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NOW v. SCHEIDLER: THE FIRST AMENDMENT FALLS VICTIM TO RICO

INTRODUCTION

The right to abortion is perhaps the most controversial issue to confront this nation since slavery. This ideological schism, coupled with the fervor often accompanying an issue viewed in terms of moral absolutes, has resulted in increasingly violent confrontations between the pro-life and pro-choice camps. One recent forty-two state survey found that, of the 281 clinics nationwide which perform abortions, over half have suffered violent attacks, threats or blockades.¹ While serious, these acts pale in comparison to the recent support for, and in at least two instances resort to, murder by members of various radical fringe elements of the pro-life movement.²

This escalating level of animosity has shocked the American psyche and forced the nation's courts to rethink the traditional doctrines governing freedom of expression. While abortion providers have enjoyed limited success in deterring clinic protests in certain instances,³ the Supreme Court's recent ruling in *National Organization*

1. Ana Puga, *Half of Abortion Clinics in Survey Report Hostile Acts*, BOSTON GLOBE, Nov. 5, 1993, at 6.

2. *Clinic Doctor Fatally Shot During Anti-Abortion Protest*, TULSA WORLD, Mar. 11, 1993, at A11 (reporting on the murder of Dr. David Gunn, a physician who performed abortion procedures in Pensacola, Fla. in March 1993); Seth Faison, *Abortion Doctor Wounded*, N.Y. TIMES, Aug. 20, 1993, at A12 (reporting on the shooting of Dr. George Tiller, a physician who performed abortion procedures in Wichita, Kansas in August 1993); *Abortion Doctor Killed at Clinic*, TULSA WORLD, July 30, 1994, at A1 (reporting on the murders of Dr. John Britton, a physician who performed abortion procedures, and his escort, James Barrett, in Pensacola, Fla. in July 1994).

3. Abortion providers have successfully prosecuted civil suits against antiabortion demonstrators under 42 U.S.C. § 1985(3) (1982) (originally enacted as the Ku Klux Klan Act of 1871) (prohibiting individuals from conspiring to deprive "any person or class of persons of the equal protection of the laws"). The usual remedy granted to abortion providers is an injunction barring demonstrators from obstructing access to the clinic. See *Roe v. Operation Rescue*, 710 F. Supp. 577, 587-90 (E.D. Pa. 1989), modified, 919 F.2d 857 (3d Cir. 1990); *New York State NOW v. Terry*, 886 F.2d 1339, 1353-54 (2d Cir. 1989). See also Lissa Shults Campbell, Comment, *A Critical Analysis of Bray v. Alexandria Women's Health Clinic and the Use of 42 U.S.C. 1985(3) to Protect a Woman's Right to an Abortion*, 41 KAN. L. REV. 569 (1993); David A. Gardey, Note, *Federal Power to the Rescue: The Use of 1985(3) Against Anti-Abortion Protestors*, 67 NOTRE DAME L. REV. 707 (1992). But see *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168, 1171-72 (C.D. Cal. 1989).

Abortion providers have also attempted to bring claims against demonstrators under 15 U.S.C. § 1 (1988) (the Sherman Act). The usual theory advanced in support of such a claim is

for *Women v. Scheidler*⁴ has furnished these clinics with an unprecedented weapon: the Racketeer Influenced and Corrupt Organizations Act (the RICO).⁵

It is the author's contention that Congress neither anticipated nor intended RICO to be used in this manner.⁶ The Act, as enacted by Congress, is an extremely powerful legal tool to be employed only where criminal actors are motivated by economic concerns. A resort to RICO where legitimate political protest is involved, in the form of antiabortion picketing, will inevitably chill free speech and interfere with the most fundamental of constitutional rights.

