1995

N.O.W. v. Scheidler: RICO Meets the First Amendment

Craig M. Bradley
Indiana University Maurer School of Law

CRAIG M. BRADLEY

NOW v SCHEIDLER: RICO MEETS THE FIRST AMENDMENT

It is customary for articles in the *Supreme Court Review* to begin by pointing out that the case about to be discussed is, or at least would have been if the Court had handled it right, one of the "most important" cases of the last Term.[1] This is as it should be since the *Review*, limited as it must be to a discussion of six or seven out of a hundred or so decisions, necessarily focuses on those that really are the "most important."

Judging by the outcry that attended the Court's decision in *National Organization of Women (NOW) v Scheidler*,[2] in which the Court held that RICO could apply to anti-abortion protesters, one would assume that it, too, should be included on any list of the most significant cases of the last Term. For example, Randall Terry, the founder of Operation Rescue, one of the defendants in the suit, termed the holding "a vulgar betrayal of over 200 years of tolerance

Craig M. Bradley is James Louis Calamaras Professor of Law, Indiana University (Bloomington) School of Law.

AUTHOR'S NOTE: I wish to thank Dan Conkle, Joe Hoffmann, Jim Lindgren, and John Garvey for their helpful comments on earlier drafts of this article.

[1] For example, "Consider two cases—the most debated as well as the most important, First Amendment cases decided by the Supreme Court in the past two Terms." Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion* 1992 Supreme Court Review 29; "In recent years, two major decisions—*Employment Division v Smith*, and *Lee v Weisman*—have effected a significant shift in our religion clause jurisprudence." Suzanna Sherry, *Lee v Weisman: Paradox Redux*, 1992 Supreme Court Review 123. "In the companion cases of *International Society for Krishna Consciousness v Lee* and *Lee v International Society for Krishna Consciousness*, The Supreme Court finessed an important opportunity to chart a clear future course for public forum doctrine." Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 Supreme Court Review 79.

[2] 114 S Ct 798 (1994).

0-226-36178-0/95/1994-0004$02.00

toward protest and civil disobedience."[3] An attorney for the America Center for Law and Justice complained that "the court's opinion today clearly and unequivocally would have applied to the lunch counter sit-ins in Selma, Alabama."[4] A spokesman for ACT-UP, a gay rights organization, declared that not only his organization but animal rights activists, environmentalists, and even feminist organizations would now be vulnerable to RICO suits.[5]

NOW v Scheidler may thus have been the most controversial unanimous decision by the Supreme Court since *Brown v Board of Education*.[6] But from a lawyer's point of view, the unanimity was eminently justified, for the Court did nothing more than hold that a federal statute meant exactly what it said.

But if *Scheidler* was an unimportant case itself, by allowing a civil RICO suit by pro-choice groups against pro-life activists to proceed, it paved the way for a number of difficult issues to be raised in the future. These involve the applicability of RICO and other statutes to suits and prosecutions against political advocacy organizations that may also engage in criminal activity.

As will be seen, the reassurance offered by Patricia Ireland of NOW that her group will use RICO "only when violence erupts"[7] does not wash away these concerns. This is because NOW's and other potential plaintiffs' views of when violence has "erupted" and who is responsible for it will differ radically from the views of prospective defendants. This article will briefly discuss the Court's decision in *NOW v Scheidler*. However, the bulk of the article will

---

[3] *Abortion Clinics Upheld by Court on Rackets Suits*, New York Times (Jan 25, 1994), p 1, col 4. Mr. Terry, a veritable Vesuvius of vitriol toward the Court, was also quoted, on the same day, as declaring the Court's ruling "the iron heel of government crushing protest and dissent," USA Today, p 1A, and that "the Supreme Court has told civil protest to go to hell." American Political Network, *Abortion Report* (Jan 25, 1994).

[4] Jay Sekulow quoted on American Political Network, Jan 25, 1994. Another representative of the same group declared that "through this technically limited court opinion, the death crowd can brand peaceful protesters, authors, publishers and ardent advocates 'racketeers.'" Keith Fouruier, The Houston Chronicle (Jan 28, 1994), p 15.

[5] "Ruling on RICO exposes activists to costly lawsuits," Washington Times (Jan 26, 1994), p A4. In a similar vein, an editorial in the Chicago Sun-Times declared that "[e]veryone who passionately holds unpopular political . . . views will now have to think twice about the dire financial consequences of engaging in militant protest."

[6] 347 US 483 (1954).

[7] USA Today, supra note 3. "Patricia Ireland of NOW says her group will use RICO only when violence erupts. 'What we're talking about are extortion and bombings and acts of violence.'"

be devoted to considering the various hurdles—arising from RICO itself, the predicate crimes that must be alleged in a RICO suit, and the First Amendment—that plaintiffs/prosecutors must overcome before a RICO case can be won against anti-abortion protesters. As will be seen, notwithstanding *NOW v Scheidler*, those hurdles are high.

I. NOW v SCHEIDLER

The plaintiffs, including the National Organization for Women and women's health centers that perform abortions, sued a coalition of anti-abortion groups, including the Pro-Life Action Network (PLAN), Operation Rescue, and various individuals associated with these groups, including the named respondent Joseph Scheidler. The suit alleged violations of the Sherman Act and of §§ 1962 (a), (c), and (d) of RICO[8] in that the defendants were

[8] The Racketeer Influenced and Corrupt Organizations Statute, 18 USC § 1961 et seq, provides in pertinent part:

> 1961(1): "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: . . . Section 1951 (relating to interference with commerce, robbery or extortion). . . .
>
> * * * *
>
> 1961(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.
> 1961(5) pattern of racketeering activity" requires at least two acts of racketeering activity. . . .
>
> * * * *
>
> 1962 (a) It shall be unlawful for any person who has received any income derived directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directed or indirectly (in) any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce.
> 1962(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest or control of any (interstate) enterprise.
> 1962(c) 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. . . .
> 1962(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.
>
> * * * *
>
> 1964(c). . . . Any person injured in his business or property by reason of a (RICO) violation may sue . . . and shall recover threefold the damages he sustains. . . .

members of a nationwide conspiracy to shut down abortion clinics through a pattern of extortionate acts that violated the Hobbs Act. Examples of this "conspiracy" included various allegations of trespass, threats, physical attacks, arson, theft of fetuses, and a variety of other activities.[9]

The Sherman Act and the RICO claims were all dismissed by the District Court, and these dismissals were affirmed by the court of appeals.[10] Of these, the Supreme Court only considered plaintiffs' claim under § 1962(c) of RICO,[11] that defendants operated their anti-abortion "enterprises" through a "pattern of racketeering activities," that is, extortion under the Hobbs Act.

As to this claim, the Seventh Circuit had issued an unusual decision in which it claimed to be ruling against plaintiffs "reluctantly," and then seemed to belie that claim by reading RICO more narrowly than was justified by the terms of the statute.

The dispute focused on the meaning of the term "enterprise," which is defined by the statute as "includ(ing) any individual, partnership, corporation, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." The Supreme Court had previously held, in *United States v Turkette*,[12] that RICO was not limited to "legitimate" organizations:[13] "There is no restriction upon the associations embraced by the definition [of enterprise]."[14]

Nevertheless, in *Scheidler*, the Seventh Circuit concluded that the term "enterprise" was limited to entities that had a "financial purpose."[15] The court's decision was based on a Second Circuit case, *United States v Ivic*.[16] *Ivic* had held that a Croation terrorist

---

[9] See Jt App pp 66–70, 95.

[10] *National Organization for Women v Scheidler*, 765 F Supp 937 (ND Ill 1991), aff'd 968 F2d 612 (7th Cir 1992). The Sherman Act claim was dismissed under the doctrine of *Eastern Railroad Presidents Conference v Noerr Motor Freight*, 365 US 127 (1961) because the defendants' activities had political, not economic, objectives and hence did not violate antitrust laws. 114 S Ct at 802. The § 1962(a) RICO claim was dismissed because voluntary contributions received by the defendants did not constitute income derived from racketeering activity. Id. The RICO conspiracy claim was dismissed because there were no substantive sections left on which to base the RICO conspiracy. Id.

[11] The Supreme Court also held that petitioners had standing to sue. 114 S Ct 802–03.

[12] 452 US 576 (1981).

[13] Id at 580.

[14] Id.

[15] 968 F2d 628.

[16] 700 F2d 51 (2d Cir 1983).

organization could not be prosecuted under RICO because the "enterprise" element of RICO was limited to "organized profit-seeking venture(s)."[17] The *Ivic* court reasoned that RICO was, as its legislative history showed, aimed at the "evil corruption of our commerce and trade" by organized crime, and not aimed at politically motivated acts. Furthermore, the term "enterprise" as used in §§ 1962(a) and (b) of RICO seemed to be limited to commercial organizations, and therefore the same understanding should be applied as to § 1962 (c). Finally, the phrase "enterprise engaged in, or the activities of which affect, interstate or foreign commerce" suggested to the court that the enterprise must be commercial in nature.

The Supreme Court, following a generally admirable series of cases in which it has carefully read RICO as covering no more and no less than the statutory language suggests,[18] made short work of the Seventh and Second Circuits' holdings. In a unanimous opinion by Chief Justice Rehnquist, the Court noted that the definition of "enterprise" in the statute could have been limited to individuals or groups that had an "economic motive," but was not.[19] Rather, as § 1961(4) declares, "enterprise includes *any* individual . . . or group of individuals. . . . "The Court further observed that, while the statute may have had " 'organized crime as its focus, [it] was not limited in application to organized crime.' "[20] Third, the Court recognized that it is not necessary to be a profit-seeking organization in order to "affect interstate commerce" under the statute.[21]

As to the "reading like terms alike" argument of the *Ivic* court, the Supreme Court held that "[t]he term 'enterprise' in subsections (a) and (b) plays a different role . . . than it does in subsection (c):"[22]

> The enterprise in [(a) and (b)] is the victim of unlawful activity and may very well be a "profit-seeking" entity that represents

---

[17] Id at 60.

[18] See, e.g., *Reves v Ernst and Young*, 113 S Ct 1163 (1993); *Sedima, S.P.R.L. v Imrex*, 473 US 479 (1985); *United States v Turkette*, 452 US 576 (1981). But see *H.J. Inc. v Northwestern Bell Telephone Co.*, 492 US 229 (1989), where the Court's requirements for proving the "pattern" under RICO seemed to be based more on a statement in the legislative history rather than on the words of the statute.

[19] 114 S Ct 805.

[20] 114 S Ct 805, quoting *H.J. Inc. v Northwestern Bell Telephone Co.*, 492 US 229, 248 (1989).

[21] 114 S Ct 804, quoting 18 USC § 1962(c).

[22] Id at 804.

