnecessary, because legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise."[29]

Justice Souter's second reason seems to eviscerate the economic-motive requirement. Everybody needs money. By rendering the need for money equivalent to possessing an economic motive, Justice Souter effectively nullified the economic-motive requirement.[30] Justice Souter's first and third stated reasons demonstrate a conscious intent to limit the applications of the overbreadth doctrine. As shown in Part II, the overbreadth doctrine provides a viable argument that RICO violates the First Amendment rights of protesters, even in this case, where the protesters were violent.

II. THE OVERBREADTH DOCTRINE AND RICO ACTIONS AGAINST IDEOLOGICALLY DRIVEN PROTESTERS

A. *Overview of the Overbreadth Doctrine*

The overbreadth doctrine permits a First Amendment challenge against a statute that, while targeting unprotected activities, still "sweeps within its ambit other activities that constitute an exercise of freedom of speech."[31] The doctrine has two aspects. In one aspect, it is a First Amendment doctrine, which finds an overly broad statute unconstitutional. At the same time, it is a special rule of standing, in the sense that the person making the overbreadth challenge may well be engaging in unprotected conduct, but can still make the overbreadth challenge on behalf of some imaginary other.[32]

The courts entertain these overbreadth challenges "not because [the challengers'] own rights of free expression are vio-

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27. *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring).

28. *Id.* (Souter, J., concurring). Apparently, Justice Souter used the verb "fail" to mean that the group has an economic motive and is therefore subject to RICO.

29. *Id.* (Souter, J., concurring).

30. *See* NOW v. Scheidler, 765 F. Supp. 937, 944 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

31. Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (voiding on overbreadth grounds a statute prohibiting all loitering and picketing).

32. *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (holding that defendant need not "demonstrate that his own conduct could not be regulated."). *But see* Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (arguing that overbreadth is merely traditional standing applied to First Amendment area).

lated, but because of a judicial prediction or assumption that *the statute's very existence* may cause others not before the court to refrain from constitutionally protected speech or expression."[33] This is the "chilling effect," where an overbroad statute not actually invoked may still deter people from lawfully exercising their free speech rights. People who contemplate some action which is protected by the First Amendment but which violates a law may decide not to test the constitutional issue, even if they would win in court should they choose to "proceed[ ] in the teeth of the statute."[34] Likening an overbroad law to a sword hanging over people's heads, Justice Thurgood Marshall remarked: "That [the courts] will ultimately vindicate [a litigant] if his speech is constitutionally protected is of little consequence — for the value of a sword of Damocles is that it hangs — not that it drops."[35]

Thus, in *Thornhill v. Alabama*,[36] the Court invalidated a law prohibiting loitering near businesses, stating that the law may reach labor strikers whose picketing activities are a form of speech publicizing labor disputes.[37] In *Gooding v. Wilson*,[38] the Court invalidated on overbreadth grounds a Georgia law that prohibited the use of "opprobrious words or abusive language, tending to cause a breach of the peace,"[39] because the statute may reach more than just "fighting words."[40]

The overbreadth doctrine itself may go too far, however, for almost every law may overreach. As a result, *Broadrick v. Oklahoma*[41] requires that a First Amendment challenger show that the overbreadth "not only [is] real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[42] Thus, the *Broadrick* Court upheld a state law prohibiting campaigning by state employees, even though the law could be read to include such protected acts as wearing campaign buttons or displaying bumper stickers.[43] The overreach was, to the

33. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (emphasis added).

34. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 854 (1970).

35. Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

36. 310 U.S. 88 (1940).

37. *Id.* at 103.

38. 405 U.S. 518 (1972).

39. *Id.* at 519.

40. *Id.* at 528.

41. 413 U.S. 601 (1973).

42. *Id.* at 615; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-28, at 1024–29 (2d ed. 1988).

43. *Broadrick*, 413 U.S. at 609–10.