Part I of this Note examines the Supreme Court's ruling in *Scheidler* and the reasons advanced for allowing RICO's use against antiabortion protestors. Part II examines the Act itself, including accompanying legislative history, to divine congressional intent as to its proper application. Part III discusses the inevitable adverse effect RICO will have on First Amendment freedoms under *Scheidler*.

that the defendants have conspired to destroy non-tangible property interests belonging to the clinic, i.e., its abortion procedure business, thereby acting in restraint of trade. The courts have responded by stating that the clinic must prove an anti-competitive effect on the provision of abortion services within the clinic's market area. Specifically, there must exist an impact on interstate commerce. Injury to the clinic's own business is insufficient. See *Northeast Women's Ctr., Inc. v. McMonagle*, 670 F. Supp. 1300, 1303-05 (E.D. Pa. 1987); *Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). But see Dinah R. PoKempner, Note, *The Scope of Noerr Immunity for Direct Action Protestors: Antitrust Meets the Anti-Abortionists*, 89 COLUM. L. REV. 662, 671 (1989).

4. 114 S. Ct. 798 (1994).

5. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-68 (1988)).

RICO has become the weapon of choice for litigants whenever possible. A suit brought under RICO provides a plaintiff with several advantages. First, a plaintiff may bring an action under civil RICO without the requirement of a criminal indictment. Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 814 (1990); See also CRIMINAL DIV., U.S. DEP'T. OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS 16 (1988). Second, a claim need only be supported by a "preponderance of the evidence." Califa, *supra*, at 814. Such a burden of proof is less demanding than that imposed by the "clear and convincing" standard or the usual criminal standard of "beyond a reasonable doubt." *Id.* Third, and most important, a successful plaintiff may recover treble damages. 18 U.S.C. § 1964 (1988).

6. See REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55 (1985) [hereinafter REPORT OF THE AD HOC CIVIL RICO TASK FORCE]. But see John H. Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251 (1990) (arguing that RICO properly lends itself to civil prosecution of pro-life demonstrators).

I. NATIONAL ORGANIZATION FOR WOMEN V. SCHEIDLER

A. *Proceedings Below*

In October 1986, the National Organization for Women, together with two women's health care centers involved in performing abortions, brought an action in the District Court of the Northern District of Illinois seeking federal relief from what they claimed was a nationwide campaign by defendants to close medical clinics which provided abortion services.⁷ The defendants named in the suit were a coalition of antiabortion groups known as the Pro-Life Action Network (the PLAN) which included, among others, Joseph Scheidler, a leading antiabortion activist, and Operation Rescue.⁸

The plaintiffs alleged that various activities engaged in by PLAN, including extortion, physical and verbal intimidation of clinic staff and patients, trespass upon and damage to clinic property, and destruction

7. NOW v. Scheidler, 765 F. Supp. 937, 938 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994). In the Illinois District Court action, plaintiffs amended their original complaint and included allegations of violations of the Sherman Act, 15 U.S.C. § 1 (1988), and RICO, 18 U.S.C. § 1962 (1988). *Id.*

The District Court ruled against plaintiffs as to the portion of their claim based upon the Sherman Act, holding that defendants' antiabortion activity was not motivated by financial or commercial concerns but was a political activity designed to influence governmental action. *Scheidler*, 765 F. Supp. at 939-41. Such activity was held not to fall within the ambit of the Act, which, according to prior judicial decisions and legislative history, was enacted to regulate anti-competitive conduct with financial, economic or commercial objectives. *Id.* at 939-40. *See* Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (holding that efforts to restrain or monopolize trade in order to influence government action are protected from anti-trust liability). The District Court's ruling as to the portion of the complaint based upon the Sherman Act was affirmed on appeal by the Seventh Circuit. NOW v. Scheidler, 968 F.2d 612, 617-23 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

8. *Scheidler*, 765 F. Supp. at 939. PLAN members involved themselves in other activities designed to undermine the operating ability of abortion clinics and the pro-choice movement in general. Members engaged in telephone campaigns in an effort to overload clinic phone lines, scheduled false appointments to prevent legitimate patients from obtaining clinic services, threatened to disrupt and harass those businesses which provided goods and services to clinics, and intimidated landlords involved in leasing property to clinics. *Scheidler*, 968 F.2d at 615-16.

Scheidler himself had previously been convicted for criminal trespass and harassment. *Id.* at 615. He authored and distributes a manual entitled *Closed: 99 Ways to Stop Abortion*, advocating illegal methods of interfering with and preventing the operation of clinics providing abortion services. Scheidler testified before Congress that "[W]hen the laws allow the killing of innocent human beings, we will change those laws. And until we change those laws, we will find ways to get around them." *Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. & 2d Sess. 61, 66 (1987).