> a property interest that may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a "profit-seeking" entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity.
>
> By contrast, the "enterprise" in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed. . . . Since the enterprise in subsection (c) is not being acquired it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity.[23]

Indeed, it seems clear that the premise of the *Ivic* court, as well as its conclusion, was incorrect. If a group of terrorists robbed banks to raise money to "buy out" a competing terrorist group, or used a pattern of arson and murder to take over such a group, it would violate §§ 1962(a) and (b), respectively, as long as it could be shown that the activities of the target group affected interstate commerce. Since terrorist and other political action groups may "affect commerce" in various ways without being "profit-seeking," it follows that they may qualify as "enterprises" under all of the RICO subsections.

Finding the statutory language "unambiguous" and "'no clearly expressed legislative intent to the contrary'"[24] the Court unanimously overruled the dismissal of the plaintiff's RICO action and allowed the suit to proceed.

Obviously, this conclusion does not strike a "death blow" or any kind of blow to the First Amendment because the question of how this lawsuit may affect the First Amendment rights of political advocacy organizations was explicitly not considered by the Court.[25] However, it is natural and appropriate to anticipate this issue now that this case is to go forward, especially in view of the fact that many of the specific allegations in NOW's complaint involve conduct that appears to be protected speech.[26] Indeed, when

---

[23] Id.

[24] 114 S Ct 806, quoting *Reves v Ernst & Young*, 113 S Ct 1163 (1993).

[25] 114 S Ct 806 n 6. However, one of the concerns expressed after the decision was that the very existence of such causes of action will allow harassing suits against political advocacy organizations even if those suits prove unsuccessful. For example, "The kinds of money pro-lifers have spent defending themselves ($1 million and climbing) by itself will cool other protesters." Dennis Byrne, Chicago Sun-Times (Jan 25, 1994), p 19.

[26] For a discussion of this issue, see text at note 111.

a case stirs up as much concern and controversy among diverse elements of society as this one did, it is wise for one or two Justices to issue a concurring opinion that, while not undercutting the majority opinion, indicates that at least some members of the Court are concerned about, and will be watching, how future developments may affect constitutional rights.

This is exactly what Justice Souter, joined by Justice Kennedy, did. Justice Souter first expressed strong support for the Court's interpretation of RICO.[27] However, he went on to stress that "nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case."[28] In particular, citing *NAACP v Claiborne Hardware*,[29] he noted that "conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity. . . . "[30] He added that "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression."[31] The remainder of this article will discuss the two types of cases raised by Justice Souter: a lawsuit where criminality, or at least criminality for the purposes of RICO, is unclear, and a suit where criminality is clear but the responsibility of the group for the criminal acts must be established.

II. RICO Criminality Unclear: The Next Phase of NOW v Scheidler

Having survived the challenge in the Supreme Court, the litigation in this case has been returned to the District Court for further proceedings. These should prove interesting. Though the defendants' and their supporters' reaction to the Supreme Court's decision was overblown, their concerns about the impact on First Amendment rights if plaintiffs were to prevail on the complaint filed in this case were not exaggerated.

---

[27] Id at 806–07 (Souter, J, concurring).

[28] Id at 807.

[29] 458 US 886 (1982).

[30] Id.

[31] Id.

The complaint named four organizations[32] and seven individuals[33] as defendants. As noted above, the sole predicate crime charged as the basis for the RICO suit was the Hobbs Act. The plaintiffs charged that the "defendants have attempted, conspired, or actually (sic) threatened or used actual force, violence or fear to induce or attempt to induce the employees of affected clinics to give up their jobs . . . doctors . . . to give up their economic right to practice medicine . . . patients . . . to give up their right to obtain services, etc."[34] Although the plaintiffs attached an appendix to the complaint listing a series of crimes such as arson and bombing committed by various people against abortion clinics in the last fifteen years, none of the arson and bombing crimes, for example, were committed by the named defendants.[35] Nor does the complaint suggest what the connection of the arsonists and bombers to the named defendants might be.

Instead, the complaint details a lengthy catalog of activities, many of which are clearly protected by the First Amendment and none of which appears to be a violation of the Hobbs Act. For example, among the "predicate acts" listed in the complaint are "Attempts, conspiracies to commit and commission of extortion against the Women's Awareness Clinic, its employees, doctors, patients and prospective patients in Ft. Lauderdale, Fla. by persons attending the 1984 National Pro-Life Conference, at which defendant Scheidler presented a workshop."[36] However, earlier in the complaint, where the activities of this workshop are spelled out, "extortionate" conduct is not alleged:

> Defendant Scheidler presented a conference workshop on "Effective Confrontation: A 'How To' of Picketing, Leafletting, Sit-ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Aware-

[32] Vita-Med Laboratories; Pro-Life Action League (PLAL); Pro-Life Direct Action League (PDAL); Operation Rescue; and Project Life. Jt App 43–44.

[33] Joseph Scheidler, John Ryan, Randall Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, and Monica Migliorino. Jt App pp 42–43.

[34] RICO Case Statement, id at 91.

[35] For example, the "Exhibit" lists bombings and arson by Peter Burkin, Michael Bray, Don Benny Anderson, and Curtis Beseda, Jt App at 162–64, but the complaint does not otherwise mention these people.

[36] Jt App p 66.

> ness Clinic, a clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.[37]

Elsewhere, the complaint charges the defendants with "trying to gain media attention,"[38] and "setting out guidelines to ensure better control of PLAN demonstrations in order to improve public perception."[39] More to the point, the defendants are charged with "criminal trespass,"[40] "storm[ing] a clinic" and "ransacking a medical procedures room, destroying surgical supplies,"[41] and shipping stolen laboratory specimens in interstate commerce.[42] In short, plaintiffs' charge that the defendants employed these tactics in order to force clinics to close, thus affecting commerce.

Some of the activities specified are clearly crimes, and others, though they may constitute protected speech on their face, may also be used to establish a conspiracy.[43] However, none of these activities constitutes "extortion" under the Hobbs Act. Since Hobbs Act violations were the sole predicate for the RICO case, it follows that, unless more can be shown, the RICO case must fail.

A. PROBLEMS WITH THE HOBBS ACT CHARGE

A Hobbs Act charge based on extortion contains four elements: (1) in any way or degree affecting commerce, (2) obtaining property from another (3) with his consent (4) induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.[44]

---

[37] Id at 48–49.

[38] Id.

[39] Id at 53.

[40] Id at 51.

[41] Id at 50.

[42] Id at 48.

[43] *Yates v United States*, 354 US 298, 334 (1957) (overt act in indictment need not be criminal).

[44] 18 USC § 1951(a) provides:

> Whoever, in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined, etc.
>
> ***
>
> (b)(2) The term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

The difficulty with NOW's complaint is that it fails to allege that the defendants "obtained property" or attempted to obtain property from the plaintiffs. But NOW asserts that this doesn't matter: "Extortion does not require that the extorter receive anything."[45] Since this goes against the clear language of the Hobbs Act, the burden is on the plaintiffs to support this assertion.

They cite four cases. In the first, *United States v Green*,[46] the Supreme Court held that the Hobbs Act covered a union representative's threatening violence in order to obtain payment for "imposed, unwanted, superfluous and fictitious services" by union members.[47] That is, it was not necessary that the defendant attempt to "obtain property" *for himself*[48]; it was sufficient that he sought to obtain it for the union members. *Green* in no way suggests that the "obtaining property" requirement can be read out of the Hobbs Act. The other cases cited by the plaintiffs are to similar effect.[49] The plaintiffs can point to nothing in the legislative history that suggests that Congress intended that the clear words of the statute be ignored.

The plaintiffs are on somewhat stronger ground when they correctly point out that "intangible property such as the rights to vote, assemble and speak in a union setting and to make business decisions free of coercion" have been covered by the Hobbs Act.[50] Since these rights cannot be "received" by another person, they reason, it must follow that loss to victims is sufficient to establish the crime. Thus, plaintiffs argue that, in this case, the loss of and interference with the legitimate business of the abortion clinics is sufficient to satisfy the Hobbs Act even though the defendants neither experienced nor sought economic gain from their actions.[51]

---

[45] Reply Brief of Petitioners (Filed Nov 1, 1993), pp 11–12.

[46] 350 US 415 (1956).

[47] Id at 417.

[48] Id at 420.

[49] In *United States v Frazier*, 560 F2d 884, 887 (8th Cir 1977), cert den 435 US 968, the Court held that, where the defendant never attempted to pick up the money he had extorted, the Hobbs Act was nevertheless violated. In *United States v Lance*, 536 F2d 1065, 1068 (5th Cir, 1976), the court rejected the defendant's claim that, in seeking to obtain a "loan" from the victim by threats, he had not sought to "obtain property." The court held that use of money even for a short period of time is a "property" interest. Id at 1068. In *United States v Santoni*, 585 F2d 667 (4th Cir 1978) cert den 440 US 910 (1979), the defendant, a public official, sought to obtain a subcontract for his designee from an unwilling contractor/victim by promising future government contracts to the contractor. Obviously, the defendant sought to "obtain property" for the subcontractor here.

[50] Reply Brief of Petitioners, supra note 45, at p 12, and cases cited therein.

[51] Id.

The problem with this argument is that, in the cases cited by the plaintiffs, even though the loss to the victim may have been intangible, the defendant nevertheless sought to obtain property, that is, *economic advantage*. For example, in *United States v Tropiano*,[52] one of the leading cases on this topic, the defendant threatened the victim company with unlawful force unless the victim stopped competing for business that the defendant wanted for himself. The court held that the victim's loss was "the [intangible] right to solicit business free of territorial restrictions wrongfully imposed by its competitors."[53] Property included "any valuable right considered as a source or element of wealth."[54] Obviously, though, the reason for the extortionate threats was that the defendant wanted to take business, or the right to solicit business, away from the victim—that is, he sought to obtain property.[55]

Similarly, in *United States v Local 560*,[56] the defendants sought to take over a union through acts of extortion and murder. While the victims' loss was characterized as an intangible right of union members to participate in the affairs of the union, nevertheless, the defendants were again plainly seeking "property," that is, control of the union, and the economic benefits that would bring.[57] Even the cases cited by NOW in which the defendants' primary motivation may have been political, such as *United States v Anderson*,[58] in which the defendant kidnapped an abortion clinic doctor, all included demands for economic advantage as well.[59]

---

[52] 418 F2d 1069 (2d Cir 1969) cert den 397 US 1021.

[53] Id at 1075–76.

[54] Id at 1075.

[55] The Model Penal Code takes the same approach as the Hobbs Act, limiting "Extortion" to the obtainment of property and calling threats made "with purpose unlawfully to restrict another's freedom of action" "Criminal Coercion." II American Law Institute, Model Penal Code and Commentaries (Official Draft 1980) § 223.4 p 203.