Court, not substantial enough when compared with the law's legitimate applications.[44] In *New York v. Ferber*,[45] the Court extended the substantiality requirement to pure speech and upheld a conviction under state law banning child pornography, even though the statute might also reach "some protected expression, ranging from medical textbooks to pictorials in the National Geographic," because the "arguably impermissible applications of the statute amount to [no] more than a tiny fraction of the materials within the statute's reach."[46]

However, the Court has never specified the required degree of substantiality.[47] Thus, at first blush the substantiality requirement appears to be merely a means to force a particular result. However, it actually shows the Court's understanding of one major policy underlying the doctrine of overbreadth, namely the need to prevent the chilling of free speech.[48] Viewed in light of that need, "substantial overbreadth" is simply an abbreviated way of saying that there is so much overbreadth that some protected speech will *actually* be chilled. The substantiality requirement assures that overbreadth is only applied when the statute "on any fair reading prohibits constitutionally protected speech."[49] The substantiality requirement would reject such overstretched slippery-slope arguments as: "'If we allow judges to award civil damages for injuries proven to be inflicted by pornography, tomorrow they'll be censoring Oprah and packing her off to the pokey.'"[50]

B. *Possible Arguments that RICO Is Substantially Overbroad*

1. Overbreadth and RICO

Applying the overbreadth doctrine to the RICO statute, it is clear that the reasons offered by Justice Souter are no answer to

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44. *Id.* at 616–18.

45. 458 U.S. 747 (1982).

46. *Id.* at 773; *see also* TRIBE, *supra* note 42, § 12-28, at 1024–25.

47. In fact, considering the number of copies of pediatrics textbooks and of the National Geographic in circulation in the state of New York, it would be terrifying indeed if the *Ferber* Court were right, namely that the books only make up a "tiny fraction" in comparison with child pornographic materials.

48. *See, e.g.*, Note, *supra* note 34, at 853; *see also supra* text accompanying notes 33–35.

49. John Quigley & S. Adele Shank, *The Invalidity of an Overbroad Statute*, 40 U. KAN. L. REV. 45, 45 (1991).

50. Ann Scales, *Feminist Legal Methods: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 14 (1992) (calling such arguments "false necessities").

an overbreadth challenge.[51] Justice Souter's concern that an economic-motive requirement may protect too much[52] turns the overbreadth doctrine on its head, refusing to cure the statute unless the cure is an exact fit. If anything, it shows that the economic-motive cure does not work and RICO cannot be saved. Justice Souter's other claim, that case-by-case adjudication is sufficient to preserve the First Amendment rights of protesters engaged in protected speech,[53] fails to recognize the chilling effects of an overbroad statute. A protester who is deterred from protesting will never be in court, and consequently no court can ever redress the deprivation of her First Amendment rights.

2. The Role of the Economic-Motive Requirement

The real issue is whether RICO, without the economic-motive requirement, is overbroad.[54] The answer is far from obvious. To state a RICO claim under § 1962(c), a plaintiff[55] must plead "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[56]

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51. *See supra* text accompanying notes 27–30.

52. *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring); *see also supra* text accompanying note 27.

53. *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring); *see also supra* text accompanying note 29.

54. Not only did the Supreme Court fail to address the issue, but so did the defendants and amici. "[The protesters'] constitutional argument . . . is directed almost entirely to the nature of their activities, rather than to the construction of RICO." *Scheidler*, 114 S. Ct. at 806 n.6.

55. The plaintiff can be either a private party, 18 U.S.C. § 1964(c) (1988), or the United States as prosecutor, *id.* § 1963(d)(1) (1988 & Supp. IV 1992). A statute that allows for a lawsuit and awards damages is a state action and thus is subject to constitutional limitations. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1963) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law . . . . The test is *not the form* in which state power has been applied . . . .") (emphasis added).

56. NOW v. Scheidler, 765 F. Supp. 937, 941 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994). The courts generally require that the "conduct" be that of the enterprise and not just of the individual defendant. *Id.*; *see also* Guerrero v. Katzen, 571 F. Supp. 714, 718 (D.D.C. 1983) (citing 18 U.S.C. § 1962(c) (1988)), *aff'd*, 774 F.2d 506 (D.C. Cir. 1985). For a protester, the requirement does not help much, because the protest conduct is wholly linked with the protest group. To satisfy the "pattern" requirement, a plaintiff or prosecutor must show that at least two racketeering acts are related, and that they pose a threat of continued activity. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). Most protests also fit this definition. Protesters regularly engage in the same acts, usually because experience has taught them that some particular acts are more effective than others. *See, e.g., infra* note 70 (animal-rights activists frequently spray-paint fur wearers). In addition, unless the protest is successful, the acts are very likely to be repeated.

