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Civil RICO and Anti-Abortion Protest: Must Protestors Profit?: NOW, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992)

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NOTE

CIVIL RICO AND ANTI-ABORTION PROTEST: MUST PROTESTORS PROFIT?: NOW, INC. V. SCHEIDLER, 968 F.2D 612 (7TH CIR. 1992)

No man profiteth but by the loss of others.[1]

INTRODUCTION

Large-scale anti-abortion rights groups have become increasingly effective in organizing, planning, and conspiring to shut down abortion clinics across the country. Between 1977 and 1989, 117 clinics were the targets of arson and bombing, 250 received bomb threats, 231 were invaded and 224 vandalized.[2] From 1988 to 1990, almost 40,000 people were arrested in Operation Rescue demonstrations[3] and incidents of reported vandalism more than doubled from 1991 to 1992.[4] Violence has escalated to the point that women's rights groups have likened protesters to "domestic terrorists"[5] and doctors refuse to provide women with abortions because they have come to fear for their lives.[6] The battle to preserve abortion rights has

1. MONTAIGNE, ESSAYS I, xxi.

2. Susan Faludi, *The Anti-Abortion Crusade of Randy Terry: Operation Rescue's Jailed Leader and his Feminist Roots,* WASH. POST, Dec. 23, 1989, at C2. Protesters have run down clinic employees with their cars and have kidnapped them along with their patients. *Id.*

3. Tamar Lewin, *With Thin Staff and Thick Debt, Anti-Abortion Group Faces Struggle,* N.Y. TIMES, June 11, 1990, at A16. Founded by Christian fundamentalist Randall Terry, Operation Rescue has provided the "shock troops" of the anti-abortion movement with demonstrations that it calls 'rescues' since 1987. *Id.* Most arrests occur during clinic "blitzes" where protesters use a method called "lock and block" which involves pouring glue into clinic locks and locking individual protesters themselves to clinic doors. NOW, Inc. v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992), *cert. granted,* 61 U.S.L.W. 3834 (U.S. June 14, 1993) (No. 92-780).

4. *See* Larry Rohter, *Doctor Is Slain During Protest Over Abortions,* N.Y. TIMES, March 11, 1993, at A1.

5. David E. Anderson, *Abortion Foes Accused of Using More Violence,* UPI, Washington News, Jan. 21, 1986 (statement of Kate Michaelman, Executive Director of the National Abortion Rights Action League (NARAL). Domestic terrorist groups include neo-Nazi, Ku Klux Klan, and other violent racist and anti-Semitic organizations, that commit crimes including "armed robbery, synagogue bombing, murder and arson." *See* G. Robert Blakely & 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, 971 n.390 (1990).

6. *See* Judith Warner, *The Assassination of Dr. Gunn: Scare Tactics Turn Deadly,* MS., May/June 1993, at 86; Rohter, *supra* note 4, at A1; Felicity Barringer, *Slaying Is a Call to Arms for Abortion Clinics,* N.Y. TIMES, March 12, 1993, at A10 (Dr. Warren Hern, medical director of the Boulder Abortion Clinic noted, "I work in four layers of bullet-proof windows. Death threats are so common they are not remarkable.").

always been met with heated and emotional debate. Recently, however, the stakes have become deadly.

With the Supreme Court's recent reaffirmation of *Roe v. Wade*[7] in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[8] and the election of a proclaimed pro-choice President, anti-abortion activist groups are likely to become even more vocal in their crusades to be heard.[9] Calling abortion clinics "abortuaries" and labeling incidents of criminal trespass "rescues," followers of these organizations *assert* that their mission to enforce "higher laws" are not protests against the right to abortion in general, but rather, direct "interven[tions] to protect particular lives threatened with imminent destruction."[10] While the anti-abortion movement has attempted to invoke the common law and statutory doctrines of necessity and justification in defense of its actions,[11] courts have refused to apply the defenses to incidents of bodily harm, the destruction of property, or unlawful trespasses which occur during demonstrations.[12] Some protesters see themselves as reminiscent of abolitionists who maintained the Underground Railroad in violation of the Fugitive Slave Act of 1793.[13] They claim to be using the same tactics of civil disobedience used to *assert* the civil rights of

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7. 410 U.S. 113 (1973).

8. 113 S. Ct. 753 (1993) (re-emphasizing fundamental right to privacy which enables women to choose abortions whose regulation by the state is not unduly burdensome).

9. The Planned Parenthood Federation of America predicted that the November 1992 presidential election would trigger more incidents of violence and assault. The National Abortion Federation estimates projected that reported crimes including vandalism, bombing, arson, trespass, assault, battery, burglary, death threats and murder would increase from 186 in 1992 to 269 in 1993. "The last time we saw this level of violence was after *Roe v. Wade* and in the early years of the Carter administration." Warner, *supra* note 6, at 86.

10. *See* Charles E. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15, 28 (1989). *Cf.* Ronald Dworkin, *Feminism and Abortion*, N.Y. REVIEW OF BOOKS, June 10, 1993 at 28 ("Most feminists do not hold that a fetus is a person with moral rights of its own, but they do insist that it is a creature of moral consequence. They emphasize not the woman's right suggested by the rhetoric of privacy, but a woman's responsibility to make a complex decision that she is best placed to make.").

11. The affirmative defense of necessity is claimed by a criminal defendant when he or she believes that commission of a crime is necessary in order to prevent a "greater" harm from occurring. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW, § 50, at 381 (1972). *See also* Arlene D. Boxerman, Commentary, *The Use of the Necessity Defense by Abortion Clinic Protesters*, 81 J. CRIM. L. & CRIMINOLOGY 677, 677 (1990) ("Since at least 1978, anti-abortion activists have been attempting to raise the necessity defense to criminal trespass charges arising out of abortion clinic demonstrations.").

12. Rice, *supra* note 10, at 16. Assuming, in direct contradiction to *Roe* that the fetus is a "person," anti-abortionists point to the Model Penal Code to argue that the justification defense sanctions property destruction and even death during protests if caused in the attempt to preserve the fetus's life. *Id.* The courts, however, have rejected the argument repeatedly. *See* James O. Pearson, Jr., Annotation, *"Choice of Evils," Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R. 5th 521 (1992); *see also* Wichita v. Tilson, 855 P.2d 911 (Kan. 1993); Erlandson v. State, 763 S.W.2d 845 (Tex. Ct. App. 1988), *cert. denied*, 493 U.S. 852 (1989); People v. Smith, 514 N.E.2d 211 (Ill. App. Ct. 1987); Commonwealth v. Wall, 539 A.2d 1325 (Pa. Super. Ct. 1988).

13. Rice, *supra* note 10, at 30 n.85 (citing A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 533-39 (1935)).

blacks in the 1960's.[14] Others find the comparison ironic and argue that the anti-abortion protesters are attempting to use those same strategies to *deny* the civil rights of women.[15]

State civil and criminal laws have too often proven inadequate and ineffective in preventing violence and prosecuting offenders.[16] Discretionary enforcement on the local level leads to inconsistent results[17] and dropped charges.[18] In addition, trespass violations result in minimum fines, short jail sentences,[19] and do not deter those and other would-be trespassers from blockading clinics again.[20] Promotional literature written and distributed by some anti-abortion groups acknowledges the reality that state criminal justice systems are unable to contain demonstrators who perceive arrest as a desirable goal.[21] Even clinics that file and succeed in suits

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14. *Id.* at 15.

15. *See* John H. Henn & Maria Del Monaco, Recent Development, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251, 251-52 (1990) ("Just as Southern politicians once stood in the doorways of schoolhouses to prevent African-American schoolchildren from passing through to exercise their constitutionally protected right to desegregated education, today anti-abortion blockaders stand in the doorways of abortion clinics to prevent women from passing through to exercise their constitutional right to choose abortion.").

16. Virtually all of the state civil remedies are weak and ineffective because they lack the ability to "proscribe repeated, unlawful acts carried on by a single group of persons pursuant to an overall plan." *Id.* at 267. "[A] patchwork of State and local laws is inherently inadequate to address what is a nationwide, interstate phenomenon . . . [since] State court injunction powers end at State lines, and a State cannot easily reach persons in other States who may have planned the illegal acts." S. COMM. ON LABOR & HUMAN RESOURCES, FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT, S. REP. No. 117, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legis Library, Committee Reports File, at * 18.

17. Henn & Del Monaco, *supra* note 15, at 268 (state criminal statutes, often prohibiting vague crimes such as disorderly conduct, can often be construed in ways that make them inapplicable to anti-abortion rights protesters); Carrie Miller, Recent Development, *Abortion, Protest, and Constitutional Protection—Bering v. Share*, 721 P.2d 918 (Wis. 1986), 62 WASH. L. REV. 311, 332 (1987) (statutory interpretation of state criminal laws enjoining "threatening," "intimidating," or "coercive" behavior lead to discretionary enforcement and require ongoing judicial management).