[56] 780 F2d 267 (3d Cir 1985) cert den 476 US 1140.

[57] In *United States v Debs*, 949 F2d 199 (6th Cir 1991), also cited by Petitioners, the defendant employed threats and violence to induce potential opponents not to oppose him for the union presidency. The court quite rightly held that "property" under the Hobbs Act included a union presidency. Id at 201.

[58] 716 F2d 446 (7th Cir 1983).

[59] For example, in *Anderson*, id, the court noted that "during the first two days of captivity, the abductors spoke only of the victims' money and how it could be obtained." Id at 447. Nothing in the case suggests that defendant's motive to obtain economic advantage need not be shown. Similarly, in *United States v Mitchell*, 463 F2d 187 (8th Cir 1972), the defendant, a representative of the Congress of Racial Equality, threatened violence against a company if the company didn't make a $1000 contribution to CORE and rehire a discharged black employee. Id at 189.

The only case to have expressly held that a defendant who lacked any intent to gain could commit "extortion" under the Hobbs Act is *Northeast Women's Center, Inc. v McMonagle*, a case that is virtually identical to *NOW v Scheidler*.[60] In *McMonagle*, the Third Circuit, citing the same inapposite precedents discussed in the preceding two paragraphs, concluded that deprivation of the victim's property interest was sufficient to satisfy the "obtaining property" requirement in the Hobbs Act.[61] This ignores the clear words of the statute.[62]

The Hobbs Act was drawn from New York's Field Code.[63] Under that code, it was well settled that extortion required an unlawful taking. As the New York cases cited by the Supreme Court in *United States v Enmons*[64] make clear, an accused could not be guilty of extortion unless he "was actuated by the purpose of obtaining a *financial benefit* for himself. . . ."[65] The crime described by the plaintiffs in this case, to the extent that they have described a crime

---

[60] 868 F2d 1342 (3d Cir 1989). In *NOW v Scheidler*, the Seventh Circuit "agree[d] with the Third Circuit's interpretation of the Hobbs Act . . . " on this point. 968 F2d at 629 and n 17.

[61] Id at 1350. See also *Town of West Hartford v Operation Rescue*, 915 F2d 92 (2d Cir 1990). In that case, the *town* where anti-abortion violence had occurred brought a civil RICO suit against the protestors, based on Hobbs Act violations. The court vacated an injunction against the defendants on the ground that the defendants had not obtained or attempted to obtain any property from the town: "the term 'property' cannot plausibly be construed to include altered official conduct." Id at 102. It could similarly be said that the requirement of "obtaining property" is not satisfied by altering the behavior of clinic personnel, but, since the court assumed, arguendo, that "interference with the Center's operations constituted extortion of the Center," id, it did not consider this issue.

[62] The court also iguored an earlier Third Circuit case, *United States v Nedley*, 255 F2d 350, 355–58 (1958). *Nedley* held that merely beating up a truck driver during a labor dispute, and thus interfering with commerce by violence, did not constitute "robbery" under the Hobbs Act because there was no "obtaining of property" by the defendants. *Nedley* did not consider whether this could have been a violation of the third, "interference with commerce by force" clause of the Hobbs Act discussed in text at notes 77–80.

[63] *Evans v United States*, 112 S Ct 1881, 1886 (n 9) (1992). "The definitions in this bill are copied from the New York Code substantially." 91 Cong Rec 11900 (1945). (Statement of Cong Hobbs.)

[64] 410 US 396 (1973).

[65] Id at 406, n 16, quoting *People v Adelstein* (emphasis added, citation omitted). Accord, *People v Ryan*, 232 NY 234, 235, 133 NE 572, 573 (1921) (intent to extort requires intent to "gain money or property"); *Field Code*, chap IV, § 584 (extortion "include[s] the criminal acquisition of the property of another). See also *United States v Nedley*, supra note 62, and New York cases cited therein, 255 F2d 355. The Supreme Court recently reiterated that extortion under the Hobbs Act covers "acts by private individuals by which property is obtained by means of threats, force or violence." *Evans v United States*, 112 S Ct 1881, 1885 (1992).

at all, is, under the Model Penal Code and the laws of most states, the crime of "criminal coercion."[66] Unfortunately for the plaintiffs, this is not one of the pattern crimes listed in RICO. Thus, although RICO itself does not require a financial motivation, as *Scheidler* held, if the pattern crime charged is extortion under the Hobbs Act, an economic motive must be proved.

The issue is virtually identical to that decided by the Supreme Court with regard to the mail fraud statute, 18 USC § 1341, in *McNally v United States*[67] and *Carpenter v United States.*[68] Section 1341 forbids anyone who, "having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses," to use the mails in furtherance of such scheme. Even though the first clause, prohibiting "fraud," does not expressly mention "money or property," the *McNally* Court concluded that the mail fraud statute was "limited in scope to the protection of property rights," as the second clause illustrated.[69] *Carpenter* went on to hold that these property rights could be intangible, such as business information, and, as I read the cases, the defendant's gain need not be identical to the victim's loss.[70] Nevertheless, even in the first clause of the statute, where "obtaining property" was not specifically mentioned, the Court read it in. Clearly in the Hobbs Act, where Congress specifically stated that "*extortion means the obtaining of property*" the Court will not read the economic gain element out.[71]

---

[66] American Law Institute, *Model Penal Code and Commentaries* (Official Draft, 1980) § 223.4 p 203: "Criminal coercion punishes threats made 'with purpose unlawfully to restrict another's freedom of action to his detriment' while extortion is . . . limited to one who 'obtains property of another by' threats."

[67] 483 US 350 (1987).

[68] 484 US 19 (1987).

[69] 483 US 360.

[70] Craig Bradley, *Foreward: Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J Crim Law & Criminol 573, 602 (1988). Thus, I concluded that the statute requires proof of a "scheme in which the defendant, through knowingly deceitful behavior, intends an economic gain and is at least negligent as to economic harm to the victim." Id. *McNally* dealt with a situation where the defendant's gain was clear; it was the loss to the victim that was in doubt. Therefore, it is the converse of this case. However, as the above summary of the *McNally* and *Carpenter* holdings shows, both potential economic harm to the victim *and* economic gain to the defendant must be shown before mail fraud can be found.

[71] "[W]here there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, supra note 67, 483 US at 359–60. The Hobbs Act was based on the Anti-Racketeering Act of 1934 (48 Stat 979) HR No 238, 79th Cong, 1st Sess (Feb 27, 1945), p 1. That statute was even more explicit in its property requirement. It prohibited

Another problem raised by defendants is that "extortion" under the Hobbs Act requires the "*wrongful* use of actual or threatened force, etc."[72] In *United States v Enmons*,[73] the Supreme Court held that the Act did not apply to threats of violence to achieve legitimate union objectives, but only to demands for under-the-table payoffs to union officials, superfluous employees, and the like. Threats of violence to achieve higher wages, for example, were not "wrongful" threats.[74] Since defendants' use of violence in this case is similarly to achieve the "legitimate" end of closing down abortion clinics,[75] they argue that it is also not a "wrongful" threat of force. However, *Enmons* is heavily influenced by specific legislative history indicating that threats or acts of *labor* violence were not covered by the act,[76] and does not hold generally that any ultimately "legitimate" goal excuses violence under the Hobbs Act.

B. A POSSIBLE SOLUTION

In any event, there is more to the Hobbs Act than the plaintiffs, or anyone else, seem to have realized. The statute forbids obstructing, delaying, or affecting commerce by robbery or extortion, or attempting or conspiring so to do. As discussed, "obtaining property" by the defendant is an element of extortion (and of robbery). But, the statute goes on to forbid "committ[ing] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." No "obtaining property" qualification applies to this portion of the statute.

This rather confusing clause is susceptible of two interpretations. First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion. But this interpretation makes no sense! Robbery and extortion

---

"any person who [affecting commerce] (a) obtains or attempts to obtain, by the use of [force, etc.], the payment of money or other valuable considerations, or the purchase or rental of property [etc.] or (b) obtains the property of another with his consent [etc.]." Id.

[72] Brief of Respondent Migliorino, pp 32–34.

[73] Note 64 supra.

[74] Id at 410.

[75] In *Bray v Alexandria Women's Health Clinic, et al*, 113 S Ct 753 (1993), the Court observed that "it cannot be denied that there are common and respectable reasons for opposing [abortion] other than hatred of or condescension toward [or indeed any view at all concerning] women as a class." Id at 760.

[76] Id at 406 (quoting Cong Hobbs asserting that assaults that occurred during a strike would not be covered by the Act).

frequently involve the commission (robbery) or threat (extortion) of violence, though "extortion" covers other threats as well. Moreover, the "robbery and extortion" clauses also forbid "attempts" and conspiracies. Thus, under this reading, the "physical violence" clause would be less inclusive, and hence would add nothing, to the preceding "robbery" and "extortion" clauses. One who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third clause nugatory.[77]

The other possible reading is more sensible. It forbids threatening or committing physical violence in furtherance of a plan to "obstruct delay or affect commerce" (other than through robbery or extortion). The Hobbs Act was first proposed during World War II, and a major concern of Congress at that time was that interstate shipments of commodities and war material not be interfered with.[78] Contrary to the common assumption that the Act prohibits interference with commerce only by robbery or extortion, both of which require an economic motive, a third sort of activity is also prohibited on the face of the Act: "obstruct[ing], delay[ing] or affect[ing]" (e.g., sabotaging) interstate shipments through the commission or threat of violence, regardless of any obtainment of property motive on the defendant's part. Thus, Nazi saboteurs who blew up interstate shipments or delayed them

[77] It is possible to imagine a case in which one threatens violence in furtherance of a personal plan to rob a bank (or commit extortion) without conspiring or attempting to rob the bank. For example, ealling a bank guard the day before the planned robbery and saying, "If you interfere with me when I rob the bank, I'll kill you," but then taking no further steps to rob the bank is, arguably, such a threat without yet being an attempt. However, such a case seems far-fetched and unlikely. Ordinarily such threats, even if the robbery never occurred, would constitute an attempt or be part of a conspiracy. Surely Congress did not add a special clause to the Hobbs Act to deal with such a remote possibility.