The economic-motive requirement ensured that the element of "enterprise" is inapplicable to political, activist, or ideological groups. Without the economic-motive requirement, such groups are included as an "enterprise" under RICO. The economic-motive requirement also limited the applicability of the "racketeering activity" element. "Racketeering activity" includes extortion under either federal law (the Hobbs Act)[57] or state law.[58] The next section shows that the Hobbs Act defines "extortion" very broadly. Thus, RICO may be overreaching.

3. The Expansive Definition of "Extortion"

The Hobbs Act defines extortion as inducing, by fear, a victim to part with her property, thereby adversely affecting interstate commerce.[59] The interstate commerce requirement establishes federal jurisdiction.[60] As a result, the definition of "interstate commerce" reaches as far as Congress's power under the Commerce Clause reaches.[61] The courts have held that any effect on interstate commerce, no matter how small, satisfies this requirement.[62]

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57. 18 U.S.C. § 1961(1)(B) (Supp. IV 1992) (citing *id.* § 1951 (1988)).

58. *Id.* § 1961(1)(A) ("extortion . . . which is chargeable under State law"). State extortion statutes "vary greatly in their wording and therefore in their coverage." 2 WAYNE A. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.12, at 459 (1986). The definition of extortion in many states parallels that in the Hobbs Act. Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1347 n.48 (1990).

59. Gale, *supra* note 58, at 1347; *see* United States v. De Parias, 805 F.2d 1447, 1450 (11th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987).

60. Stirone v. United States, 361 U.S. 212, 218 (1960) ("The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference.").

61. *Id.* at 215 (holding that the Hobbs Act manifests "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion"); *see* United States v. Augello, 451 F.2d 1167, 1169 (2d Cir. 1971) (citing the "sweeping power of Congress" under the Commerce Clause), *cert. denied*, 405 U.S. 1070 (1972).

62. United States v. Billups, 692 F.2d 320, 331 n.7 (4th Cir. 1982) ("de minimis"), *cert. denied*, 464 U.S. 820 (1983); *see also* United States v. Stephens, 964 F.2d 424, 429 (5th Cir. 1992); United States v. Alexander, 850 F.2d 1500, 1504 (11th Cir. 1988), *cert. denied*, 489 U.S. 1068, *and vacated*, 492 U.S. 915 (1989); United States v. Lotspeich, 796 F.2d 1268, 1270 (10th Cir. 1986); United States v. Glynn, 627 F.2d 39, 41 (7th Cir. 1980); United States v. Harding, 563 F.2d 299, 302 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); United States v. Daley, 564 F.2d 645, 649 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); United States v. Brown, 540 F.2d 364, 373 (8th Cir. 1976); United States v. Hathaway, 534 F.2d 386, 396 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); United States v. Mazzei, 521 F.2d 639, 642–43 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); United States v. Shackelford, 494 F.2d 67, 75 (9th

The definition of "property" is "not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right."[63] The courts have considered "property" to include such intangible rights as the right of an entrepreneur to pursue a lawful business[64] and the right of union members to democratic participation in its affairs.[65] Thus, any activity by any protester is capable of infringing upon somebody's property rights, most likely the rights of the protest's target.