Operation Rescue is a militant pro-life organization founded by Randall Terry. *See generally* Larry Martz et al., *The New Pro-Life Offensive*, NEWSWEEK, Sept. 12, 1988, at 25; Julian Bond, *Dr. King's Unwelcome Heirs*, N.Y. TIMES, Nov. 2, 1988, at A27; Charles E. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15 (1989) (providing a detailed treatment of various legal and philosophical questions brought about by the abortion rescue movement and an analysis of Operation Rescue, its goals and tactics).

of center advertising, constituted a pattern of racketeering and illegal activity⁹ in violation of RICO.¹⁰ Specifically, section 1962(a), (c) and (d) were implicated.¹¹ Subsection (a) prohibits establishing, acquiring, operating or investing in an “enterprise” with “income derived . . . from a pattern of racketeering activity or through collection of an unlawful debt.”¹² Subsection (c) forbids “any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of that enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”¹³ Subsection (d) renders illegal a conspiracy to violate any of the above provisions.¹⁴

At trial, the District Court granted defendants’ motion to dismiss for failure to state a claim.¹⁵ The court acknowledged that, although the defendants’ actions may have constituted extortion as alleged (thereby becoming a “pattern of racketeering activity” for section 1962 purposes), there was no income generated from such activity as required by subsection (a).¹⁶ Any income produced resulted solely from contributions by persons sympathetic to the defendants’ cause, i.e. supporters.¹⁷ Thus, the conduct complained of did not fall within the purview of subsection (a).¹⁸

That portion of the plaintiffs’ claim based upon subsection (c) prompted closer examination by the District Court. It was noted that the circuits which had addressed similar RICO claims were in conflict as to whether the predicate acts of racketeering or the enterprise¹⁹

9. To state a RICO claim, a plaintiff must establish a “pattern of racketeering activity” involving the commission of, or conspiracy to commit, at least two predicate acts within a ten-year period. 18 U.S.C. § 1961(5) (1988). For a list of those activities which serve as “predicate acts,” see 18 U.S.C. § 1961(1) (1988).

10. *Scheidler*, 765 F. Supp. at 938.

11. *Id.* at 941, 944.

12. 18 U.S.C. § 1962(a) (1988).

13. 18 U.S.C. § 1962(c) (1988).

14. 18 U.S.C. § 1962(d) (1988).

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

16. *Id.* at 941.

17. *Id.*

18. *Id.*

19. 18 U.S.C. § 1961(4) (1988) (defining “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”).

itself must be economically motivated.²⁰ The Second and Eighth Circuits held that this was indeed the case,²¹ while the Third Circuit refused to impose an economic motive requirement.²²

The District Court considered the approach taken by the Second Circuit as the better reasoned of the two views and held that, in order to properly state a RICO claim, a plaintiff must allege that a defendant's actions were in furtherance of some profit-generating goal.²³ Although plaintiffs alleged that defendants' actions were designed to force abortion clinics out of business, the court concluded there was no true economic motive behind such conduct.²⁴ Rather, closing health centers which provided abortion services was a means toward a political end, not an income-generating act in and of itself.²⁵ Because the court found nothing to sustain those portions of plaintiffs' claim based upon subsections (a) and (c), the subsection (d) component, requiring a conspiracy to violate section 1962, was also dismissed.²⁶

On appeal, the Seventh Circuit affirmed the District Court's dismissal of the plaintiffs' claim.²⁷ Though the appellate court conceded that it was common judicial practice to liberally construe RICO, it adhered to the District Court's reasoning in holding that an economic motive was required in order to bring a defendant within reach of the statute.²⁸ In its evaluation of plaintiffs' section 1962(c) claim,²⁹ the court, relying upon the Second Circuit Court of Appeal's decision in *United States v. Ivic*,³⁰ found support for an economic motive requirement in the Justice Department's RICO Guidelines which stated that

20. *Scheidler*, 765 F. Supp. at 942.