[78] "The purposes of this bill are (1) to prevent interference with interstate commerce by robbery or extortion, as defined in the bill, and (2) to prevent interference during the war with the transportation of troops, mumitions, war supplies, or mail in interstate or foreign commerce." HR No 238, 79th Cong, 1st Sess (Feb 27, 1945), p 1. (Submitted by Cong Hobbs.) However, the Committee's reference to the war effort apparently applied to another portion of the bill than what was to become the Hobbs Act. Id at p 9. This second portion (Title II) was never enacted, presumably beeause the war ended. Nevertheless, the quoted passage shows Congress's concern with interference with commerce by thrcats and violence that may not constitute extortion. As another congressman put it, "The so-called Hobbs bill is designed to make assault, battery and highway robbery nnpopular. Its purpose is to protect commerce against interference by violence, thrcats, coercion, or intimidation." 91 Cong Rec H11907 (Dec 12, 1945) (statement of Cong Fellows).

through bomb threats (true or false) would be guilty under this reading of the statute.[79] So too would anti-abortion protesters who, with no economic motive, interfered by threats or violence with the abortion business, at least if we leave aside First Amendment concerns, which are discussed below.[80]

C. PROBLEMS WITH EXTORTION AS A PREDICATE ACT

Another possible approach for the plaintiffs is simply to charge extortion under state law, which is a separate RICO predicate offense. Although many states limit "extortion" to property offenses as the Hobbs Act does (calling the activities of the defendants here "criminal coercion," which is not a RICO pattern crime), "a number of states leave the realm of property altogether and cover threats made to induce the [victim] to do 'any act against his will.'"[81] The difficulty with this approach is that the plaintiffs will be limited to charging activities that occurred in the states that do not require an economic motive for extortion.[82]

Another obstacle must be overcome if state law extortion is charged.[83] Unlike the Hobbs Act, the typical extortion statute re-

---

[79] Congress was well aware that Nazi saboteurs had in fact been landed by submarine on American shores to carry out such activities. United States Department of Justice, *Annual Report of the Attorney General to Congress* (1942), p 13; Leslie Thomas, *Orders for New York* (Penguin Books, 1990) is a novel devoted to this episode. See also 2 *German-Born Men Held for Espionage*, New York Times (Jan 22, 1943), p 9, referring to another, 32-agent spy ring, headed by a Gestapo agent.

[80] That the Hobbs Act covers three, rather than two, means of interfering with commerce is supported by dictum in *Stirone v United States*, 361 US 212, 215 (1960): "The Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with commerce by extortion, robbery or physical violence" (in *Stirone*, extortion was charged). Quoted with approval, *United States v Culbert*, 435 US 371, 373 (1978).

[81] 2 Wayne LaFave and Austin Scott, *Substantive Criminal Law* (1986) § 8.12 p 460.

[82] According to LaFave and Scott, id at 460, the only such states are Alaska, Colorado, Kansas, New Mexico, Ohio, and Wyoming. However, other states may simply call extortion "criminal coercion." Under the reasoning of *United States v Nardello*, 393 US 286 (1969), as long as the defendant's activities fall under what *Congress* would have considered extortion, it doesn't matter that state law may "label" it something else. Id at 293–94. But *Nardello* was based on the fact that "extortion" under the Travel Act clearly included "blackmail" as that term was used in Pennsylvania law. By contrast, "extortion" under the Hobbs Act is limited to "obtaining property." Thus, plaintiffs may have a hard time arguing that when Congress referred to "extortion . . . chargeable under state law" in RICO, it had in mind a crime that is not called extortion by either the state or the US Code.

[83] In contrast to the usual extortion statute, the Hobbs Act does not require a threat. Violence or fear will also suffice. The federal courts are agreed that, "as long as a defendant exploits his victim's fear, it is not necessary that the defendant make any threat, nor that he have created the fear." Norman Abrams and Sara Sun Beale, *Federal Criminal Law* (2d ed 1993), p 203 and cases cited therein.

quires that certain *threats* be used to obtain the property in question.[84] These include threats to inflict bodily injury on the victim, to accuse him of a criminal offense, to expose a secret, and so on.[85] But when one examines the complaint in *NOW v Scheidler*, it does not clearly set forth such threats. Rather, it simply lists a series of demonstrations, trespasses, and other efforts by the defendants to discourage or prevent abortions. The nearest thing to an extortionate threat in the complaint is ¶ 44, which states that

> Scheidler told the then-clinic administrator that he had come to "case the place" because he and his followers intended to force DWHO to close. . . . *He threatened Conner with reprisals should she refuse to quit her job.* Conner subsequently left her job. . . .[86]

If these "reprisals" were that she would be subjected to violence or exposure of secrets, then it would qualify as an extortionate threat in most states (leaving aside the "obtaining property" problem). But if by "reprisals" Scheidler merely meant further demonstrations and harassment, then there will be problems with the definition of "extortion" in most or all states, since there is neither a threat of bodily harm nor of exposure of secrets.[87] Where the

---

[84] Under the Hobbs Act, to establish extortion, the obtainment of property may be achieved by use of "actual or threatened force, violence or fear." It has been held that the fear need not be a consequence of a direct or implied threat by the defendant. *United States v Billups*, 692 F2d 320 (4th Cir 1982) cert den 464 US 820.

[85] See, e.g., Model Penal Code, supra note 55, § 223.4. See also LaFave and Scott, supra note 81 at § 8.12.

[86] Jt App pp 50–51. Another of what plaintiffs call a "threat" appears in ¶ 45: "Scheidler threatened that anti-abortionists 'will get rid of' [clinics such as DWHO]. I proclaim Delaware is going to become the first state in the union to be free of abortion facilities." Id. This is clearly a political, not an extortionate, "threat." See Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw L Rev 1081 (1984) for a detailed discussion of the various types of extortionate threats.

Beyond this, there are several references to implied threats to unidentified victims such as ¶ 74: "The public statements of defendant Scheidler and the local co-conspirators implied that the clinics were not following proper procedures in disposing of medical waste. They carried the clear threat to suppliers, landlords, doctors and others who provide goods or services to the clinics that they too could be targeted by defendants for theft and other illegal activity as well as harassment and public conttoversy." Jt App p 60. See also ¶¶ 75 and 77. Any prosecutor who attempted to base an extortion prosecution on such a vague charge would be subject to prompt dismissal of his case.

[87] See LaFave and Scott, supra note 81, at § 8.12, discussing the kinds of threats that qualify as extortion under various state laws. It is also possible to violate the extortion laws of some states, as well as the Hobbs Act, by threatening concerted action, such as strikes or picketing, if the threatener is not paid off by the victim, but this is limited to under-the-table payoffs to the threatener, not satisfaction of the group's demands. Model Penal Code and Commentaries, supra note 56, p 219; *United States v Enmons*, 410 US 396, 406 n 16 (1973).

threat is of unlawful but nonviolent behavior, such as trespassing on the clinic's property, interfering with patient access, etc., it is unlikely to qualify under state extortion statutes. The additional First Amendment problems with criminalizing such threats are discussed in Part IV below.[88]

III. A RICO Case Where Criminality Is Clear

Thus far, the discussion has focused on the *NOW v Scheidler* case itself where, in my view, the plaintiffs have failed to adequately allege the pattern crimes that must be the basis of the RICO civil action. Assume, however, that the commission of pattern crimes that are clearly outside the protection of the First Amendment can be established. This portion of the article discusses the difficulties a plaintiff would face in tying the organization, from which they wish to recover treble damages, to those crimes.

Imagine an anti-abortion organization called "Save Our Babies" (Sob). Sob is a nonprofit organization formed for the purpose of engaging in "all legitimate means to prevent the destruction of unborn children." Its charter limits the organization's activities to lobbying, picketing, testifying before legislative committees, taking out ads in newspapers, and "engaging in all legitimate forms of vigorous political protest." However, its members have frequently gone beyond the charter by trespassing on abortion clinic property and disrupting operations there by interfering with access by doctors and patients. Their activities have included grabbing and hitting clinic employees, throwing rocks through clinic windows, and stealing discarded fetuses as well as other property that was of value to the clinics. Moreover, the board of directors has endorsed all of the above activities.

So far, while a variety of local laws, as well as the new federal Freedom of Access to Clinic Entrances Act, have been violated, none of these acts are included within the listed pattern crimes of RICO,[89] as those crimes have, up to now, been viewed.[90] Conse-

[88] Plaintiffs also assert that they can prove other RICO predicate offenses such as theft from interstate shipments, 18 USC § 659 and the Travel Act, 18 USC § 1952. Petitioner's Reply Brief (Nov 1, 1993), p 14. Since these claims are not developed in the complaint, they are not dealt with here.

[89] See 18 USC § 1961(1), note 8 supra.

[90] As discussed above, under my interpretation of the Hobbs Act, some of these acts could be regarded, not as extortion, but as interference with commerce by the commission or threat of physical violence.

quently, any RICO civil suit or prosecution against Sob or the individuals involved in these various crimes must be dismissed, without regard to any special concerns about the First Amendment.[91]

However, two members of Sob, Bakunin and Molotov, conclude that these methods are too tame. Accordingly, on two successive weeks, they firebomb two different abortion clinics. On the third week they are arrested, and assorted bomb-making equipment is seized—evidence that they are planning further firebombings. They, the board of directors of Sob, and Sob itself are indicted for RICO violations as well as sued under RICO by the clinics in question. In addition to fines and imprisonment, removal of the board of directors under § 1964(a) will be sought by the government upon conviction. Treble damages are sought by the civil plaintiffs under § 1964(c).

The RICO indictment, which is also the basis for the civil suit, charges that Molotov, Bakunin, and the board conducted Sob through a pattern of racketeering activities (two counts of arson in violation of state law), in violation of 18 USC § 1962(c), and conspired to do so in violation of § 1962(d). Since "arson" is one of the crimes listed in RICO's definition of racketeering activity, the first hurdle to a successful RICO prosecution/civil suit has been surmounted. Furthermore, Sob is clearly an "enterprise" after *Scheidler*.

A. THE "PATTERN" ISSUE

There is a good deal more that must be proved to make out a RICO case against all named defendants. The first issue is whether a "pattern" of racketeering activity has been committed as defined by *H.J. Inc. v Northwestern Bell Telephone Co.*[92] In *H.J. Inc.*, the Court was concerned that the definition of "pattern" in § 1961(5) states only that a pattern "requires at least two acts of racketeering activity." The Court concluded that, while two acts are thus necessary to establish a "pattern," they are not sufficient.[93] Rather, the

[91] Many of the allegations in the complaint in *NOW v Scheidler* involve similar acts. Recognizing that these acts alone could not be the basis of a RICO suit, NOW's attorneys couched these charges as examples of a "conspiracy to commit extortion," which, on its face, would constitute a RICO violation. The First Amendment issues raised by such a complaint are discussed in Part IV.

[92] 492 US 229, 239 (1989).