18. *See, e.g.*, Tom Coakley, *Abortion Clinic Blockers Cleared*, BOSTON GLOBE, Dec. 1, 1989, at 33. *See also Abortion Clinic Violence, Oversight Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st and 2d Sess. 29 (1987) (statement of Heather Green, Director of Community Education, Hillcrest Clinic, Norfolk, Va.).

19. *See, e.g.*, Gaetano v. United States, 406 A.2d 1291, 1292 (D.C. 1979) (imposing a $50 fine); People v. Smith, 514 N.E.2d 211, 212 (Ill. App. Ct. 1987) (imposing $100 fine and two years court supervision); *Judge Relents on Jail Terms for Anti-Abortion Protesters*, N.Y. TIMES, June 24, 1989, at 6; Coakley, *supra* note 18.

20. NOW, Inc. v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992) (noting that one defendant before the court had been arrested more than three hundred times in violation of state criminal trespass laws); Crozer Chester Medical Center v. May, 506 A.2d 1377, 1378 & n.3 (Pa. Super. Ct. 1986); *Judge Fines 10 for Protests over Abortion*, N.Y. TIMES, Feb. 28, 1990, at B1.

21. *See, e.g.*, OPERATION RESCUE, JOIN US IN OPERATION RESCUE (pamphlet announcing blockages in New York City during the week of April 30 to May 7, 1988) ("It is most unlikely that you will be compelled to serve a jail sentence. And if we have hundreds of rescuers risking arrest, the likelihood of a severe penalty is even less."); Women's Health Care Services v. Operation Rescue, 773 F. Supp. 258, 265-66 (D. Kan. 1991) ("By targeting Wichita as the focus of its national efforts, Operation Rescue has virtually overwhelmed the resources of the city's relatively small police forces to respond with dispatch and effectiveness.").

against protest groups are often foiled by the refusal of organizers to pay adverse judgments and their ability to conceal financial assets.[22]

In response to the growing need for strong federal grounds of relief, Congress has just recently drafted the Freedom of Access to Clinic Entrances Act which creates federal criminal and civil remedies for women and clinics who are intentionally injured, intimidated or interfered with because they seek or provide reproductive health services.[23] Prior to this piece of legislation, abortion-rights groups such as the National Organization for Women (NOW) and the National Abortion Rights Action League (NARAL) invoked various judicial remedies to counter the demonstrations. These included creative (but not always successful) federal claims under the Civil Rights Act of 1871,[24] the Sherman Antitrust Act,[25] and the Racketeer Influenced and Corrupt Organizations Act (RICO).[26]

Courts[27] and commentators[28] are divided on the appropriateness of defining anti-abortion groups as the type of organization Congress intended to reach in passing RICO, which was part of the Organized Crime Control Act of 1970.[29] Courts are even further divided as to whether the statute should be limited only to cases involving parties driven by economic motivation.[30] *NOW, Inc. v. Scheidler*,[31] a Seventh Circuit case currently

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22. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 172 (1990) (citing Susan Faludi, *Where Did Randy Go Wrong?*, MOTHER JONES, Nov. 1989, at 27-28.).

23. Freedom of Access to Clinic Entrances Act, S. 636, 103d Cong., 1st Sess. (1993) (imposes criminal sanctions and provides civil remedies to individuals who by force or threat of force, intentionally injure, intimidate, or interfere with any person seeking reproductive health services or who intentionally destroys the property of a medical facility providing reproductive health services); *infra* note 164.

24. 42 U.S.C. § 1985(3) (1988). *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

25. 15 U.S.C. § 1 (1988). *See, e.g.*, Missouri v. National Organization for Women, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

26. 18 U.S.C. §§ 1961-1968 (1988). *See, e.g.*, NOW, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3834 (U.S. June 14, 1993) (No. 92-780).

27. *Compare* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.) *cert. denied*, 493 U.S. 901 (1989) *with* West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990).

28. *Compare* Michele R. Moretti, Note, *Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?*, 25 NEW ENG L. REV. 1363 (1991) (suggesting an expansive interpretation of RICO is essential to combat social harms caused by anti-abortion extortionists) *with* Anne Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators are Racketeers?*, 56 UMKC L. REV. 287 (1988) (suggesting that without limitation to situations originally intended by Congress, RICO statute may have to be abandoned as an abusive, harsh, and overreaching provision) *and* Norman Abrams, *Seeing Demonstrators as Extortionists*, L.A. TIMES, Op-Ed, Nov. 12, 1989, at M5 (arguing that when a prosecutor refuses to file criminal charges under RICO, a private plaintiff should be barred from seeking civil damages).

29. Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

30. *Compare Scheidler*, 968 F.2d at 612 *with* Feminist Women's Health Center v. Roberts, No. C86-161(V)D, 1988 WL 156656 (W.D. Wash. 1988).

31. 968 F.2d 612 (7th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3834 (U.S. June 14, 1993) (No. 92-780).

before the Supreme Court, directly addresses the difficulties of interpreting and applying RICO to anti-abortion protesters and provides an opportunity for the Court to confront problems that have been plaguing the lower federal courts for years.[32] The Court's decision in *Scheidler*, however, reaches beyond the abortion rights debate: the question presented asks whether *any* RICO enterprise or predicate act must have "an overriding economic motive" in addition to the requirement that the challenged conduct affect interstate commerce and injure the plaintiff's "business or property."[33] Thus, although the issue reaches the Court in the context of an abortion rights case, a decision which recognizes the existence of an economic motive requirement in all future civil RICO claims may have potentially far-reaching implications.

Part I of this Note canvasses the history of RICO and analyzes the circuit split on economic motive requirements in civil RICO claims. Part II examines *Scheidler*, a civil RICO claim brought by women's rights groups and women's health clinics against anti-abortion protest groups including the Pro-Life Action League, the Pro-Life Action Network, and Operation Rescue. Part III views *Scheidler* as misguided in its application of civil RICO to anti-abortion protesters and argues that RICO is an appropriate federal remedy in such suits. Part IV considers the continued applicability of RICO to anti-abortion protesters after *Scheidler*, regardless of any economic motive requirement.

Finally, this Note concludes that while recent decisions of the Supreme Court have limited federal jurisdiction in abortion rights cases, both the executive and legislative branches have worked to expand that jurisdiction. For example, Congress has recently created federal criminal and civil rights causes of action under the Freedom of Access to Clinic Entrances Act.[34] This Act, however, does not eliminate the need to seek alternative forms of relief. Therefore, civil RICO still remains a viable remedy.

I. PRIOR LAW

A. RICO and its Requirements

In 1970, Congress enacted the Organized Crime Control Act, of which RICO was Title IX,[35] in an effort to "seek eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced

32. The Supreme Court refused to grant certiorari on this divisive issue as recently as two years ago. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3rd Cir.), *cert. denied*, 493 U.S. 901 (1989) (White, J., dissenting).

33. NOW, Inc. v. Scheidler, 62 U.S.L.W. 3403 (U.S. Dec. 14, 1993).

34. Freedom of Access to Clinic Entrances Act of 1993, S. 636, § 2715, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legis Library, Committee Reports File; *infra* note 164.

35. Organized Crime Control Act of 1970, Pub. L. 91-452, § 901(a), 84 Stat. 922, 941.

sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[36] RICO provides both criminal penalties and civil remedies for the commission of any of four types of prohibited activities: (1) investing income derived from racketeering in an interstate enterprise (money laundering);[37] (2) acquiring or maintaining an interest in such an enterprise through a pattern of racketeering activity;[38] (3) conducting an enterprise through a pattern of racketeering activity;[39] and (4) conspiring to violate any of the above provisions.[40] In addition, civil RICO awards treble damages to victims claiming injury due to a violation of the statute,[41] and any person injured in her business or property by reason of a violation of RICO has standing to sue.[42] "Racketeering activity" is defined as any act or threat chargeable under enumerated state and federal laws.[43] These acts, called "predicate offenses," include diverse crimes such as murder, Hobbes Act extortion, mail fraud, white slave trafficking, arson and money laundering.[44] An "enterprise" for RICO purposes is defined as both a legal or a nonlegal entity associated in fact either individually or as

36. *Id.* at 922-23 (Statement of Findings and Purpose).

37. 18 U.S.C. § 1962(a) (1988) provides:

> 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 an 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.

38. 18 U.S.C. § 1962(b) (1988) ("It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate commerce.").

39. 18 U.S.C. § 1962(c) (1988) ("It shall be unlawful for any person employed 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.").

40. 18 U.S.C. § 1962(d) (1988) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.").

41. 18 U.S.C. § 1964(c) (1988) ("Any person injured in his business or property by reason of a violation of section 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.").

42. *Id.*

43. 18 U.S.C. § 1961(1)(A) (1988) (defines "racketeering activity" to include murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drug offenses punishable under State law by imprisonment for more than one year).