21. *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983) (finding that Croatian nationalist bombings were designed to eliminate political opponents, not obtain money, and thus not addressable under RICO); *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (citing *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)) (finding that defendants' attempts to control St. Louis labor unions were designed to enhance finances, thereby satisfying the economic motive requirement of RICO), *cert. denied*, 488 U.S. 974 (1988). See also *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

22. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.) (holding that since the Hobbs Act, a RICO predicate offense, required no economic motive, it was not necessary for plaintiff's claim to allege that defendants' conduct was economically motivated), *cert. denied*, 493 U.S. 901 (1989).

23. *Scheidler*, 765 F. Supp. at 943.

24. *Id.* at 944.

25. *Id.*

26. *Id.*

27. *NOW v. Scheidler*, 968 F.2d 612, 631 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

28. *Id.* at 629.

29. 18 U.S.C. § 1962(c) (1988) (prohibiting the conduct or participation in the affairs of an enterprise through racketeering).

30. 700 F.2d 51 (2d Cir. 1983).

no indictment of an association was to issue unless that entity existed for the purpose of achieving an economic goal.³¹

The Court of Appeals further bolstered its ruling by noting that the *Ivic* court interpreted the term “enterprise” in section 1962 (a) and (b) as an “organized profit-seeking venture.”³² The *Ivic* court determined that there was no indication Congress intended that term to have a different meaning in subsection (c).³³ Finally, the Court of Appeals pointed out that the Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co.*,³⁴ held “[w]e should not lightly infer that Congress intended [terms] to have wholly different meanings in neighboring subsections.”³⁵

B. *The Supreme Court*

The Supreme Court, noting the conflict among the circuits as to RICO’s requirement of an economic motive,³⁶ granted plaintiffs’ petition for certiorari.³⁷ In addressing the portion of plaintiffs’ claim predicated upon section 1962(c), the Court first looked to the operative language of the provision to determine whether an economic motive was in fact mandated.³⁸ It stated that no such requirement was facially indicated.³⁹ The Court reached a similar conclusion regarding section 1961(1)⁴⁰ and (4)⁴¹, the relevant RICO definitional provisions.⁴²

The Court determined that the Seventh Circuit’s reliance upon the meaning of the term “enterprise” in subsections (a) and (b) (as a means of ascertaining how that term should be interpreted in subsection (c)) was misplaced.⁴³ In prohibiting the use of income gained through racketeering to acquire an interest in, establish or operate an

31. *Scheidler*, 968 F.2d at 628.

32. *Id.* at 627 (relying upon *Ivic*, 700 F.2d at 60).

33. *Ivic*, 700 F.2d at 60.

34. 473 U.S. 479 (1985).

35. *Scheidler*, 968 F.2d at 627 (citing *Sedima, S.P.R.L.*, 473 U.S. at 489).

36. Compare *Ivic*, 700 F.2d at 59-65 and *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (holding that RICO requires an enterprise to be directed toward an economic goal), *cert. denied*, 488 U.S. 974 (1988) with *Northeast Women’s Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.) (finding that no economic motive is required under RICO since the predicate act requires no economic motive), *cert. denied*, 493 U.S. 901 (1989).

37. *NOW v. Scheidler*, 113 S. Ct. 2958 (1993).

38. *NOW v. Scheidler*, 114 S. Ct. 798, 803-04 (1994).

39. *Id.*

40. 18 U.S.C. § 1961(1) (1988). See *supra* note 9.

41. 18 U.S.C. § 1961(4) (1988). See *supra* note 19.

42. *Scheidler*, 114 S. Ct. at 803-04.

43. *Id.* at 804.

enterprise engaged in or affecting interstate commerce, the “enterprise” referred to in subsection (a) was construed as something to be procured; a “victim” of the racketeering activity.⁴⁴ The term was given a similar construct within the context of subsection (b).⁴⁵

However, in evaluating subsection (c), the Court concluded that the “enterprise” mentioned therein was not an acquisition *resulting from* illegal activity but, rather, the “vehicle” *through which* such activity was carried out.⁴⁶ Thus, because subsection (c), unlike subsections (a) and (b), prohibits an individual employed by or associated with an enterprise from taking part in the affairs of that enterprise through a “pattern of racketeering,” it does not require that the enterprise possess a property interest.⁴⁷ Since the enterprise is not one being acquired, the Court held there need be no economic motive for participation in its affairs through racketeering.⁴⁸