[93] Id.

term "pattern" suggests something more than just two unrelated events. Thus, they turned to the legislative history to determine that "pattern" requires both a showing that "the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity."[94]

Since these crimes were carried out by the same two people who belonged to the same organization and for the same purpose, the "relatedness" prong has been satisfied.[95] Indeed, in the context of attacks on abortion clinics, relatedness is unlikely to be a problem since the crimes will all have similar purposes and victims.[96]

Establishing "continuity" is a more difficult task. In *H.J. Inc.*, the Court required that the predicate crimes must either occur, or have threatened to occur, over a

> substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned with long-term criminal conduct.[97]

This seems to impute a more limited meaning to the term "pattern" than it would ordinarily have, and it is a meaning that is not justified by the legislative history, as Justice Scalia, concurring in the result, pointed out.[98]

Nevertheless, this is now the law, and the "continuity" requirement will pose a substantial barrier to any RICO suit or prosecution.[99] In the Sob case, the evidence of two bombings a week apart would not, after *H.J. Inc.*, establish a pattern. However, the additional evidence found during the search that showed that the sus-

---

[94] Id.

[95] "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id at 240 quoting 18 USC § 3575(e).

[96] However, two such crimes will have to be committed by members of the same enterprise in order to qualify under RICO at all. It is surely sufficient, however, that *any* two of the RICO pattern crimes be committed—there need not be two of the *same* crime.

[97] 492 US at 242.

[98] 492 US at 253. As Justice Scalia noted, the majority seemed to be holding that "at least a few months of racketeering activity (and who knows how much more?) is generally for free, as far as RICO is concerned." Id at 254.

[99] Since *H.J. Inc.*, a number of cases have been lost due to a failure to satisfy this "continuity" requirement. For example, *Brode v Cohn*, 966 F2d 1237 (8th Cir 1992); *River City Markets, Inc. v Fleming*, 960 F2d 1458 (9th Cir 1992); *Aldridge v Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F2d 587 (11th Cir 1992).

pects were planning future bombings would be enough to show a "specific threat of repetition extending indefinitely into the future,"[100] and thus to satisfy the "continuity" requirement.[101]

B. THE "CONDUCT OR PARTICIPATE" ISSUE

Even though it has now been established that Bakunin and Molotov have committed a "pattern of racketeering activity" and that Sob is a "enterprise" under RICO, the RICO case is far from complete. It must now be established that the bombers "conducted or participated, directly or indirectly, in the conduct" of Sob's affairs "through" the pattern of bombings.

In *Reves v Ernst & Young*,[102] an accounting firm misrepresented the value of certain assets of an agricultural co-op to hide the fact that the co-op was insolvent, to the disadvantage of the co-op's creditors. The accountants, as far as the record reflected, were acting without the knowledge of the co-op's board.[103] The RICO suit was brought by the trustee in bankruptcy, Reves, against the accounting firm, claiming that the defendant had "conducted or participated in the conduct" of the *co-op's* (not the accounting firm's) affairs through a pattern of securities fraud in violation of 18 USC § 1962(c).

The Supreme Court concluded that the "conduct or participate" element of RICO had not been satisfied—that to violate RICO one must "participate in the operation or management of the enterprise itself."[104] Since the accounting firm was an independent auditor

---

[100] 492 US at 242.

[101] See also *United States v Indelicato*, 865 F2d 1370 (2d Cir 1989), cited with approval in *H.J. Inc.*, 492 US at 235 n 2, finding "continuity" in a triple murder that occurred in a matter of a few minutes, because the purpose of the murder, a Mafia power struggle, posed the threat of ongoing criminal activity.

It is not entirely clear from *H.J. Inc.* whether the "ongoing criminal activity" must also be RICO predicate crimes or whether other crimes, such as battery or trespass, might establish "continuity" by combining with predieate crimes that are too close in time to establish a "pattern" by themselves. However, since RICO requires a "pattern of racketeering activity" and since the Court has said that "pattern" requires continuity, it is likely that continued racketeering offenses and not just any offenses would be required.

[102] 113 S Ct 1163 (1993).

[103] Id at 1167. Just why Ernst and Young did this is unclear. For an interesting discussion of the economic consequences of *Reves* and other RICO cases, see Daniel Fischel and Alan Sykes, *Civil RICO After Reves: An Economic Commentary*, 1993 Supreme Court Review 153 (1994).

[104] Id at 1173.

that was not acting by direction of, or even with the knowledge of, the co-op's board of directors, it could not be said to have "conducted or participated in the conduct" of the co-op's affairs.[105] Having taken this clear, but restrictive,[106] view of RICO, the Court then backed off from it somewhat:

> We agree that liability under § 1962(c) is not limited to upper management. . . . An enterprise is "operated" not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management. An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, for example, by bribery.[107]

While the limits of *Reves* are thus unclear, it is obvious that the plaintiff/prosecutor must show considerably more connection between the bombers and the Sob leadership than that the bombers were members of Sob, and were generally trying to advance its agenda. Either the bombers must have been acting at the direction of the leadership, or the leadership must have been sufficiently connected to the bombings that individual officers would be guilty, at least as accessories or conspirators,[108] of arson under state law. If this were shown, then the officers themselves could be found to have conducted the enterprise through a pattern of arson with no

---

[105] Id at 1167. Another approach that the plaintiff might have taken would have been to denominate the accounting firm as the "enterprise" and attempt to show that that firm was conducted through a pattern of securities fraud, but this was not charged.

[106] Prior to *Reves*, the broadest view of RICO, held by the Second Circuit, was that one could be guilty under § 1962(c) if "the predicate offenses are related to the activities of the enterprise." *United States v Scotto*, 641 F2d 47, 54 (2d Cir 1980) cert den 452 US 961. Compare *Bennett v Berg*, 710 F2d 1361, 1364 (8th Cir 1983) cert den 464 US 1008, requiring "some participation in the operation or management of the enterprise itself," a very narrow reading of the statute that tbe Court also rejected.

[107] 113 S Ct 1173. The Court declined to decide "how far § 1962(c) extends down the ladder of operation because it is clear that Arthur Young [Respondent's predecessor] was not acting under the direction of the Co-op's officers or board." Id at n 9. But the Court rejected the narrow reading of some circuits that the defendant must exercise "siguificant control over or within an enterprise." Id at 1170 n 4.

[108] The definition of "racketeering activity" in § 1961(1) includes "any act or threat involving . . . arson under state law. . . . " Thus co-conspirators and accessories, including, apparently, accessories after the fact, would be covered. See Norman Abrams and Sara Sun Beale, *Federal Criminal Law* (2d ed 1993), p 511, and cases cited therein (conspiracy to commit pattern crimes enough). Solicitation to commit a crime would also apparently be covered by this section.

need to show participation of Bakunin and Molotov in the operation or management of Sob.[109]

Another way to get around the "operation or management" problem is to define the "enterprise" differently. If, for example, Bakunin and Molotov had no position in the national organization but were in charge of the Kalamazoo branch of Sob, then that branch could be the "enterprise."[110] However, this would mean that the national organization, its directors, and assets would be exempt from prosecution and suit.

IV. First Amendment Issues

A. The Protection of Political Advocacy Groups

So far, this article has been devoted to a basic discussion of RICO, and the underlying pattern crimes of Hobbs Act and extortion, that would be applicable to any prosecution or civil suit directed at an organization under the RICO statute. It has taken no account of the special problems posed when the defendant organization is a political advocacy group and, as such, entitled to the highest level of First Amendment protection:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . We have there-

[109] RICO also requires that the enterprise must be conducted "through," that is, by means of, the racketeering activity. Thus if the managers of an enterprise merely committed pattern crimes on the premises of the enterprise, this is not a RICO violation. For example, *United States v Nerone*, 563 F2d 836 (7th Cir 1977) (a trailer park that was a front for a gambling operation was not operated "through" the pattern of racketeering activity absent proof that gambling proceeds were used by or channeled into the park). This is unlikely to be a problem in the anti-abortion context where the crimes are committed to advance the purposes of the organization.

[110] It is important to recognize, however, that the enterprise must have an existence *independent* from the mere association of people necessary to commit the pattern crimes. *Turkette*, note 18 supra, 452 US at 583: "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government." Such factors as the existence of a physical location where the enterprise is situated and the conduct of other business, or crimes, beyond the pattern crimes may be used to establish the enterprise.

> fore been particularly vigilant to ensure that individual expressions remain free from governmentally imposed sanctions.[111]

Group expression on matters of public concern is, if possible, entitled to even greater protection:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.[112]

As Justice Souter recognized in his concurrence in *Scheidler*, the case that is most pertinent to his First Amendment concerns is *NAACP v Claiborne Hardware Co.*[113] In that case, a boycott of white merchants was organized by the NAACP to secure compliance with a list of demands for equality and racial justice. The merchants successfully sued the NAACP and 144 individuals in state court on the ground of malicious interference with business, among other charges. The Mississippi Supreme Court upheld the judgment because the petitioners "had *agreed* to use force, violence and threats to effectuate the boycott" (against blacks who violated the boycott), and that "the agreed use of illegal force . . . to achieve a goal [is not protected by the First Amendment]."[114] Several instances of violence and threats of violence were established.[115]

After recognizing the importance of associating to express political views, the Court further observed that peaceful picketing and boycotting were also protected.[116] "Speech does not lose its pro-

---

[111] *Hustler Magazine v Falwell*, 485 US 46, 50–51 (1988). Accord, *N.A.A.C.P v Claiborne Hardware*, supra, at note 29 p 913: "This Court has recognized that speech on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' . . . 'Speech concerning public affairs is more than self-expression; it is the essence of self-government' " (citations omitted).

[112] *NAACP v Alabama ex rel. Patterson*, 357 US 449, 460 (1958).

[113] 458 US 886 (1982).

[114] 458 US at 895 (emphasis the Court's; citations omitted).

[115] For example, Charles Evers, Field Secretary of the NAACP, stated, "If we catch eny of you going in any of them racist stores, we're gonna break your damn neck." Id at 902. Four incidents of actual violence were proved to have occurred "because the victims were ignoring the boycott." Id at 904. In none of these incidents was anybody hurt. Id.

[116] Id at 909.

tected character . . . simply because it may embarrass others or coerce them into action."[117]

On the other hand, the Court noted that the "First Amendment does not protect violence. . . . No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence."[118] But, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[119]

In particular, two limitations were placed on tort liability where First Amendment protected activity is combined with illegal or tortious behavior. First, damages must be limited to "the direct consequences of violent conduct."[120] Second,

> [f]or liability [of an individual] to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[121]

These two limitations are not directly relevant to the hypothetical case, but they are pertinent to the actual litigation in *Scheidler* and to other similar cases where the damages, especially treble damages sought under RICO, may not be readily tied to the illegal behavior[122] or where the responsibility of certain members of the group may not be clearly established.

Finally, and directly relevant to the Sob case, the Court discussed the liability of the organization for the acts of individual members:[123] "The NAACP—like any other organization—may be held liable for the acts of its agents that are undertaken within the

---

[117] Id at 910.