44. 18 U.S.C. § 1961(1)(B) (1988) (enumerates more than 32 separate acts indictable under selected provisions of Title 18 which qualify as RICO "predicate offenses." The offenses range from sports bribery and trafficking of motor vehicle parts to wire fraud and obstruction of justice).

partnerships, unions or corporations;[45] and a "pattern of racketeering activity" is established by the commission of two or more predicate offenses within a ten year period by any member of an enterprise.[46]

After enactment, the criminal provisions of RICO immediately "became the new darling of the prosecutor's nursery," however, the civil provisions "sat virtually unused on the library shelf for some ten years."[47] Prior to the Supreme Court's clarification of the meaning and scope of civil RICO in *Sedima, S.P.R.L. v. Imrex Co.*,[48] the statute was "floundering in a sea of judicial distaste."[49] Many circuits were unwilling to expand the reach of the civil provisions beyond the stereotypical "mobster" and were uneasy about attaching the "racketeering" label to the activities of legitimate business enterprises,[50] despite the fairly straightforward directive of Congress that the provisions of RICO "shall be liberally construed to effectuate its remedial purpose."[51]

In *Sedima*, a business fraud action involving a Belgian importer and an American electronics manufacturer, the plaintiff alleged fraud in the preparation of purchase orders, breach of contract and three counts of "racketeering" under the treble damages provision of 18 U.S.C. § 1962(c)).[52] The Supreme Court, for the first time explicitly commanded that "RICO is to be read broadly . . . [as] an aggressive initiative to supple-

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45. 18 U.S.C. § 1961(4) (1988) ("[E]nterprise" 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.).

46. 18 U.S.C. § 1961(5) (1988) ("[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.).

47. *See* Melley, *supra* note 28, at 291 (quoting Joan G. Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 RUTGERS L. REV. 285, 285 (1983)); *see also Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP., BANKING AND BUSINESS LAW 55 (noting that of the 270 federal district court decisions interpreting civil RICO prior to 1985, only 3 percent (nine cases) were decided in the entire decade from 1970 to 1979).

48. 473 U.S. 479 (1985).

49. Geri J. Yonover, *Fighting Fire With Fire: Civil RICO and Anti-Abortion Activists*, 12 WOMEN'S RTS. L. REP. 153, 159 (1990).

50. *See* Donald J. Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma*, 57 TEMP. L.Q. 731-32 (1984); *see also* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984) (noting concern that "respected and legitimate 'enterprises' [such] as the American Express Co., E.F. Hutton & Co., Lloyd's of London . . . and Merrill Lynch" had all been labeled "racketeers" in civil RICO claims).

51. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 947. *But see* Craig W. Palm, Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980) (arguing that the liberal construction clause of RICO should govern only when the plain meaning of the statute is ambiguous). *See also* William Rehnquist, Remarks of the Chief Justice at the A.B.A. Mid-Year Meeting in Denver, Colo. 1-12 (Feb. 6, 1989) (stating that "[a] sharp curtailment of the basis for civil RICO action . . . would . . . help to cut down on the work of the federal courts").

52. *Sedima*, 473 U.S. at 483.

ment old remedies and develop new methods for fighting crime."[53] *Sedima* held generally that there is no prior conviction threshold requirement to a private action brought under § 1964(c),[54] nor is there any requirement that the plaintiff must establish any specifiable "racketeering injury" beyond one that normally results from the finding of a "pattern of racketeering activity" under the statute.[55] Justice Powell warned in dissent that civil RICO claims after the Court's decision would result in unfettered resort to RICO and an inappropriate federalization of future claims alleging what should be ordinary common law wrongs and whose remedies are properly left to the states.[56]

Since *Sedima*'s liberal interpretative holding, lower courts and commentators have also expressed Justice Powell's fears of RICO's further expansion and have limited the statute by imposing on it an economic motive requirement.[57] While the plain language of RICO does not explicitly state that proscribed activity must be driven by financial motive or purpose, its application to non-economic actors has been confined. The room for statutory interpretation has led plaintiffs to implicate the statute in novel ways that some claim to have been unforeseen by its framers;[58] however, the Supreme Court itself admonished in *Sedima* that the "fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[59] The Court further noted that if its application of RICO against those other than "archetypal, intimidating mobsters" was defective, the difficulty was "inherent in the statute as written," and therefore, "its correction must lie with Congress."[60]

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53. *Id.* at 497.

54. *Id.* at 493.

55. *Id.* at 495.

56. *Id.* at 530 (Powell, J., dissenting).

57. "[I]t appears that the [*Sedima*] majority, the commentators, and even the dissent did not contemplate the uses to which the broadened reading of the RICO cause of action could be put in the noncommercial world. Following the *Sedima* directive, courts could now allow RICO to be applied in extraordinary ways." Catherine Reid, Note, *Limiting Political Expression by Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 RUTGERS L.J. 201, 213 (1988). *See, e.g.*, Von Bulow v. Von Bulow, 634 F. Supp. 1284, 1307 (S.D.N.Y. 1986) (famous murder case in which a wealthy victim qualified as an "enterprise" under RICO, and her husband's alleged plans to kill her qualified as a "pattern of racketeering activity" within the meaning of the statute).

58. "RICO has moved beyond logic and intent into areas far removed from racketeering. Originally intended to combat organized crime, RICO is used increasingly in ideological disputes." Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 806 (1990). *See also* Sedima, S.P.R.L. v. Imrex, 741 F.2d 482, 487 (2d Cir. 1984) (expressing distress at the "extraordinary, if not outrageous" uses of RICO and its use as a tool in everyday fraud cases).

59. *Sedima*, 473 U.S. at 499 (quoting Haroco, Inc. v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984)).

60. *Id.*

B. Split in Circuits on Economic Motive Requirement

Despite Justice Powell's call for clarifying legislation, Congress has never acted on the economic motive question; although it has considered amending civil RICO several times.[61] In the meantime, the lower courts have hopelessly lacked direction in civil RICO cases where the actors are not clearly or solely inspired by monetary gains or incentives. Confusion runs rampant among the Circuit Courts of Appeals. For example, the Second and Eighth Circuits have explicitly demanded an economic motive under RICO, finding that either the "enterprise" or the "predicate acts" provision of the statute requires it.[62] The Fourth, Ninth and Eleventh Circuits appear to reject financial motive, but have not had to consider a close case directly.[63] The Third Circuit has held that an economic motive is not required when the predicate act which violates RICO is a Hobbes Act[64] crime, but the court had no occasion to decide what other predicate acts may not require

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61. In response to Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), Senator Dennis Deconcini introduced a bill in an attempt to "restore the usefulness and effectiveness of the RICO statute that existed prior to the explosion of abusive and harassing lawsuits filed in the 1980's." *See* RICO Reform Act of 1989, S. 438, 101st Cong., 1st Sess., 135 Cong. Rec. 2646, 2659 (Feb. 23, 1989). The bill, which was not enacted, proposed to amend the statute to include: "additional predicate offenses within the definition of "racketeering activity," such as prostitution involving minors, computer fraud, and certain activity relating to terrorist acts abroad *and to exclude from such definition participation in, or support of, non-violent public speech undertaken for reasons other than economic . . . .*" *See* S. Rep. No. 269, 101st Cong., 1st Sess., 136 Cong. Rec. S4923 (daily ed. April 24, 1990) (emphasis added). Similar attempts to amend RICO followed in 1990 and in 1991, but were not successful. Both versions attempted to limit a private plaintiff's resort to RICO by heightening the standard of proof to "clear and convincing" and to limit the treble damage provision to "major participants" engaging in "egregious" criminal conduct. *See* RICO Amendments Act of 1990, H. Rep. 975, 101st Cong., 2d Sess., 136 Cong. Rec. H12420 (daily ed. Oct. 27, 1990); RICO Amendments Act of 1991, H.R. Rep. 312, 102d Cong., 1st Sess., 137 Cong. Rec. H9757 (daily ed. Nov. 13, 1991).

62. *See* United States v. Flynn, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988), *aff'g* United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); United States v. Bagaric, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); United States v. Ivic, 700 F.2d 51 (2d Cir. 1983).

63. Although the Fourth and Eleventh Circuits reject a "financial benefit" requirement under RICO, the defendants before the courts were clearly profit-oriented. *See* Adam D. Gale, Note, *The Use of Civil RICO Against Anti-Abortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1357 n.124 (1990) (citing United States v. Webster, 669 F.2d 185, 186-87 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982)); United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). *See also* United States v. Thordarson, 646 F.2d 1323, 1328 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981) (finding economic motive irrelevant because the statute "prescribe[s] conduct without regard to the status of ultimate objectives of the person engaging in it.").