The Court, citing its decision in *H.J., Inc. v. Northwestern Bell Telephone Co.*,⁴⁹ addressed the appellate court’s reliance upon the Second Circuit ruling in *United States v. Bagaric*,⁵⁰ which held that Congress, through its statement of findings prefacing RICO, sought to condemn illicit activity which required an economic motive.⁵¹ The Court pointed out that the predicate acts upon which the plaintiffs’ RICO claim was based, such as the alleged extortion, while not benefiting the defendants financially, were nevertheless acts which had the potential to “drain money from the economy by harming businesses such as the clinics.”⁵² Thus, the Supreme Court held that Congress did not intend to limit the application of RICO to acts undertaken with a profit-seeking motive.⁵³

Though the Court of Appeals concluded that the Justice Department’s RICO Guidelines were entitled to deference, inasmuch as they

44. *Id.*

45. *Id.*

46. *Id.* (emphasis added). The Court noted that “[o]ne commentator uses the terms ‘prize,’ ‘instrument,’ ‘victim,’ and ‘perpetrator’ to describe the four separate roles the enterprise may play in section 1962.” *Id.* at 804 n.5 (referring to G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 307-25 (1982)).

47. *Id.* at 804.

48. *Id.*

49. 492 U.S. 229, 248 (1989).

50. 706 F.2d 42, 57 n.13 (2d Cir.) (noting reliance upon congressional findings, which state that the purpose of the Organized Crime Control Act is to reach the activities of groups that “drain billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption”), *cert. denied*, 464 U.S. 840 (1983).

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

52. *Id.*

53. *Id.*

required the existence of an economic motive before indictment of an entity as an "enterprise," the Supreme Court thought this emphasis misguided.⁵⁴ It pointed to the fact that the Justice Department amended its guidelines in 1984 to provide that an enterprise be "directed toward an economic or other identifiable goal."⁵⁵ The Court cited this as further support for its position that RICO required no economic motive of a defendant.⁵⁶

II. RICO AND CONGRESSIONAL INTENT

The Organized Crime Control Act (the OCCA), Title IX of which is RICO, became law on October 15, 1970.⁵⁷ The primary purpose of the Act was to address those unique problems presented by organized crime.⁵⁸ Specifically, the Kefauver Committee,⁵⁹ the first among many national committees to address the issue prior to enactment of the OCCA, reported that criminal syndicates were undermining the nation's economy through their acquisition of legitimate businesses using funds generated by illegal activity.⁶⁰ This involvement in American enterprise was claimed to "harm innocent investors and competing organizations, interfere with free competition, [and] seriously burden interstate and foreign commerce."⁶¹

Due to the tendency of organized crime operations to "legitimate" criminal revenue by investing in legal businesses, the crime fighting methods traditionally used against this element were quickly becoming antiquated, and therefore, a more sophisticated approach

54. *Id.*

55. *Id.*

56. *Id.*

57. See Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) [hereinafter OCCA] (codified as amended in scattered sections of 18 U.S.C.).

58. See G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249, 256 (1982).

59. See S. REP. NO. 141, 82d Cong., 1st Sess. 1 (1951).

60. See Blakey, *supra* note 58, at 249. See also G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980); SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 1 (1969).

The Senate Report stated:

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

Id.

61. See Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 809 (1990) (alteration in original) (quoting S. REP. NO. 617, *supra* note 60, at 1).

was needed.⁶² As money was seen as the driving force behind these operations, it was believed that the manner in which to destroy organized crime was to attack its economic base.⁶³ This tactic was the purpose for which RICO, with its disproportionate penalty, forfeiture and pre-trial seizure provisions,⁶⁴ was designed.⁶⁵