[118] Id at 916.

[119] Id at 916–17.

[120] Id at 918 (citations omitted). This probably would eliminate the treble damage option under RICO, even if an organization's liability under that statute could otherwise be established.

[121] Id at 920.

[122] In a RICO case, damages are limited to those "proximately caused" or "flowing from" the pattern of racketeering activity. *Sedima S.P.R.L. v Imrex*, 473 US 479, 497 n 15 (1985). Accord, *Holmes v Securities Investor Protection Corp*, 112 S Ct 1311 (1992).

[123] Since the Court had already found that the imposition of liability on Charles Evers was improper, it concluded that liability could also not be imposed "on his principal [i.e. the NAACP]." Id at 930. Accordingly, the following discussion of organizational liability is dictum.

scope of their actual or apparent authority" and for "other conduct of which it had knowledge and specifically ratified."[124] Later, the Court noted that "[t]o impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment."[125] Lastly, the Court observed that to "equate the liability of the national organization with that of a branch" required proof that "the national authorized or ratified the misconduct in question. . . ."[126]

Unfortunately, these various statements express somewhat contradictory tests for when the organization may be held responsible for the acts of its members. The first statement, that the NAACP "like any other organization may be held liable for the acts of its agent, etc." does, indeed, state the general rule of corporate liability:

> Courts [have] easily concluded that public policy considerations required that the corporation be held accountable for crimes committed or authorized by officers and directors at the policy-making level of the corporate hierarchy. . . . Similarly, courts [have] rationalized the imposition of criminal liability upon corporations for the conduct of managers and supervisors. . . . subject to the limitation that the agents must act "within the scope of their employment." It should be noted, however, that criminal conduct may occur within the scope of employment even though the agent is not authorized to commit crimes and despite good faith efforts to prevent their commission.[127]

Nor is corporate liability limited to supervisory personnel. " 'The corporation may be criminally bound by the acts of subordinate, even menial, employees.' Corporations accordingly may be held accountable for criminal acts of low level employees such as salesmen, clerical workers, truck drivers and manual laborers."[128] The "only limitation" is that such workers be acting within the scope of their employment.[129] The mens rea necessary to hold the corpo-

---

[124] Id at 930.

[125] Id at 931.

[126] Id (citations omitted).

[127] Kathleen Brickey, *Corporate Criminal Liability* (2d ed 1992), p 100 (citations omitted). Accord, American Law Institute, Model Penal Code (Official Draft, 1985) § 2.07.

[128] Id at 100–01 (citations omitted).

[129] Id at 105 (citations omitted). In fact, Prof. Brickey goes on to note that such liability is found even if the agent is violating an express corporate policy. Id at 109.

ration responsible for the crimes of its agents will be imputed to the corporation if the agent acted with an "intent to benefit the corporation." Thus, "managerial inattention to ongoing patterns of criminal conduct" or "neglect of supervisory responsibilities may provide a basis for holding a corporation guilty of a knowing violation of the law."[130]

If the NAACP in *Claiborne Hardware*, or Sob in our case, is treated "like any other organization," as the Court suggested, there would seem to be extensive organizational liability for the acts of individual members. Molotov and Bakunin were members of the organization acting generally within the scope of the organization's goal of shutting down abortion clinics. Moreover, they were obviously acting with an intent to benefit Sob. Thus, Sob would be liable, notwithstanding any official policies against violence or lack of knowledge of the bombers' activities. At most, as Professor Brickey suggests, negligence on the part of supervisors suffices for corporate liability and perhaps strict liability (without any fault on the part of supervisors) may be imposed as long as the agents were acting within the scope of their employment.

But the Court's later statements in *Claiborne Hardware* clearly undercut such a result. The thrust of the *Claiborne* opinion is that political advocacy organizations may *not* be treated like "any other organization." This leads to the Court's second observation that the NAACP may be found liable "for other conduct of which it had knowledge *and* specifically ratified."

If the Court is still referring to the acts of agents here, which subsequent discussion suggests it is,[131] then it is surely extending too much protection since, if the leadership had knowledge of its agents' illegal conduct, it would hardly be necessary that they also "specifically ratify" it.[132]

---

[130] Id at 131. Prof. Brickey continues: "[A] corporate culpable mental state may be established by imputing to the corporation the collective knowledge of its employees as a group, notwithstanding the absence of proof that any single agent intended to commit the offense or even knew of the operative facts that led to the violation." Id. The Model Penal Code would only hold the corporation liable if "the offense was authorized, requested . . . or recklessly tolerated by a high managerial agent acting in behalf of the corporation within the scope of his employment." § 2,07(1)(c). However, Prof. Brickey observes that the Code's restrictive approach has not been followed by the federal courts. Brickey, supra note 127, at p 95.

[131] "[T]here is no evidence here that the NAACP ratified—or even had specific knowledge of—any of the acts of violence or threats of discipline [by its agent] associated with the boycott."

[132] The Court's reference to "other" conduct also may be read as suggesting that Sob could even be responsible for acts of nonmembers if it had knowledge of, and ratified, that conduct. Thus, if the President of Sob heard about bombings committed by another

Third, the Court stated that liability could not be imposed without a finding that "the NAACP authorized—either actually or apparently—or ratified unlawful conduct. . . ." Assuming that this liability is limited to the acts of members of Sob, this standard seems closest to the mark.

The Court's formulation is similar to the Model Penal Code's general provision for imposing liability on corporations for the criminal acts of it agents. The Code provides that the

> corporation may be convicted for the commission of an offense if:
> (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.[133]

Thus, if the officials of the organization "authorized, requested, commanded or performed" the offense, the organization would clearly be responsible. Moreover, "recklessly tolerated" means essentially the same thing as apparent authorization. If the board members were "reckless," in that they "disregarded a substantial and unjustifiable risk"[134] that members of the organization were going to commit bombings in furtherance of organizational goals—such as by ignoring the fact that bottles filled with gasoline with rags stuffed in the top were being stored at corporate headquarters—the organization should be liable. Similarly, if the leadership created a climate in which violent behavior seemed to be encouraged, then it is also appropriate to hold Sob responsible. This would be "reckless toleration" under the Model Penal Code and "apparent authorization" under *Claiborne Hardware*.

As noted above, negligence on the part of the board, that is,

---

organization and publicly stated his approval, the Court seems to be saying that Sob would now be criminally liable. But again, this is surely not the Court's intent. Neither foreknowledge nor subsequent ratification of planned violent activity by Organization B should not subject Organization A to civil liability unless some further connection between the organizations can be established.

[133] Model Penal Code, supra note 55, § 2.07(1)(c). The Code originally included a similar provision for unincorporated associations, but, in the final draft, it was eliminated "in favor of an approach that invited specific legislative consideration of each expansion of liability as may from time to time appear desirable." 1 Model Penal Code and Commentaries (Official Draft, 1985) § 2.07, p 343.

[134] Model Penal Code, supra note 55 at § 2.02(2)(c). The Code goes on to explain that the disregard of the risk "involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation." Id.

failing to perceive a risk of which it should have been aware, would also ordinarily give rise to corporate liability.[135] However, the need to err on the side of First Amendment protections—to provide "breathing space"[136] for Sob's First Amendment rights—must be considered. If negligence is the ordinary standard for corporate liability,[137] then it cannot be the standard for the liability of a political advocacy organization, even when certain members of that organization commit serious crimes. Otherwise, no "breathing space" would have been afforded the advocacy group. This is consistent with the *Claiborne Hardware* test since no "apparent authority" could be found in the board's failure to even perceive a risk that bombings might occur, even if that failure was negligent. Thus, in the above hypothetical, if the board members could convince a jury that they had no clue as to the potential uses of bottles filled with gasoline, neither Sob nor its board would be liable, despite the fact that a "reasonable person" would have perceived this risk.

A recklessness standard is further supported by the Court's holdings in the field of libel. There, liability may be imposed on both the original speaker and on the media that publish his speech, for a statement about a public figure made "with knowledge that it was false or with reckless disregard of whether it was false or not,"[138] but not when the statement was merely false in fact, or even negligently false.

It seems appropriate to create a "political advocacy organization"

---

[135] Some readers may be wondering why I am not discussing § 2.06, "Culpability for the Acts of Another." This is accomplice liability and is, in general, more difficult to prove than is organizational responsibility for the acts of members. In order to establish that the board members were "accomplices" to the bombing, it would be necessary to prove that, "with a purpose of promoting or facilitating the commission of the offense," they either "solicited [another] person to commit it" or "aid[ed] or agree[d] to aid such other person in planning or committing it." § 2.06(3)(a). As discussed earlier, if it can be can be shown that Sob's directors were accomplices in the bombings, then Sob's responsibility as an "enterprise" under RICO would be established with no need to prove that Molotov and Bakunin had any ties to Sob at all.

[136] *Hustler Magazine v Falwell*, 458 US 46, 52 (1988) (citations omitted).

[137] As Prof. Brickey observes, the Model Penal Code "greatly restrict[s]" corporate liability compared to how the law has actually developed. Brickey, supra note 127 at p 96.

[138] *New York Times v Sullivan*, 376 US 254 (1964). As the Court has more recently explained, "actual malice mean[s] only knowledge of falsity or reckless disregard as to truth or falsity, the latter not being satisfied by mere negligence." Frederick Schauer, *Constitution Law and Individual Rights in Constitutional Law (1994 Supplement to Gerald Gunther)* 188, characterizing, *Masson v New Yorker Magazine, Inc.*, 501 US 496 (1991). This is comparable to the Model Penal Code requirement that the actor must "disregard a substantial and unjustifiable risk that the material element exists or will result from his conduct."

category that mirrors, in the criminal law, the special protections that are afforded to speakers and the media in libel law when they discuss "public figures." Libel is not regarded with as much opprobrium by society as criminal behavior, but this fact cuts both ways. On the one hand, one could argue that if a reckless organization is held responsible for libel, it is only fair to also hold it responsible for more serious wrongs. On the other hand, since the damage to the organization, and to its ability to get out its message, would be even greater in case of a criminal conviction and/or a RICO treble damage suit, a higher standard of mens rea should perhaps be required. This is consistent with the Supreme Court's approval of strict liability (i.e., no level of mens rea need be proved) only for relatively nonserious, administrative violations, whereas some higher level of culpability is required for more serious crimes.[139]

In my view, a reckless attitude by the leadership should be sufficient to hold the leadership and the organization responsible for crimes committed by the membership. Recklessness is sufficient, in a homicide case, to subject a defendant to serious criminal penalties (for manslaughter) and, in the libel area, to make the defendant responsible for major damages, despite the limitations imposed by the First Amendment.