The requirement of "fear" is also liberally defined. Fear may be fear of economic loss as well as of physical harm.[66] Fear need not be the consequence of any direct threat, as long as circumstances render the victim's fear reasonable.[67] Once there is fear, the exploitation of such fear violates the Hobbs Act even if the defendant did not cause the victim's fear.[68]

The combined expansiveness of all three elements allows the Hobbs Act to reach protesters who interfere, perhaps even minimally, with the business of the target, especially if circumstances are such that the target of the protest reasonably feels threatened by the protesters. This certainly applies to patients of abortion clinics, many of whom already suffer from stress and anxiety when they encounter the gauntlet of protesters.[69] However, it may also apply when animal-rights activists picket fur stores, whose customers can reasonably claim that they fear harm to the

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Cir.), *cert. denied*, 417 U.S. 934 (1974). On the other hand, because the interstate commerce requirement is a jurisdictional element, the prosecutor or civil plaintiff must plead and prove that element in every case. *Stirone*, 361 U.S. at 218; United States v. Staszcuk, 517 F.2d 53, 59 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975).

63. United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

64. United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1134 (E.D.N.Y. 1992). In Northeast Women's Ctr., Inc. v. McMonagle, 689 F. Supp. 465, 474 (E.D. Pa. 1988), *aff'd*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), the court explicitly applied this property right to the business of an abortion clinic.

65. United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 283 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

66. United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

67. United States v. Haimowitz, 725 F.2d 1561, 1572 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

68. *Id.*; *see also* United States v. Williams, 952 F.2d 1504, 1513 (6th Cir. 1991).

69. *See, e.g.*, Maureen M. Smith, *Tucci Leads Robbinsdale Abortion Vigil*, MINNEAPOLIS STAR TRIB., Apr. 25, 1993, at 1B, *available in* LEXIS, News Library, STRIB File ("Our patients don't need this on such a serious day in their lives." (quoting clinic counselor referring to peaceful anti-abortion protest)).

furs they wear.[70] Likewise, a white lunch-counter owner can claim a reasonable fear of a large group of black civil rights protesters invading and sitting-in at the counter.[71] At the extreme, a defense contractor may claim that anti-nuclear weapon protesters engage in tactics that reasonably cause fear to the contractor.[72] While the arguments in these examples may appear unrealistic, neither the language in the Hobbs Act nor its judicial interpretation prevents such arguments. The unrealistic nature of these arguments only reveals that the Hobbs Act's expansiveness allows it to be reasonably extended to unreasonable lengths.

Adding the broad applicability of the Hobbs Act to that of RICO, a viable argument exists that RICO is overbroad and can be applied against peaceful protesters. The Hobbs Act reaches many protest activities and RICO enhances the protesters' criminal liability and penalties for their concerted and repeated acts of protest. To casually brush the overbreadth argument aside is unwarranted. To claim that the argument is not applicable because the protesters in *Scheidler* were not peaceful[73] misses the point of the overbreadth doctrine altogether.

CONCLUSION

It is puzzling that the Supreme Court did not consider the overbreadth doctrine at all.[74] *Scheidler* certainly helps advocates

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70. It appears to be well known that anti-fur activists frequently spray-paint other people's furs. *See, e.g.,* Denise Hamilton, *Fur — the Real Thing — in Disguise*, L.A. TIMES, Oct. 4, 1991, at E1, E9 ("Animal rights activists have reportedly shattered windows of furriers, splashed wearers with red paint and followed them down the street hissing 'murderer.'"). Even if the protesters were peaceful and did not actually harm the furs, it would be reasonable for the customers to fear such harm, and it would also be reasonable to infer that the protesters were exploiting that fear.

71. *Cf.* Charles Laurence, *The LA Riots: The Streets of Fire*, LONDON SUNDAY TELEGRAPH, May 3, 1992, at 14, *available in* LEXIS, News Library, TELEGR File ("To the jury, [the videotape of the beating of Rodney King] showed a large black man — a figure that lurks in the back alley of every white imagination . . . ."). *But see* Soule & Weinstein, *supra* note 7, at 394–95 (arguing no Hobbs Act violation by sit-in protesters).

72. *Cf. Crew Cannot Sue Maimed Protester*, N.Y. TIMES, Jan. 5, 1990, at A19 (munitions train conductor who ran over and severed anti-nuclear weapon protester's legs later sued protester for causing the conductor emotional distress).