64. The Hobbes Act makes it a crime to extort property from a business engaged in interstate commerce. *See* 18 U.S.C. § 1951(a) & (b)(2) (1988); *infra* note 82.

economic motive.[65] Finally, a Washington District Court has refused to require any economic motivation under RICO at all.[66]

The Second Circuit was the first to identify an economic motive requirement for RICO violations in *United States v. Ivic*.[67] There, the court held that political organizations (Croatian nationalists), constituted an enterprise under 18 U.S.C. § 1962 only if their terroristic activities were designed as a "profit-seeking venture" whose purpose was to infiltrate legitimate businesses.[68] The court held that because *neither* the enterprise *nor* the racketeering predicate acts had a financial purpose, RICO was not violated.[69] The Second Circuit soon afterward clarified *Ivic's* reasoning in *United States v. Bagaric*,[70] another case involving Croatian nationalists. There, the court stated that economic motivation under § 1962 does not have to constitute the predominant purpose motivating a RICO defendant's enterprise or predicate acts; the requirement is satisfied as long as there exists an objectively visible economic goal for either.[71] The court recognized that while non-profit political organizations by definition do not exist *primarily* to make money, the existence of a monetary goal that was subordinate to the main objective of achieving Croatian independence was sufficient to satisfy RICO's economic motive requirement.[72]

Like the Second Circuit, the Eighth Circuit requires economic motive under RICO. However, the enterprise *must* be "directed toward an economic goal,"[73] and in addition, it must have a "discrete economic association existing separately from the racketeering activity."[74] This implies an adaptation on the Second Circuit's reasoning in *Ivic* to demand proof that the enterprise is economically motivated *regardless* of whether or not the predicate acts alleged have any financial purpose.[75] Economic purpose, however, is construed broadly.

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

66. Feminist Women's Health Center v. Roberts, No. C86-161(V)D, 1988 WL 156656 (W.D. Wash. 1988).

67. 700 F.2d 51 (2d Cir. 1983).

68. *Id.* at 60.

69. *Id.* at 59.

70. 706 F.2d 42 (2d Cir.), *cert. denied,* 464 U.S. 840 (1983).

71. *Id.* at 55.

72. *Id.* at 58.

73. United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).

74. United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

75. *Cf.* Mary L. Perry, Note, *Judicial Creation of an Economic Requirement Under RICO: Time to Dismantle the Barricade*, 68 WASH. U. L.Q. 1021, 1033 n.92 (arguing "that the *Flynn* decision did not resolve the question of whether the Eighth Circuit would allow a RICO claim against an enterprise without an economic goal if the predicate acts did not have an economic orientation.").

For example, in *United States v. Flynn*,[76] the Eighth Circuit held that the defendant member of a group constituting an enterprise under RICO acted with others to carry out the "common purpose" of "dominat[ing] local labor unions."[77] The court held that the enterprise profited economically from the domination, even though it received no money, by committing the predicate offenses of murder and the conspiracy to murder a rival labor union leader.[78] Therefore, even though the predicate acts were not overtly economic in nature, the Eighth Circuit affirmed Flynn's RICO conviction because the enterprise functioned to achieve an "economic goal."[79]

The Third Circuit, on the other hand, has explicitly rejected the Second and Eighth Circuits' formulation of RICO's economic motive requirement—and it did so in an anti-abortion protest case. In *Northeast Women's Center, Inc. v. McMonagle*,[80] the defendants forcibly entered the clinic on four occasions, knocked down and injured employees, ransacked medical cabinets, threw supplies on the floor, and harassed patients. Ultimately some staff members resigned and the clinic lost its lease.[81] In its civil RICO suit, the clinic alleged a violation of the Hobbes Act,[82] a predicate offense often implicated and specifically enumerated under RICO,[83] and claimed that the protesters extorted the clinic's right to operate a business and its staff's right to employment.[84] The clinic argued that the Hobbes Act itself did not require a showing of economic motive; therefore, when invoked as a predicate offense under RICO, no additional economic showing was required.[85] In direct contradiction to the Seventh Circuit's later decision in *Scheidler*,[86] the Third Circuit held that extortion in violation of the Hobbes

76. 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).

77. *Id.* at 1051.

78. *Id.* at 1052.

79. *Id.*

80. 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

81. *Id.* at 1346-47.

82. Anyone who "in any way or degree obstructs, delays, or affects commerce in the movement of any article or commodity in commerce, by robbery or extortion" violates the Hobbes Act. 18 U.S.C. § 1951(a) (1988). "Extortion" is defined as "obtaining [] property of another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2) (1988).

83. 18 U.S.C. § 1961(1)(B) (1988); *supra* note 44.

84. *Northeast Women's Center, Inc.*, 868 F.2d at 1350.

85. *Id.* at 1349-50. Even the Second Circuit does not require that economic motive be proven to violate the Hobbes Act. *See* United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). Thus the difference in the Second and Third Circuit's interpretation of RICO does not arise from a disagreement over construction of the Hobbes Act. Perry, *supra* note 75, at 1034 n.100.

86. 968 F.2d 612, 629 (7th Cir. 1992) (holding that even when the defendant violates the Hobbes Act, the plaintiff must, in addition, prove that either the "predicate act" or the "enterprise" has an economic motivation in order to satisfy RICO).

Act did not require additional proof of an economic motive to satisfy RICO.[87] *Northeast Women's Center, Inc.* does not directly answer the broader question, however, of whether the Third Circuit, like the Second and Eighth, still requires a showing of economic motive or goal in defining an enterprise under RICO.[88]

In *Feminist Women's Health Center v. Roberts*,[89] yet another anti-abortion case alleging Hobbes Act violations, the Western District of Washington rejected both an inquiry into the economically motivated activity and one into the profit-seeking nature of the enterprise. There, the protesters engaged in various forms and levels of harassment including the making of "hang-up" phone calls to the Center, occupying all the Center's parking with their automobiles and creating a gauntlet that patients and employees had to pass through to enter.[90] One defendant went as far as setting the Center on fire three times.[91] After the third fire, the Center was forced to close.[92] Relying on *Sedima's* admonition to broadly construe RICO claims, the district court explicitly refused to adopt the Second Circuit's economic motive requirement under *Ivic* and held that it would be inappropriate to dismiss the plaintiff's RICO claim based on the lack of evidence supporting financial motive in the absence of controlling Ninth Circuit precedent.[93]

II. *NOW, INC. V. SCHEIDLER*: THE SUPREME COURT'S OPPORTUNITY TO LIMIT RICO TO ECONOMIC ACTORS

In *NOW, Inc. v. Scheidler*,[94] the Seventh Circuit rejected the Third Circuit's decision in *Northeast Women's Health Center, Inc.*,[95] and held that RICO defendants whose predicate offenses violate the Hobbes Act must still prove that those acts or the enterprise are economically motivated before civil

87. *Northeast Women's Center, Inc.*, 868 F.2d at 1350. Because the Third Circuit found economic motive unnecessary to prove a Hobbes Act violation, it specifically refused to consider whether the evidence offered by the clinic *would* be sufficient to show economic motivation. *Id.* at 1349 n.7.

88. The defendants in *Northeast Women's Center, Inc.* did not challenge the district court's charge to the jury which outlined the elements of an "enterprise" under RICO. The instruction provided that "[a]ll the plaintiff has to prove is the existence of an ongoing organization, either formal or informal in nature in which the various associates functioned as a continuing unit. The enterprise must have an existence separate and apart from the pattern of activity in which it engages." 868 F.2d at 1348 n.5. Apparently, the Third Circuit, unlike the Second and Eighth, requires no additional showing that the RICO "enterprise" be financially motivated or have any monetary purpose or goal.

89. No. C86-161(V)D, 1988 WL 156656 (W.D. Wash. 1988).

90. *Id.* at *1.

91. *Id.*

92. *Id.*

93. *Id.* at *12 n.2.

94. 968 F.2d 612 (7th Cir. 1992).

95. 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

RICO liability will attach.[96] In this case, the plaintiff NOW, a non-profit organization aimed at advancing and protecting women's rights, together with two Illinois women's health centers, claimed that the defendant, Joseph Scheidler, Executive Director of the Pro-Life Action League,[97] together with members of other anti-abortion activist groups, and employees of Vital-Med Inc., a medical testing laboratory, conspired to close all women's health centers providing abortions through a pattern of illegal activity.[98]

NOW claimed that the coalition of anti-abortion groups spearheaded by Scheidler engaged in the following illegal activities: extortion, physical and verbal intimidation and threats directed at health center personnel and patients, trespass, blockades, destruction of center advertising, phone campaigns designed to tie up health center lines, false appointments to prevent legitimate patients from making them, and tortious interference with the centers' business relationships with landlords, patients, personnel and medical testing laboratories.[99]

NOW alleged that these acts violated the Sherman Antitrust Act[100] and the Racketeer Influenced and Corrupt Organizations Act (RICO).[101] The district court granted Scheidler's motion to dismiss the complaint because it failed to state a claim upon which relief could be granted under F.R.C.P. 12(b)(6).[102] NOW appealed and the Seventh Circuit "reluctantly" affirmed the dismissal on the grounds that the Antitrust Act was not intended to apply to the anti-abortionists' activities and because RICO requires either that the

96. *Scheidler*, 968 F.2d at 629.

97. Scheidler has been called the "Green Beret of the abortion" by Christian fundamentalist and politician Pat Buchanan. *See Abortion Clinic Violence*, *supra* note 18, at 64.

98. *Scheidler*, 968 F.2d at 615.