A recklessness standard gives political advocacy groups sufficient "breathing space" that they need not fear that vigorous espousal of their cause will lead to criminal prosecution. But if the leadership consciously disregards known risks that the membership is committing or planning particular crimes (felonies in a RICO case), it is appropriate to subject the organization to criminal and civil penalties when those crimes are carried out.[140] This captures the spirit of the "apparent authority" limitation of *Claiborne Hardware*.

Another fundamental question is, What is a "political advocacy organization" and do we really want to give it any special protection? Should groups such as the KKK, the Aryan Brotherhood, and certain extremist anti-abortion groups, which combine political advocacy and a political message with violent criminal behavior, be

[139] *Morissette v United States*, 342 US 246, 252–53 (1952).

[140] It will be necessary for the plaintiff/prosecutor to establish that the organization, formally or informally, explicitly or implicitly, endorsed both the ends and the means adopted by the actors. Thus, Sob would not incur organizational liability merely because the board knew that its anti-abortion policies would attract certain fanatics who were willing to commit murder to advance the organization's stated goal of eliminating abortion.

entitled to any special consideration by the law when the criminal behavior of the organization leads to prosecution or civil suit?

The answers are, first, that a "political advocacy organization" is any group that has a political message to convey. If that message is merely a front for criminal activity, then it will not be difficult to satisfy the limited additional protections that the First Amendment provides, for such an organization will, by definition, be purposeful or knowledgeable, or at least reckless, as to the criminal conduct of its members. Second, as the Court reiterated in *Claiborne Hardware*, " 'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.' "[141] Consequently, limited First Amendment protection for such groups, whose tactics may be both abhorrent and illegal, is simply the price that must be paid for freedom of speech and association.

Up to this point, the discussion has assumed that the criminal actors were "members" of a formal organization. However, many of the most serious crimes might well be committed by people who never were, or no longer are, officially on the membership rolls, or by groups that have no formal membership. To hold the organization liable for crimes or treble damages for acts committed by nonmembers might allow hostile outsiders to destroy the organization by committing crimes in its name. On the other hand, organizations should not be allowed to escape liability simply because they have no formal "members" (or officers or board of directors) or because the perpetrators of the crime have "resigned" prior to committing criminal acts.

There is no blanket resolution to this class of problems. Courts will simply have to decide case by case whether it is appropriate to charge the organization with the acts of people who act like "members" or "officers" even though they may not be formally designated as such. Conspiracy law has frequently faced the problem of who is a "member" of a conspiracy, and RICO's "operation or management" test will be useful in ascertaining who the leaders of an organization may be. RICO's definition of "enterprise" clearly includes groups of people that have no formal organization.

It must, however, be reemphasized that in order to make out a RICO case it is necessary to establish the existence of an "enter-

[141] 458 US at 919, quoting *Scales v United States*, 367 US 203, 229 (1961).

prise," formal or informal, legal or illegal, with an existence *independent* of the pattern crimes. Two people who agree to commit a series of bombings do not, by that agreement alone, commit a RICO conspiracy. Rather, the prosecution/plaintiff must show that there was an "enterprise" (e.g., an organized crime "family") that had an existence separate from the bombing scheme, and that the defendants conducted, or planned to conduct, that enterprise "through" the bombings. Thus it must be shown that Sob was conducted through a pattern of bombings before Sob can be a RICO defendant.

To summarize: In order to hold a political action organization liable under *any* theory or statute, it is necessary to show that the leaders of that organization had a mens rea of "purpose," "knowledge," or "recklessness" toward criminal activity performed by members, or people who acted like members. As the Court put it in *Claiborne Hardware*, the member-perpetrators must act with "actual or apparent authorization" of the leadership or the leadership must ratify their acts. Frequently, the evidence will show that the leadership's involvement in the crimes was sufficient to charge them with aiding and abetting. But it is easy to imagine cases where the leadership creates a climate in which criminal behavior is encouraged, without any leadership planning of specific crimes. This is sufficient for organizational liability if it can be shown that the leadership "apparently authorized," including recklessly tolerating, such acts.

The statutory limits on a RICO case seem to be similar to these First Amendment limits, but, unlike ordinary civil liability, a RICO case may only be based on proof of the serious felonies listed in the statute. The only issue is whether the Court's observation in *Reves* that, under RICO, lower-level personnel must be acting "under the direction" of upper management is co-extensive with *Claiborne*'s First Amendment admonition that organizational liability is limited to cases where the leadership "actually or apparently" authorized the unlawful conduct. Arguably, "direction" is a more limited term than "apparent authorization," and consequently RICO may prohibit fewer activities than the First Amendment would allow it to. However, if the Supreme Court were ever to consider this issue, I suspect it would extend RICO's coverage to those who were acting with the "apparent authority" of management, as well as those who were "directed" by management. That

is, a mens rea of "recklessness" by management toward criminal behavior of members should satisfy the requirements of both RICO and the First Amendment.

B. THE PROTECTION OF POLITICALLY MOTIVATED CRIMES

We have seen that the First Amendment offers some protection to political advocacy organizations when they are attacked on the ground that their members have committed crimes. But does it also limit those crimes for which a politically motivated actor may be charged (and hence for which he may be sued under RICO)? I believe that it does.

For example, it is well settled that inducing fear of economic loss satisfies the "extortion by fear" element of the Hobbs Act.[142] Thus, if a public official states that he will not approve a construction project unless he is paid off, he induces "fear" in the victim and violates the Hobbs Act.[143] This is so despite the fact that disapproval of the project is perfectly legal.[144] By this reasoning, if Operation Rescue threatens an abortion clinic with picketing unless it closes down, and in so doing creates fear of economic loss, the Hobbs Act has, on its face, been violated (assuming *arguendo* that this constitutes "obtaining property" as NOW urges).[145]

But despite the fact that this threat has violated all of the elements of the Hobbs Act, this *cannot* be a criminal violation because the threat is protected by the First Amendment. In *Organization for a Better Austin v Keefe*,[146] a civil rights group demanded that the respondent cease his "blockbusting" real estate sales practices or they would distribute pamphlets critical of him. The Court struck

---

[142] For example, *United States v Lisinski*, 728 F2d 887, 890–91 (7th Cir 1984) and cases cited therein.

[143] *United States v Williams*, 952 F2d 1504, 1513 (6th Cir 1991) and cases cited therein. As discussed above, the only exception to this principle seems to be a limited one, based on Congress's intent in enacting the Hobbs Act, that labor leaders who threaten violence do not violate the Hobbs Act as long as their demands are "legitimate," that is, for wages and benefits, rather than for under-the-table payments or featherbedding.

[144] It is the "paradox of blackmail" that threatening legal behavior, such as reporting a crime to the police unless one gets something he is legally entitled to request, such as a job, is nevertheless the crime of extortion or blackmail. See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 Col L Rev 670 (1984) for a full discussion of this paradox and the reasons for it.

[145] As noted, supra text at notes 44–71, this is an assumption with which I disagree.

[146] 402 US 415 (1971).

down an injunction on the pamphleteering and, in the process, seemed also to validate the original threat to the respondent: "The claim that the expressions were intended to exercise a coercive effect on respondent does not remove them from the reach of the First Amendment."[147]

This is not extortion, but not because the threat is to perform some legitimate activity since, as noted above, threats to perform legitimate acts may nevertheless be the basis of an extortion charge. Nor is it that the act threatened is constitutionally protected. Thus, if X threatens a merchant that CORE will picket, legally, outside his store and drive away business unless he contributes $500 to CORE, this is probably extortion as well.[148] Rather, the reason must be, as in *Keefe*, that the threat is to perform a legal act, *and* the goal is to achieve a political end, rather than to obtain property from a particular victim.[149]

On the other hand, the Court has frequently held that "the First Amendment does not protect violence (or). . . . threats of violence."[150] To the extent that violent acts occur, it seems correct that society's interest in preventing, and protecting victims from, acts of violence completely overcomes First Amendment interests.

---

[147] Id at 911. On the other hand, it is clear that threats of *violence* on behalf of a public interest organization, either to influence behavior, or to receive contributions, *is* extortion. For example, *United States v Mitchell*, 463 F2d 187, 191 (8th Cir 1972).

[148] The facts of the hypothetical are drawn from *United States v Mitchell*. However, in *Mitchell*, there was a threat of violence if the victim did not contribute to CORE. Id at 191–92. Accord, *United States v Starks*, 515 F2d 112 (3d Cir 1975). It is also clear that extortion of political contributions by a threat that the victim will not receive a government job or contract violates the Hobbs Act. See, e.g., *United States v Cerilli*, 603 F2d 415, 420 (3d Cir 1979) cert denied 444 US 1043, and cases cited therein. However, no ease seems to have dealt with a threat to picket or engage in other First Amendment activity in order to obtain money except the labor cases which, as noted above, are outside the coverage of the Hobbs Act. In my view such demands are "commercial speech" and, as such, not fully protected by the First Amendment. Consequently, a threat to engage in First Amendment activity that would cause economic harm to the victim, *coupled with* a demand for money, does constitute extortion.

[149] This is a tentative conclusion that is somewhat undercut by the Supreme Court's further observation in *Keefe* that "[S]o long as the means are peaceful, the communieation need not meet the standards of acceptability.'" However, the Court was not concerning itself with demands for money or property in *Keefe*. See Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L Rev 964, 1003 (1978): "Since whistle blowing, but not blackmailing, involves using speech directly to make the world correspond to the speaker's substantive values rather than merely to increase the speaker's wealth . . . " (it is entitled to First Amendment protection). For a thorough discussion of the clash between the crime of criminal coercion and First Amendment values, see Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw L Rev 1081 (1984).

[150] For example, *Claiborne* at p 916.

Thus, no special First Amendment considerations should apply to violent crimes, or threats of violence, other than the limitations on organizational liability discussed above.

Similarly, it is clear that nonviolent crimes, such as trespass or violations of the new federal statute on freedom of access to abortion clinics, can be charged even as to political protest activities. In *Adderly v Florida*,[151] civil rights protestors were arrested when they trespassed on the property of the county jail, blocked the entrances (at least in the sheriff's opinion),[152] and appeared to be attempting to enter. The Supreme Court, by a 5–4 vote, upheld their convictions for trespass despite the fact that no violence occurred: "Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. . . ."[153]

Though the dissenters in *Adderly* strongly disagreed with this holding, their disagreement was based on the fact that the jail was public property. They conceded that trespass on private property, even to advance First Amendment goals, could constitutionally be prohibited.[154]

The only issue remaining, and the one that is directly pertinent to the extortion charges leveled in *NOW v Scheidler*, is whether *threats* to commit nonviolent crimes may also be punished. (Threats to commit violent crimes are clearly unprotected because of society's need to intervene *before* the defendant has a chance to carry out his threat, or even to attempt it.) When an anti-abortion protester calls the abortion clinic and says, "If you open your doors tomorrow, we're going to picket and harass employees and patients who come there," is this extortion? The issue is especially troubling when the nonviolent crime itself may be a petty misdemeanor, such as trespass, but the threat to commit it may be the felony of extortion or, more usually (because of the absence of the "obtaining of property" element), criminal coercion.