73. NOW v. Scheidler, 114 S. Ct. 798, 807 (1994) (Souter, J., concurring).

74. The Court gave one explanation: The Court did not consider the First Amendment issue because it was not a question on certiorari and it was not argued by the parties. *Id.* at 806 n.6. However, the opinion does not explain why certiorari was not granted on that issue. Furthermore, the Court could have raised the issue sua sponte.

of abortion rights, but the case cannot be seen as an attempt to help them because the Court has not been particularly friendly to *Roe v. Wade*.[75] The fact that the Court did not engage in a First Amendment discussion is even more puzzling considering that only two years earlier, in *R.A.V. v. City of St. Paul*,[76] the Court went to great lengths to create a new First Amendment argument for striking down a hate-crime ordinance.[77]

If *Scheidler* was not deliberately intended to either help women or restrict free speech, then it was most likely intended to help the other major beneficiaries of the ruling — criminal prosecutors. Indeed, the federal government was invited to file an amicus brief[78] in which it took an approach almost identical to the Court's, arguing the statutory language only and ignoring First Amendment issues.[79] With the spread of ideologically and religiously driven terrorism, the federal government would be particularly interested in using RICO to enhance its prosecutorial power.[80] The Justices may have been mindful of the bombing of the World Trade Center[81] and the subsequent trial of the suspected terrorists, who were not charged with any RICO violation because the Second Circuit had held that RICO implied an economic-motive requirement.[82] Thus, it appears that

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As this Recent Development went to press, the defendants in *Scheidler* filed a new appeal to the Seventh Circuit, seeking dismissal on First Amendment grounds. Daniel J. Lehman, *Abortion Foes Get Delay to Appeal NOW Suit*, CHI. SUN-TIMES, Mar. 29, 1994, at 16.

75. 410 U.S. 113 (1973) (striking down state anti-abortion law as unconstitutional).

76. 112 S. Ct. 2538 (1992).

77. The Court struck down the ordinance as content discrimination, even though the Court admitted that "we are aware of . . . [no case] that even involved, much less considered and resolved, the issue of content discrimination through regulation of 'unprotected' speech." *Id.* at 2545 n.5. Three Justices would simply strike down the ordinance on overbreadth grounds. *Id.* at 2550 (White, J., concurring); *id.* at 2561 (Blackmun, J., concurring); *id.* (Stevens, J., concurring). The majority's creation of the new rule has been called by one commentator "extreme intellectual gymnastics." Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-*Brown *Era*, 46 VAND. L. REV. 865, 871 n.31 (1993).

78. NOW v. Scheidler, 113 S. Ct. 1042 (1993) (mem.) (inviting Solicitor General to file brief).

79. Brief for the United States, NOW v. Scheidler, 114 S. Ct. 798 (1994) (No. 92-780).

80. *See id.* at 1–2.

81. *See* Timothy M. Phelps, *New Weapon for Clinics*, NEWSDAY, Jan. 25, 1994, at 6, *available in* LEXIS, News Library, NEWSDY File.

82. United States v. Ivic, 700 F.2d 51, 59 (2d Cir. 1983); *see* Soule & Weinstein, *supra* note 7, at 374 n.45. Victoria Toensing, the former Deputy Assistant Attorney General who started the Justice Department's Terrorism Unit, was quoted as saying

Scheidler may simply represent a sympathetic set of facts that were used to advance the cause of law enforcement, while free speech concerns were brushed aside.

Freedom of speech protects abortion-rights activists as well as anti-abortion protesters. In spite of the facts of *Scheidler*, there should not be any divergence between the right to free speech and the right to an abortion. Therefore, abortion-rights groups should be cautious in using RICO against anti-abortion protesters. RICO should not be invoked against peaceful protesters.[83] In addition, abortion-rights groups should be willing to agree to some judicial restrictions of RICO. That way, RICO can remain a viable legal tool to use against violent anti-abortion protesters without violating the free speech right of peaceful activists on either side of the abortion question.

that the indictment in the World Trade Center case "'reads like a RICO indictment.'" Andrew Blum, *Trade Center Case Turns on Forensics*, NAT'L L.J., Oct. 25, 1993, at 8.

83. *Cf. supra* note 4.