99. *Id.* NOW's complaint also alleged that two of the defendants established competing pregnancy testing and counseling facilities, abrasively confronted women entering the facilities as "sidewalk" counselors, invaded a judge's home, contacted businesses providing goods and services to clinics, threatened to disrupt and harass them if business transactions with the clinics continued, and even participated in a conspiracy to steal fetal remains from a medical testing laboratory. *Id.* at 615-16. Scheidler kept a full storage drum of the stolen remains in his backyard for several weeks until they could be parcelled out to anti-abortion organizations in Indiana, North Carolina, North Dakota, Delaware, and Florida. Upon shipment, activists would hold mass burial services for the fetuses during grisly staged protests. *Id.* at 616.

100. The Sherman Antitrust Act, 15 U.S.C. § 1 (1988) declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade of commerce. . . ."

101. *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(a) (1988) (making it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt"); 18 U.S.C. § 1962(c) (1988) (making it "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"); *see also* 18 U.S.C. § 1962(d) (1988) (making it "unlawful to conspire to commit" any of the prohibited acts in 18 U.S.C. § 1962(a), (b), or (c)).

102. *Scheidler*, 968 F.2d at 614.

group as a whole be an economically motivated enterprise or engaged in economically motivated predicate acts.[103]

The court considered the basis of NOW's RICO claim as a question of first impression in the Seventh Circuit.[104] First, NOW alleged that the defendants violated the money laundering provision of RICO § 1962(a) because the donations received by supporters were derived from their racketeering activity.[105] The Seventh Circuit agreed with the district court's determination that the income Scheidler and the other protesters received through donations was not "derived directly or indirectly[] from a pattern of racketeering activity," and therefore was not sufficiently proven to be the product of extortion as required by the statute.[106] The Seventh Circuit held that because NOW failed to allege that contributors to the anti-abortion organizations would not have donated money to them "but-for" the groups' acts of criminal trespass, threats and vandalism, the receipt of donations by itself was an insufficient cause to support a RICO violation under § 1962(a).[107]

Second, the court addressed the precise issue of whether or not RICO liability could be imposed when neither the "enterprise" nor the "pattern or racketeering activity" provision of 18 U.S.C. § 1962(c) is economically motivated.[108] The court analyzed similar cases from other Circuits which had split on the issue and affirmed the district court's dismissal of the complaint because NOW had not alleged that the protesters had "some profit-generating purpose."[109] While some of the cases examined by the Seventh Circuit concerning § 1962(c) involved "non-traditional" RICO actors,[110] only two involved anti-abortion protesters specifically, neither one of which required an economic motive.[111] While noting that no explicit language in the statute requires RICO actors to be economically motivated, the Seventh

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103. *Id.* The Seventh Circuit's "reluctance" to dismiss the case is clear in view of the defendants' egregious illegal acts. The opinion carefully describes clinic invasions by hundreds of individuals, one of whom the court noted, had already been arrested under state criminal law charges more than three hundred times. *Id.* at 615.

104. *Id.* at 626 ("[W]e have never grappled with the economic motive issue head on.").

105. *Id.* at 623.

106. *Id.* at 625.

107. *Id.* ("The attenuated causal connection between the defendants' criminal trespass, threats, and vandalism, and their receipt of donations from third parties . . . is simply too tenuous to satisfy the requirements of § 1962(a).").

108. *Id.* at 626.

109. *Id.*

110. The Supreme Court has noted that "although [RICO] had organized crime as its focus, [it] was not limited in application to organized crime." *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 248 (1989). However, the stated intent of the Seventh Circuit ruling in *Scheidler* was not to "extend[] [RICO] so far as the activities of political terrorists" or "revolutionaries" unless the "activities were centered around the commission of economic crimes." 968 F.2d at 628.

111. *See Scheidler*, 968 F.2d at 626 (citing Northeast Women's Health Center, Inc. v. McMonagle, 868 F.2d 1342 (3rd Cir. 1989); Feminist Women's Health Center v. Roberts, No. C86-161(V)D, 1988 WL 156656 (W.D. Wash. 1988)).

Circuit adopted the profit-oriented limitation imposed by Second Circuit case law[112] and justified its decision as a matter of statutory interpretation.[113]

While their primary contention was that RICO had no inherent economic motive requirement, NOW's alternative argument was that even if the Seventh Circuit found that RICO enterprises or predicate acts under § 1962(c) *did* demand economic motivation, the fact that Scheidler and the anti-abortionists intended to raise the clinics' "costs of doing business" by committing acts of extortion was sufficient to satisfy the economic motive requirement.[114] NOW argued that the protesters acted to generate funds: they received contributions as a result of their unlawful acts and sold materials detailing illegal methods of closing health centers.[115] Efforts to generate financial gain for the protest movement, when coupled with the protesters' economic *effect* on the clinics, arguably satisfied any implied economic requirement under RICO.[116] The Seventh Circuit disagreed, however, found that no Circuit previously imposing economic motive under RICO had ever specifically held that raising victims' costs could satisfy the requirement,[117] and dismissed the argument noting that although "reprehensible criminal and tortious conduct results incidentally in donations to support it, it is more a comment on the nature of the defendants' supporters than on the *purpose* of the defendants' acts."[118] Therefore, while it adopted the Second and Eighth Circuits' formulation of an economic motive requirement, the Seventh Circuit failed to follow suit entirely and interpreted RICO's financial incentives narrowly.[119] Finally, because the Court of Appeals found that NOW had alleged no violations sufficient to satisfy 18 U.S.C. § 1962(a) and (c), their claim that Scheidler and the other defendants had conspired to violate those same sections under 18 U.S.C. § 1962(d) failed as well.[120]

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112. *See* United States v. Ferguson, 758 F.2d 843 (2d Cir. 1985); *see also infra* notes 62, 67-72 and accompanying text.

113. *See Scheidler*, 968 F.2d at 629 ("In this case we do not believe we are adding elements to the offense, but merely fleshing out the definitions of those elements.").

114. *Id.* at 630.

115. *Id. See, e.g.*, JOSEPH SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION (1985) (anti-abortion practice manual detailing effective methods of protest ultimately aimed at forcing abortion clinics out of business). Some of the 99 Chapters in CLOSED instruct protesters on means of halting a health facility's ability to do business altogether. Chapter 86 is entitled "Special Clinic Closing Programs: Project Jericho, Three Month Blitz, and Others," *id.* at 297, and Chapter 94 addresses "The Abortion Hospital: A Special Problem." *Id.* at 325. *See also Abortion Clinic Violence, supra*, note 18, at 63.

116. *Scheidler*, 968 F.2d at 630.

117. *Id.*

118. *Id.* (emphasis added).

119. The Second and Eighth Circuits construe the economic motivation requirement broadly. *See, e.g.*, United States v. Bagaric, 706 F.2d 42, 55 (2d Cir.) (economic motive requirement satisfied as long as there exists an objectively visible economic goal), *cert. denied*, 464 U.S. 840 (1983); United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir.) (RICO "enterprise" must be "directed toward an economic goal"), *cert. denied*, 488 U.S. 974 (1988).

120. *Scheidler*, 968 F.2d at 630.

III. DEFECTS IN *SCHEIDLER*: RICO'S PROPER APPLICATION TO ANTI-ABORTION PROTESTERS

The Seventh Circuit's decision in *Scheidler* is defective for two reasons. First, the opinion fails to adequately explain why economic motive *should* be required for a RICO "enterprise" or "predicate act." Second, it fails to sufficiently outline what type of financial incentive, goal, or motive a future plaintiff is required to prove. The Seventh Circuit in *Scheidler* purports to follow the Second Circuit in requiring economic motive as first enunciated in *Ivic*, but then chooses to ignore that Circuit's later decisions which arguably only require a showing that the RICO enterprise has some financial impact.[121]

In addition, the *Scheidler* court improperly looked to the implied economic motivation required by *Ivic's* construction of the term "enterprise" under 18 U.S.C. § 1962(a) to guide its statutory interpretation of 18 U.S.C. § 1962(c).[122] While defining terms consistently within the same statute admittedly has elemental appeal, this approach fails to note how each of RICO's individual subsections is targeted at different types of conduct in which the enterprise plays different roles.[123] The effect of such a limited reading of RICO, unless corrected by the Supreme Court, will have the harsh and unfortunate result of preventing many otherwise valid and reasonable RICO claims from ever being considered on the merits. Like the plaintiffs in *Scheidler*, future RICO claimants wishing to challenge illegal acts of anti-abortion protest will also be dismissed for failing to state a cause of action

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121. *Id.* ("We do not contest that the defendants' activities had an economic effect on the plaintiffs, we simply refuse to equate that effect with the economic motive required by *Ivic* and its progeny."); *but c.f.*, *Bagaric*, 706 F.2d at 42; United States v. Ferguson, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985).