Such a threat is potentially eligible for triple First Amendment

---

[151] 385 US 39 (1966).

[152] The majority says that the sheriff "claim(ed) that they were blocking the entrance." Id at 45. The dissent says, "it is undisputed that the entrance to the jail was not blocked." Id at 52.

[153] Id at 47.

[154] Id.

protection since it is speech about associational activities that are political in nature. Moreover, at the time it is uttered, it is nothing more than speech. To make the utterer liable for arrest at the time that the threat is made is akin to a prior restraint on expression. There is no clear and present danger unless the threat is of immediate criminal action. The appropriate response of the victim of the threat is to threaten back: "If you trespass on my property, or interfere with my staff or patrons, I'll have you arrested."

It is a part of the threatener's constitutional rights to test the victim's resolve by making a threat of nonviolent illegality and seeing if the victim is prepared to invoke the law. Where the "victim" is, for example, a utility company, it may well be that the victim would prefer to accommodate the threatener's demands rather than appear on the news ordering hundreds of protesters to be dragged off of its property by police. If the victim is not interested in negotiating, then he can have the police standing ready to arrest the protesters as soon as they break the law.

Beyond this, allowing a crime (and hence, an arrest) to occur at the time of the threat would deprive the threatener of the *opportunity to be arrested at the scene of the protest.* As nonviolent protesters such as Gandhi and Martin Luther King were well aware, the public arrest of hundreds or thousands of protesters can be the most potent arrow in the protester's quiver.[155] Moreover, to allow the leadership to be arrested for threatening a protest (also known as "negotiating") would likely kill off the protest altogether. This would be similar to the injunction of the protest (which began with a threat) that the Court struck down in *Keefe.*

By contrast, even an *implicit* threat of conduct that may result in injury to people is a crime.[156] Suppose an anti-abortion group

---

[155] "Since nonviolent action has entered the scene, however, the white man has gasped at a new phenomenon. He has seen Negroes, by the hundreds and by the thousands, marching toward him, knowing they are going to jail, wanting to go to jail, willing to accept the confinement, willing to risk the beatings and the uncertain justice of the southern courts.

"There were no more powerful moments in the Birmingham episode than during the closing days of the campaign, when Negro youngsters ran after white policemen, asking to be locked up. There was an element of unmalicious mischief in this. The Negro youngsters, although perfectly willing to submit to imprisonment, knew that we had already filled up the jails, and that the police had no place to take them." Martin Luther King, *Why We Can't Wait* 29–30 (New American Library 1963).

[156] But not, as discussed, extortion, because the "obtaining property" element is missing. This would, however, be the crime of criminal coercion in most states as well as a violation of the Hobbs Act for interfering with commerce by threats of violence.

calls an abortion clinic and threatens, "If you open your doors tomorrow there's going to be trouble." This could be a crime if, based on the past behavior of the defendant, a jury could conclude that the defendant, "with purpose unlawfully to restrict another's freedom of action threatened to commit a crime of violence."[157] Threats to throw rocks at, or physically blockade, the clinic would likely put staff and patrons in fear of bodily injury[158] and would also be criminally punishable.[159]

Threats to throw eggs at the clinic, by contrast, or to otherwise trespass on clinic property in ways that do not threaten bodily injury would be immune from prosecution. But the actual throwing of the eggs or trespassing would be criminal, and the protesters could be arrested for an attempt as soon as they arrived at the clinic because, at this point, a clear and present danger of crime is present.[160]

If the threatener is not guilty of extortion when he makes a nonviolent threat with a political goal, then the problem of a threat to trespass being a more serious crime, extortion, than the trespass itself, is also taken care of. Finally, if there is no extortion, there can be no RICO civil suit.

The above formulation is consistent with the Supreme Court's recent holding in *Madsen v Women's Health Center.*[161] In *Madsen*, the Court upheld, in part, an injunction that limited the range of anti-abortion protesters' demonstrations outside a clinic. As such, it did not consider the limits of the constitutional right, posited here, to threaten nonviolent protest. After *Madsen*, in my view,

---

[157] Model Penal Code § 212.5 (Criminal Coercion). The Code prohibits threats to "commit any criminal offense." My proposal is narrower to accommodate the First Amendment. I would further use a "recklessness" mens rea as to such threats. Thus if the threatener consciously disregarded a known risk that his threat would be taken as a threat of violence, then he is guilty. However, he would not be guilty for negligence, that is, even though a reasonable person might have construed his threat as a threat of violence.

[158] However, as discussed in note 161, infra, if the threat to blockade makes it clear that the proposed blockade will not lead to injury to people, it is protected by the First Amendment, and also not covered by the Freedom of Access to Clinics Act of 1994.

[159] So, too, would advocacy of violence toward people at the clinic, so long as it was "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v Ohio*, 395 US 444, 447 (1969). Advocacy of nonviolent conduct would similarly not be punishable until it rose to the level of an attempt, a concept that is slightly closer to the actual commission of a crime than the *Brandenburg* standard.

[160] I am not troubled by using their threat as evidence against them to show intent once an actual attempt has occurred. However, this may be a matter for further debate.

[161] 114 S Ct 2516 (1994).

anti-abortion protesters could still threaten nonviolent breaches of the injunction with impunity. If they actually violated the injunction, they could be prosecuted, as in *Madsen*.

This formulation is also consistent with the Freedom of Access to Clinics Act of 1994, which forbids interfering with clinics by "force or threat of force or by physical obstruction" and "intentionally damaging or destroying property" of a clinic but does not forbid threats of trespass or property damage.[162]

C. SPECIAL PROBLEMS IN CONSPIRACY CASES

Since ordinarily, any enterprise, and certainly an anti-abortion organization, will involve cooperative action by more than one person, a RICO conspiracy may also be charged,[163] as was done in *Scheidler*. An extended discussion could be devoted to the issues raised by the RICO conspiracy statute,[164] but for the purposes of this article, two issues must be raised, if not resolved. The first is that the terms "conspiracy" (a crime) and "association" (a protected First Amendment right) may mean the same thing. Courts must be especially careful in applying a conspiracy statute to a political advocacy organization. In *Claiborne Hardware*, the Court held that liability may be imposed only if "the group itself possessed unlawful goals and the individual held a specific intent to further those illegal goals."[165] However, it is not clear that the Court really intended to restrict liability to those who "specifically intended" illegality, as opposed to those who were knowing or reckless as to such activity. Second, as discussed above, intending *any* illegal activity, as opposed to violent illegality, is not

---

[162] The wording of the statute, "by force or threat of force or by physical obstruction," suggests that threats of physical obstruction are not covered by the statute, so long as they don't also constitute a threat of force. This is consistent with the First Amendment right posited here. While most threats of physical obstruction will also be threats of force, if a protester threatens, for example, to chain the doors of the clinic shut at night, such that no use force is threatened to clinic patients or employees, this is a "threat of physical obstruction" which would not violate the statute and could not be punished under the First Amendment.

[163] 18 USC § 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

[164] For a discussion of some of the problems and possibilities raised by § 1962(d), see Gerard Lynch, *RICO: The Crime of Being a Criminal*, 87 Colum L Rev 661, 945–55 (1987); Craig Bradley, *Racketeers, Congress and the Courts*, 65 Iowa L Rev 837, 876–88 (1980).

[165] *Claiborne Hardware* (note 113 above) at 920.

sufficient for conspiracy liability when the purpose of the conspiracy is to achieve First Amendment goals.[166]

These problems are especially troubling when a RICO conspiracy is charged since the defendants may now be responsible for the doubly inchoate offense of agreeing to form an enterprise that will commit the pattern crimes,[167] rather than simply agreeing to commit a crime. Yet, despite the fact that the RICO charge is more removed from actual harm than ordinary conspiracy, the penalties are much greater.[168]

V. Conclusion

To summarize: Although NOW was rightly victorious in the Supreme Court on the issue of whether political organizations can fall within the prohibitions of RICO, its complaint, at least in the form that it appears in the Joint Appendix in the Supreme Court, is defective. First, it does not adequately plead extortion under the Hobbs Act, since one of the elements of Hobbs Act extortion, "obtaining property," is missing. However, this problem may be solved by the argument that the third clause of the Hobbs Act, forbidding interfering with commerce by force or violence, does not require proof of the "obtaining property" element. Also, there may be other crimes mentioned in the complaint, such as interstate transportation of stolen property—18 USC § 2314—that can be adequately tied to the named defendants and will suffice as pattern crimes under RICO.

Second, the complaint also fails to establish extortion under most state laws because there is no extortionate threat, that is, a threat of violence, exposure of secrets, etc. if defendant's demands are

---

[166] In *Scales v United States*, 367 US 203, 229 (1961), on which the Claiborne Court relied, the Court only approved conspiracy prosecutions when the defendant intended to accomplish the aims of the organization by "resort to violence." In *Claiborne*, the Court speaks as if "unlawful" behavior and "violent" behavior are synonymous. 458 US at 920.

[167] There is, at least, generally agreement that each defendant must have personally agreed to at least two pattern crimes (but not necessarily all of the crimes that are the object of the conspiracy). For example, *United States v Rastelli*, 870 F2d 822, 828 (2d Cir 1989) and cases cited therein.

[168] Five years for a violation of 18 USC § 371; twenty years, forfeiture, and treble damages for RICO violations.

not met, as well as the "obtaining property" problem discussed above.

Even if the members of a defendant organization have clearly committed two RICO predicate offenses, such as arson, it still must be proved that these crimes constituted a "pattern" and that the organization was "conducted through" that pattern of crimes if a RICO case is to be established under § 1962(c).

Assuming that plaintiffs can establish all of the elements of a RICO offense, the political nature of the defendants' acts means that the First Amendment will make it more difficult to render the organization responsible for the acts of its members than would otherwise be the case.

Finally, the First Amendment will not allow the plaintiffs to make out a RICO case based on "extortion" if the defendants' only threat was to engage in nonviolent (*even if illegal*) protest activities. Rather, plaintiffs' only recourse will be to demand enforcement of the state and federal laws protecting against the *actual* trespass and blockading of abortion clinics, plus state law civil suits based on such conduct. If, however, violence or threats of violence can be shown, the Hobbs Act will have been violated and the RICO case should proceed. However, the *Claiborne Hardware* limitation of damages to "the direct consequences of violent conduct"[169] will likely eliminate the treble damage remedy.

---

[169] See note 113 above, at p 918.