Statements made while under consideration by the House Judiciary Committee suggest that, in targeting organized crime, RICO was to focus on revenue-generating criminal activity. For example, Senator John L. McClellan, Chairman of the Criminal Law and Procedures Subcommittee of the Senate Judiciary Committee and author of the bill, appearing as a witness before the Judiciary Committee, testified that RICO was designed to prevent organized crime from infiltrating legitimate businesses using criminal *proceeds*.⁶⁶ Similarly, the House sponsor of the bill, Representative Richard H. Poff, asserted that the purpose for which criminal syndicates engaged in illicit activity was that of *pecuniary gain*.⁶⁷

As evidenced by the statute's Statement of Findings,⁶⁸ congressional focus upon damage to American enterprise by criminal syndicates utilizing ill-gotten gains serves as a clear indicator that economic motivation was intended to play an important role in determining a defendant's culpability under RICO.⁶⁹ Further, such a requirement is implicit in the language of section 1961(1),⁷⁰ RICO's definitional section.⁷¹ That section refers to crimes which embrace an economic motive, such as gambling, or to those which promote schemes inclusive of

62. See THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 200 (1967).

63. See S. REP. NO. 617, *supra* note 60, at 1.

64. See Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 701-07 (1990) (detailing the expansive and devastating nature of these provisions).

65. See S. REP. NO. 617, *supra* note 60, at 1-2.

66. See Califa, *supra* note 5, at 811 (emphasis added) (noting statement rendered by Sen. McClellan as reported in *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 85 (1970)).

67. See Califa, *supra* note 5, at 811 (emphasis added) (noting statement rendered by Rep. Poff as reported in *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 80 (1970)).

68. See S. REP. NO. 617, *supra* note 60, at 1.

69. Califa, *supra* note 5, at 809.

70. 18 U.S.C. § 1961(1) (1988). See *supra* note 9.

71. Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protestors and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1350 (1990) (conceding, though not asserting, the argument).

a profit-generating component, such as extortion.⁷² Thus, it is probable that Congress saw no need to insert an economic motive requirement into section 1961(1) or any other portion of the statute.⁷³

Another reason the legislature failed to expressly include an economic motive requirement in RICO was that otherwise, an unconstitutional law would have resulted; one based on status.⁷⁴ To avoid this effect, Congress defined organized crime in terms of the activity, rather than the identity, of its participants.⁷⁵ This functional definition had the inevitable effect of sweeping within its reach persons who were not participants in organized crime, but who nonetheless were involved in activities characteristic of that element.⁷⁶ Senator Poff, while acknowledging this result, stated that this effect was purely incidental and inconsistent with Congress' original intent.⁷⁷

RICO's opponents (and some supporters, most notably Senators Edward M. Kennedy and Philip A. Hart) feared from the outset that the OCCA might be used to quiet political protest.⁷⁸ During Senate hearings on the bill which proved to be the forerunner of the final RICO bill,⁷⁹ the American Civil Liberties Union (the ACLU) expressed concern over the sweeping reach given those provisions.⁸⁰ Specifically, the ACLU noted that offenses of the type stemming from anti-war demonstrations then taking place across the nation could satisfy the bill's definition of "pattern of racketeering activity,"⁸¹ thereby

72. *Id.*

73. *Id.*

74. Califa, *supra* note 5, at 813 n.49. Congress sought to avoid any express reference to membership in the Mafia, since a status-oriented classification would have rendered RICO unconstitutional. *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Noto v. United States*, 367 U.S. 290, 299 (1961). *See also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 525 (1984) (Powell, J., dissenting) (stating that "[t]he legislative history reveals that Congress did not state explicitly that the statute would reach only members of the Mafia because it believed there were constitutional problems with establishing such a specific status offense"); 116 CONG. REC. 35,343-44 (1970) (statements of Reps. Cellers and Poff).

75. *See* REPORT OF THE AD HOC CIVIL RICO TASK FORCE, *supra* note 6, at 90.

76. *See* REPORT OF THE AD HOC CIVIL RICO TASK FORCE, *supra* note 6, at 90. *See also* 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan) ("It is self-defeating to attempt to exclude from any list of offenses such as that found in [T]itle IX all offenses which commonly are committed by persons not involved in organized crime").

77. 116 CONG. REC. 35,344 (1970).