122. *Scheidler*, 968 F.2d at 629. The Second Circuit in *Ivic* reasoned that the term "enterprise" as used in subsection (a) "clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money." 700 F.2d 51, 60 (2d Cir. 1983). The Second Circuit further reasoned that the same interpretation should apply to the definition of "enterprise" under subsection (c) because "[w]hen the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in other places." *Id.*

123. *Scheidler's* adaptation of the Second Circuit's reasoning in *Ivic*, however, gives no recognition to the distinct role a RICO "enterprise" plays under 18 U.S.C. § 1962(a) or (b) on one hand, and 18 U.S.C. § 1962(c) on the other:

> In subsections (a) and (b), the enterprise is an investment vehicle or target, sometimes denominated the "prize" or "victim" of the RICO defendant's misconduct. Quite distinctly, under subsection (c), the enterprise itself is the malefactor. Section 1962(c) is, therefore, directed at preventing or punishing a different ill than that targeted by section 1962(a) or (b)—namely, enterprise misbehavior (persons conducting an enterprise's affairs through a pattern of racketeering activity). There is no apparent need or warrant to require that the culprit enterprise of subsection (c) bear the earmarks of the financial plum or plundered booty envisaged in subsections (a) and (b). The Second Circuit's conclusion, is at best, the procrustean product of a perceived consistency at odds with the structure of the statute.

GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 57 (1992).

and thus, their meritorious complaints will not survive even the most summary stages of federal review.

The Supreme Court granted certiorari in *Scheidler* in order to address the question whether a violation of 18 U.S.C. § 1962(c) requires proof that either the "enterprise" or the "predicate acts" of racketeering activity are economically motivated.[124] Should the Court require proof of economic motive, the additional barrier need not necessarily prohibit RICO's applicability to anti-abortion protesters in the future. However, unless the Court clearly defines the scope of such a motive within workable constitutional limits, the potential for continued RICO application is questionable.

There is *no* question that RICO is a powerful weapon against enterprises that threaten constitutional rights which require the federal courts' imprimatur and protection.[125] Civil RICO has several advantages over state criminal laws that too often fail to protect the civil rights of women seeking abortions or abortion counseling. No indictment is necessary before a plaintiff brings suit, a crime need only be proved by a preponderance of the evidence, a standard of proof considerably less demanding than the criminal proof beyond a reasonable doubt, and the pleading requirements are more liberal than those required of a criminal indictment.[126]

While some critics argue that RICO's use against anti-abortion extremists is akin to "using a cannon to go hunting for squirrels,"[127] most protest groups are not small game. Other commentators note that as highly organized, sophisticated and economically powerful networks, the groups establish systems of financial support in an effort to "immunize" their members from traditional civil and criminal remedies.[128] Like the organi-

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124. 61 U.S.L.W. 3834 (U.S. June 14, 1993) (No. 92-780).

125. "The indispensability of such a remedy is readily apparent when reviewing the zeal with which authorities have prosecuted illegal protest activity. The prevailing attitude has ranged from reluctant to recalcitrant at local, state, and federal levels of government." Moretti, *supra* note 28, at 1398. For example, in response to a clinic firebombing in Everett, Washington, both the town's police and fire chiefs "publicly suggest[ed] that the clinic staff may have torched their own clinic to get publicity or collect insurance money. . . . [T]he police pressured clinic staff members to submit to lie detector tests and scrutinized their personal finances." *Abortion Clinic Violence*, *supra* note 18, at 601 (testimony of Betty Maloney).

126. *See* CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS 16-18 (1988); *but cf.* Califa, *supra* note 58, at 836 (arguing that free speech is chilled by loose definitions of "enterprise" and "pattern of racketeering activity," "liberal pleading requirements, implication by association, the specter of treble damages, costly defense, intrusive discovery, and the racketeer label").

127. Melley, *supra* note 28, at 308. *See also* Wexler, *supra* note 47, at 292 n.33 ("RICO [has been] labeled as 'cruel,' 'totalitarian,' the 'death sentence,' and a tool which can 'reach out and castrate people'").

128. Moretti, *supra* note 28, at 1363. The anti-abortion movement supports its members in crisis. Rescue America raised money to help the family of protester and murderer Michael Griffin, who shot a doctor outside a Pensacola, Florida clinic. Don Treshman, the head of Rescue America in Houston claimed that the money was intended to help Griffin's wife and daughters, not to pay for his legal defense. "We know that the abortionist is well taken care of. But there is a financial strain for the defendant." *See* Rita Ciolli, *Protester Slays Abortionist*, NEWSDAY, March 11, 1993, at 4.

zations that originally inspired RICO, the rescue movement uses force, fear and coercion to accomplish "moral" objectives through physical and psychological intimidation.[129] Undoubtedly, this was the type of threat to public welfare that Congress intended to eliminate with its RICO legislation.[130]

Drafters of RICO recognized that state and local law enforcement efforts simply failed to reach the roots of dispersed criminal organizations.[131] The statute was designed to buttress traditional enforcement which only prosecutes individuals and allows officials to go beyond the individual and strike at the organized network underlying his or her criminal activity.[132] Abortion protest groups who organize, conspire, and attempt to commit unlawful activities often perpetuate their goals despite the fact that individual members may be removed from their ranks.[133] "The soldiers, once removed, will simply be replaced by [others] willing to carry out the aim of the group's activities."[134] Civil RICO is an appropriate and effective means of reaching the source of criminal activity that is easily disguised under the rubrics of moral protest, political expression or constitutionally protected free speech.[135] In addition, independent studies have concluded that civil RICO

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129. *See* Patricia G. Barnes, Student Work, *Civil Disobedience and Civil RICO: Anti-Abortionists as Racketeers*, 93 W. VA. L. REV. 359, 359 (1991). "Today's radical anti-abortionists fancy themselves to be a modern-day John Brown," asserting their innocence under higher law in the same spirit as he who led the revolt at Harper's Ferry to free the slaves. *Id.*

130. Congress prefaced its intended scope of RICO with a Statement of Findings and Purpose:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; . . . (3) this money and power are increasingly used to infiltrate and corrupt legitimate businesses and labor unions; . . . (4) organized crime activities in the United States weaken the stability of the Nation's economic system.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23.

131. Michael Goldsmith & Penrod W. Keith, *Civil RICO Abuses: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 60-61.

132. *Id.*

133. *See Abortion Clinic Violence*, *supra* note 18, at 56-57 (testimony of Joseph M. Scheidler):

> We have no intention of being intimidated by threats to our rights of free speech, assembly and redress of grievances. We will return again and again to the abortuaries to talk women out of abortion, to try to convert medical personnel who have turned their healing profession into a killing profession. We will confront in the courts and on the streets, every false arrest, every malicious prosecution and every unconstitutional injunction. . . .

134. Jo Anne Pool, Note, Northeast Women's Center, Inc. v. McMonagle: *A Message to Political Activists*, 23 AKRON L. REV. 251, 265 (1989).

135. The plaintiff's complaint in *Scheidler* did not attempt to bar all anti-abortion activities since "peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest" are protected by the First Amendment. 968 F.2d at 616. The complaint sought relief for criminal and tortious acts unrelated to constitutionally protected free speech such as "trespass, clinic invasion, vandalism, extortion, and tortious interference with business

is effective against highly organized conspiracies because it "facilitate[s] the prosecution of a criminal group involved in superficially unrelated criminal ventures and enterprises connected only at the usually well-insulated upper levels of the organization's bureaucracy."[136] Therefore, it seems obvious that the Seventh Circuit's close-minded approach to RICO in *Scheidler* results in an unreasonable emasculation of a potentially powerful and expansive statute.

IV. CONTINUED APPLICATION OF RICO TO ANTI-ABORTION PROTESTERS AFTER *SCHEIDLER*

A. The Plain Language of the Statute Requires No Economic Motive

Before granting certiorari in *Scheidler*, the Supreme Court invited the Solicitor General of the United States to respond to the applicability of an economic motive requirement under civil RICO.[137] The newly formed Clinton administration refused to require one.[138] Likewise, NOW and other plaintiffs have continually argued that Congress defined "enterprise" and "racketeering activity" clearly and precisely to avoid any need to look for hidden meanings or to require judicial amendments. In other words, if Congress meant to require economic motive, it would have said so.[139] In enacting RICO, concern was centered on the *effect* of concerted criminal conduct on business and interstate enterprise, and not the *motives* of those

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relationships." *Id.*

136. Blakely & Perry, *supra* note 5, at 856 n.12. *See also Organized Crime: 25 Years After Valachi: Hearings Before the Permanent Subcomm. on Interrogations of the Senate Comm. on Governmental Affairs*, 100th Cong., 2d Sess. 505 (1988) (Statement of David C. Williams, Director, Office of Special Investigations, General Accounting Office):

> Before the Act, the government's efforts were necessarily piecemeal, attacking isolated segments on the organization as they engaged in single criminal acts. . . . The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal prosecution. With the passage of RICO, the entire picture of the organization's criminal behavior and the involvement of its leaders in directing the behavior could be captured and presented.

137. 61 U.S.L.W. 3498 (U.S. Jan. 19, 1993) (No. 92-780). Represented by Solicitor General Drew S. Days, III, the Department of Justice is arguably the greatest outside influence on Supreme Court decision-making. The Solicitor General has been called both a "handmaiden" to the Court and its "10th Justice." Joan Biskupic, *Lag on Solicitor General May Benefit Bush Policies*, WASH. POST, Feb. 8, 1993, at A4.

138. Brief for the United States as Amicus Curiae Supporting Petitioners at 7-8, NOW, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3834 (U.S. June 14, 1993) (No. 92-780); *Supreme Court Review*, NOW, Inc. v. Scheidler, NAT. L.J., Aug. 23, 1993, at S24.

139. JOSEPH, *supra* note 123, at 58-59 ("There is no Robin Hood exception to RICO. There is no 'safe harbor' for miscreant enterprises, whatever their motivation. If all the statutory criteria are satisfied, . . . the statute has been violated. 'Economic motivation' is beside the point.").

perpetrating the criminal acts.[140] This is reinforced by the fact that an enterprise within the meaning of 18 U.S.C. § 1962(a), (b), or (c) can be a nonprofit legal entity that need not generate money or realize profit of any kind.[141] Therefore, the legislative history confirms the plain meaning of the statute and that Congress intended RICO "to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways,"[142] regardless of economic incentives. However, Congress' failure to explicitly mention economic motive in the language of the statute may also lead to the opposite conclusion: arguably, the legislators did not foresee the need to refer explicitly to economic motive because they *assumed* such a motive was necessary.[143]

B. An Implied Economic Motive Requirement Under RICO Should Encompass Economic Impact in Anti-Abortion Protest Cases

Even if the Supreme Court affirms *Scheidler* and decides to require economic motive as prerequisite to a RICO claim, it cannot be assumed that anti-abortionists lack financial incentive simply because they are non-traditional RICO actors. While the primary means of achieving anti-abortion goals is superficially driven by an emotional plea for the fetus's "right to life," a more sophisticated analysis of the protest groups reveals an intricate structure which has proven itself able to support and encourage illegal activities that negatively influence the supply of abortion-related services. Therefore, the economic motive requirement under RICO when applied to anti-abortionists and other enterprises whose agenda do not precisely fit into preconceived "mobster" molds should be sensitive not only to economic motivation, but to economic impact on the market as well.[144] Anti-abortion protests interfere with a health clinic's ability to conduct business and therefore, have a direct financial impact on the industry as a whole.[145] The

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140. Although Congress focused on organized crime, it stressed liberal interpretation of RICO. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

141. *See, e.g.*, Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1018 (3d Cir.), *cert. denied*, 482 U.S. 915 (1987) (court constituted an "enterprise" under RICO); United States v. Yonan, 800 F.2d 164, 167 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987) (prosecutor's office considered "enterprise" under RICO); United States v. Hocking, 860 F.2d 769 (7th Cir. 1988) (Illinois Dep't of Transportation fit within definition of "enterprise" for purposes of RICO.)

142. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 248-49 (1989).

143. Gale, *supra* note 63, at 1358-59 & n.135.

144. *See* Frans J. von Kaenel, Comment, *The Seventh Circuit Bestows Immunity from RICO Prosecutions Upon Anti-Abortion Protestors*, 71 WASH. U. L.Q. 175 (1993) (arguing that *Scheidler* should have expanded the economic motivation requirement to encompass economic impact); *see also* Gale, *supra* note 63, at 1349, 1368.

145. *See, e.g.*, Northeast Women's Health Center, Inc. v. McMonagle, 868 F.2d 1342, 1346-47 (3d Cir), *cert. denied,* 493 U.S. 901 (1989) (clinic forced to install sophisticated security equipment to thwart repeated attempts at criminal trespass by protestors); Dinah R. PoKempner, Note, *The Scope of Noerr Immunity for Direct Action Protestors: Anti-Trust Meets*

mere existence of a mixed motive should not preclude RICO's application altogether.

Even when applied to traditional RICO enterprises in the commercial business world, the economic motive requirement does not measure profit merely by counting the amount of money in a company's coffers.[146] Profit is also measured by the indirect effect a company's activities has on competitors in the marketplace. For example, most would agree that the establishment of a company's "No Questions Asked" rebate policy for dissatisfied customers is ultimately grounded in and supported by an underlying economic motive. The company benefits long term if its customers are satisfied, even if it means lost profit in the short term. Similarly, anti-abortion protesters "profit" politically when protests bring immediate attention to the issue of abortion and economically by soliciting funds to support future action.[147] By harassing clinic employees, doctors, patients and landlords, the protestors have the effect of forcing clinics out of regional markets, and sometimes, out of business altogether.[148]

There is no question that some anti-abortion protesters aim to, and do, push abortion clinics out of the marketplace. Often protest efforts are consciously targeted at one geographic area where a concerted series of attacks is orchestrated on clinics over a short period in hopes that abortion

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the Anti-Abortionists, 89 COLUM. L. REV. 662, 665-68 (1989) ("Protests that seek to interfere with the conduct of business force abortion clinics to invest more heavily in security measures, insurance, and litigation, and make it more difficult for clinics to retain qualified personnel.").

146. The Second Circuit's RICO decisions involving international terrorism support this proposition. *See* United States v. Ivic, 700 F.2d 51 (2d Cir. 1983); United States v. Bagaric, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); United States v. Ferguson, 758 F.2d 843 (2d Cir.), *cert, denied*, 474 U.S. 1032 (1985). While the Second Circuit has not yet decided whether its economic motivation requirement applies similarly to anti-abortion protest cases, it appears that the Court's economic motive rationale is nevertheless "concerned with preventing crimes that cause victims to lose money rather than with crimes that necessarily result in the defendants gaining money for personal profit." Gale, *supra* note 63, at 1369.

147. In fact, anti-abortion groups control the disposition of large sums of money. Operation Rescue acknowledged the receipt of $300,000 in donations for 1989, and others estimate the organization receives over $1 million annually in donations. *See* Faludi, *supra* note 3, at C1. Michael McMonagle, executive director of the Pro-Life Coalition of Southeastern Pennsylvania reported raising $120,000 a year for the organization. *See Northeast Women's Center, Inc.*, 868 F.2d at 1349 n.7. McMonagle sent out a fund raising letter crediting the loss of an abortion clinic's lease in 1986 to the "persistent prayers and protests of Pro-Life citizens." *Id.* at 1346 n.3.

148. *See* American College of Obstetricians & Gynecologists, Pennsylvania Section v. Thornburgh, 613 F. Supp. 656, 658-61 (E.D. Pa. 1985) (doctors refused to work at clinics under same management as other clinics which were the targets of repeated protest). As a direct result of increasingly violent protests, vacant physician positions at health clinics providing abortion services and reproductive counseling are commonplace. *See* Sara Rimer, *Abortion Clinics Seek Doctors But Find Few*, N.Y. TIMES, March 31, 1993, at A-14; Sandra G. Boodman, *The Dearth of Abortion Doctors; Stigma, Low Pay and Lack of Personal Commitment Erode Ranks*, WASH. POST, April 20, 1993, at Z7.

services become wholly unavailable in the region during that time.[149] Between 1982 and 1985 alone, activist-related arson and bombing caused more than $4.6 million in property damage and have forced clinics to provide additional security measures for patients and to obtain expensive business insurance.[150] According to the Alan Guttmacher Institute, abortion services are now unavailable in 83 percent of America's counties.[151] Nationally, the number of medical schools that teach abortion techniques has declined from 24 percent in 1985 to 12 percent in 1991.[152]

In addition to the emotional and psychological strain on individual women seeking intensely personal medical care, the demonstrations also have a costly impact on the community.[153] Towns and cities are forced to expend scarce resources on police, fire, and medical services in order to cope with repeated protests and thousands of protesters clog local courts and jails at great public expense.[154] The groups' activities, therefore have an undeniable economic impact on health care and other service industries.[155]

CONCLUSION

NOW, Inc. v. Scheidler is an important case because the question of an economic motivation requirement in *all* civil RICO claims has broad implications that reach far beyond the explosive abortion arena from which the debate arose. The split in the Circuit Courts of Appeals reveals wide disparity in judicial approach and philosophy, probably because RICO's statutory language was purposely designed to be ambiguous. The ambiguity, for better or worse, has opened the door to interpretations which support its union with highly emotional political causes. The Seventh Circuit's narrow

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149. For example, in September 1992, fourteen Michigan clinics were attacked within a two-week period and on one single day in March 1993, five San Diego clinics were sprayed with butyric acid. *See* S. COMM. ON LABOR & HUMAN RESOURCES, FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT, S. REP. NO. 117, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legis Library, Committee Reports File, at *5.

150. Moretti, *supra* note 28, at 1390.

151. Warner, *supra* note 6, at 87.

152. Sharman Stein, *Abortion Doctors Under Seige*, CHI. TRIB., March 12, 1993, at 1.

153. S. COMM. ON LABOR & HUMAN RESOURCES, FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT, S. REP. NO. 117, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legis Library, Committee Reports File, at *3. ("In addition to destroying clinics and severely limiting access to health care, arson and bombings have resulted in injuries to firefighters and caused millions of dollars in property damage. From January through May 1993 alone, three reported acts of arson in Florida, Texas, and Montana caused over $1.5 million in damages.").

154. Lewin, *supra* note 3, at A16. *See also* Renee Graham, *Demonstrations a "Financial Strain" on Town*, BOSTON GLOBE, March 5, 1989, at 40 (single day's arrest of anti-abortion demonstrators would cost the city of Brookline, Mass. $10,000 to $20,000).

155. Moretti, *supra* note 28, at 1394. RICO's treble damage provision of 18 U.S.C. § 1964(c) has been invoked in an attempt by medical clinics and health facilities filing private civil actions under RICO to turn the economic tables on protesters. The clinics hope to deter protesters with the threat of hefty monetary penalties, imposed by a federal court judgment. In this way, the clinics hope to sap the financial resources of the anti-abortionists whose unlawful acts drain the courts, the community, and the medical industry of operating capital.

view of RICO in *Scheidler* not only fails to follow completely the reasoning of Second and Eighth Circuit precedent, but it also fails to recognize the liberal construction drafters of the legislation intended. The Supreme Court should rectify this error and find that the plain language of civil RICO requires no economic motive. In the alternative, any implied economic motive the Court wishes to acknowledge should encompass economic impact or affect in anti-abortion protest cases. Any less generous interpretation is unsupported by legislative history and would unduly burden the federal law's ability to fight and deter the types of crime state law is unable to reach.

Scheidler also reflects a current trend in anti-abortion protest cases in which plaintiffs seeking protection of federal laws have been met with substantive and procedural barriers to relief. Most recently, in *Bray v. Alexandria Women's Health Clinic*,[156] the Supreme Court ruled that federal civil rights statute 42 U.S.C. § 1983(c), popularly known as the Klu Klux Klan Act, does not provide a federal cause of action against persons obstructing access to abortion clinics.[157] However, while the Supreme Court moves in the direction of limiting federal jurisdiction in anti-abortion protest cases, individual state legislatures,[158] Congress,[159] and the Department of Justice under the newly-elected administration,[160] have embarked on a path of expanding that jurisdiction.

Invocation of RICO in anti-abortion protest cases has traditionally been a last resort for private plaintiffs seeking federal relief on both legal and equitable grounds.[161] This is probably due to the federal courts' split on determining the proper role and scope of RICO in such cases,[162] and the reluctance to give full effect to the statute's liberal construction clause.[163]

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156. 113 S. Ct. 753 (1993).

157. *Id.* at 758-64. In *Bray*, Justice Scalia, writing for the majority, declared that the clinic had not shown that the protesters' actions were the result of an "invidiously discriminatory animus," *id.* at 758, because "[o]pposition to abortion cannot reasonable be presumed to reflect a sex-based intent; there are common and respectable reasons for opposing abortion other than a derogatory view of women as a class." *Id.* at 760.

158. *See* Steven Lee Myers, *Bill to Bar Abortion Clinic Blockades*, N.Y. TIMES, March 23, 1993, at B4 (New York State Assembly votes 106 to 35 to change the state's penal code to define blocking of a medical center as aggravated harassment, a misdemeanor punishable by up to a year in prison).

159. *See infra* note 164.

160. *See* Karen Tumulty, *Reno Calls for Bill to Protect Abortion Clinics*, L.A. TIMES, April 2, 1993, at A4 (calling for legislation extending federal protection to women seeking access to abortion clinics a "top priority").

161. Eve Paul, General Counsel for the Planned Parenthood Federation admits that "RICO is not the ideal vehicle, but we don't have a lot of vehicles." *See* Gregg Krupa, *Supreme Court Puts Abortion on Back Burner*, BOSTON GLOBE, March 16, 1993, at 6.

162. *See supra* notes 61-93 and accompanying text.

163. *See supra* note 51; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 523 (1985) (Powell, J., dissenting).

With the newly created Freedom of Access to Clinic Entrances Act,[164] specifically targeted at anti-abortion protesters in an attempt to supplement existing but inadequate state and local laws, as well as to recognize the limitations of other federal remedies,[165] the use of RICO may remain a last resort. However, because Congress was specific in its intent *not* to pre-empt the enforcement of applicable state or federal laws, be they criminal or civil in nature,[166] and because RICO can still offer plaintiffs the imposition of the "racketeering" label,[167] broad concepts of standing,[168] and especially

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164. In late November, 1993, both Houses of Congress passed virtually identical versions of a bill entitled the "Freedom of Access to Clinic Entrances Act of 1993." The Senate version would amend Title XXVII of the Public Health Service Act, 42 U.S.C. § 300aaa (1988) as follows:

> SEC. 2715 FREEDOM OF ACCESS TO CLINIC ENTRANCES.
>
> (a) Prohibited activities. Whoever—
> (1) By force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or class of persons from obtaining or providing pregnancy or abortion-related services: *Provided, however,* That nothing in this section shall be construed as expanding or limiting the authority of States to regulate the performance of abortions or the availability of pregnancy or abortion-related services; . . . .
> shall be subject . . . to the civil remedies provided in subsection (c) . . . .
> . . . .
> (c) Civil Remedies.
> (1) Right of Action—
> (A) In General. Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a medical facility that provides pregnancy or abortion-related services.
> (B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.
> . . . .
> (d) Rules of Construction. Nothing in this section shall be construed or interpreted to . . . .
> . . . .
> (3) Provide exclusive authority to prosecute, or exclusive penalties for, acts that may be violations of this section and that are violations of other federal laws;
> (4) Limit or otherwise affect the right of a person aggrieved by acts that may be violations of this section to seek other available civil remedies; . . . .

S. 636, 103d Cong., 1st Sess. (1993).

165. *See* Freedom of Access to Clinic Entrances Act, S. 636, § 2(a)(5), (6), (11), (12), & (13), 103d Cong., 1st Sess. (1993) (Congressional Statement of Findings and Purpose).

166. Freedom of Access to Clinic Entrances Act, S. 636, § 2715(D), 103d Cong., 1st Sess. (1993); *supra* note 164.

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

the mandatory treble damages award,[169] it can remain a viable, and at times, preferable civil remedy.

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Author's note:

On January 24, 1994, the Supreme Court decided the case of *Now, Inc. v. Scheidler.* Now, Inc. v. Scheidler, No. 92-780, 1994 U.S. LEXIS 1143 (Jan. 24, 1994). Chief Justice Rehnquist, writing for a unanimous Court, held that RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering in 18 U.S.C. § 1962(c) were economically motivated. *Id.* at *24. The Court found, as a simple matter of statutory construction, that nowhere in § 1962(c) or in § 1961's definitions of "enterprise" and "pattern of racketeering activity" is the indication that the framers of RICO required proof of a profit-seeking motive. *Id.* at *14; *see supra* Part IV.A. In addition, the Court admitted that while it is arguable that an "enterprise" engaged in interstate or foreign commerce suggests that the enterprise, by its nature, *would* have a profit-seeking motive, "the language in § 1962(c) does not stop there; it concludes enterprises whose activities 'affect' interstate or foreign commerce." *Id.* at *15; *see supra* Part IV.B. The Court rejected the argument that the use of the term "enterprise" in § 1962 (a) and (b), although "arguably tied in with economic motivation" leads to the inference of a economic motivation requirement in § 1962(c). *Id.* at *15. Noting that the term "enterprise" in subsections (a) and (b) "plays a different role in the structure of those subsections than it does in subsection (c)," the Court distinguished the enterprise in (a) and (b) as the "victim of unlawful activities." *Id.* In contrast, the enterprise in (c) "connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed." *Id. see supra* notes 122-23 and accompanying text.

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168. *See* 18 U.S.C. § 1962(a) (1988); *supra* note 37; 18 U.S.C. § 1962(b) (1988); *supra* note 38; 18 U.S.C. § 1962(c) (1988); *supra* note 39. *Compare* Freedom of Access to Clinic Entrances Act, S. 636, § 2715(c)(1)(A), 103d Cong., 1st Sess. (1993) (limiting availability of civil action by private plaintiff to only those persons "involved in providing or seeking to provide, or obtaining or seeking to obtain services in a medical facility that provides pregnancy or abortion-related services"); *supra* note 164.

169. Cullen v. Margiotta, 811 F.2d 698, 713 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987) ("civil RICO requires that a successful plaintiff be awarded treble damages"). *Compare* Freedom of Access to Clinic Entrances Act, S. 636, § 2715(c)(1)(B), 103d Cong., 1st Sess. (1993) (compensatory and punitive damages, costs of suit and reasonable fees for attorneys and expert witnesses available for private plaintiff); § 2715(c)(2)(B) & (3)(B) (temporary, preliminary, or permanent injunctive relief, compensatory damages awarded, and civil penalties imposed in action brought by Attorney Generals of United States or individual States).

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