78. G. Robert Blakey, *Perversion of Intent: The RICO Racket*, NAT'L REV., May 16, 1994, at 61-62.

79. S. 1861, 91st Cong., 1st Sess. § 2(a) (1969) (codified as amended at 18 U.S.C. § 1961(1)(A)); 115 CONG. REC. 9569 (1969).

80. Gale, *supra* note 71, at 1361.

81. *Measures Relating to Organized Crime: Hearings on S. 30 and Related Measures Before the Subcomm. on Criminal Laws and Proc. of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 475 (1969) [hereinafter *Senate Hearings*].

resulting in the use of RICO's crushing sanctions against political protestors.

Though the ACLU focused its argument on the potential misuse of section 1962(a) against such demonstrators, the argument was implicitly, if not equally, applicable to section 1962(c).⁸² In articulating its fear that RICO's broad language might lend itself to prosecution of political protestors, the ACLU nevertheless noted that "[i]t is clear that this proposed legislation is in no way intended to subject [such persons] to the penalties described."⁸³ This statement, rendered by an independent legal services organization actively involved in the bill's legislative process, serves as contemporaneous evidence that Congress never intended RICO to be employed against persons engaged in ideological protest.

The proposition that an economic motive requirement inheres in RICO's provisions generally, and in section 1962(c) specifically, is strengthened by the Justice Department's objection to the initial definition given "racketeering activity" as "too broad."⁸⁴ At the time, the bill defined such activity as "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year."⁸⁵ The Justice Department claimed that such breadth "would result in a large number of unintended applications."⁸⁶

As a result of these objections, the Senate subcommittee altered the definition of "racketeering activity" to include various specific crimes cognizable under state law.⁸⁷ The subcommittee's response is indicative of congressional intent to limit RICO's application and suggests that efforts by the judiciary to expand the statute's reach, by refusing to require an economic motive, are misguided.

It is quite likely that Congress acquiesced in RICO's breadth in exchange for a statute which would provide the means to aggressively confront the problems posed by organized crime; problems which had, until that time, remained unsolvable.⁸⁸ Such a compromise is perhaps one reason for congressional failure to expressly include an economic motive requirement in Title IX. Another possible explanation for this

82. Gale, *supra* note 71, at 1361. See also *Senate Hearings*, *supra* note 81, at 475-76.

83. *Senate Hearings*, *supra* note 81, at 476.

84. Gale, *supra* note 71, at 1361.

85. S. 1861, *supra* note 79.

86. Gale, *supra* note 71, at 1361.

87. *Senate Hearings*, *supra* note 81, at 405. See also 18 U.S.C. § 1961(1) (1988).

88. See Blakey & Gettings, *supra* note 60, at 1021.

void is that many members wanted a crime fighting statute in effect before the upcoming November 1970 elections and end of the congressional session, and thus felt that an overly-broad RICO was preferable to none at all.⁸⁹

Perhaps the most damning condemnation of the *Scheidler* ruling, and RICO's use against political protestors, comes from the statute's principal drafter himself, Professor G. Robert Blakey of the Notre Dame School of Law.⁹⁰ Professor Blakey has noted that RICO was not intended to have any application "beyond the marketplace of commercial transactions."⁹¹ Referring to *Scheidler* (in which, not coincidentally, he served as defense counsel to Joseph Scheidler),⁹² he has stated that "[u]ntil the applicability of RICO to demonstra[tors] is definitively rejected, [this] success . . . in the Supreme Court will chill political and social protest of all types. Such a weapon of terror against First Amendment freedoms was not what I was told to design when I was counsel to Senator McClellan"⁹³

As support for his interpretation of RICO, Professor Blakey points out that "[n]o offense relating to trespass or vandalism in the context of protests was included in the final version of RICO."⁹⁴ Further, he notes that the offenses of "riot" and "coercion" were ruled out as RICO predicate acts (those acts which may form a pattern of racketeering for purposes of RICO prosecution) in order "to preclude any possibility that RICO might be used against demonstrators."⁹⁵ As Professor Blakey has remarked, "A world of legal difference exists between a Vito Corleone . . . and [those engaged in political protest]."⁹⁶

It is clear from the above that RICO was originally intended to reach only those who, out of a desire for pecuniary gain, undertake criminal activity. In the words of Senator McClellan, "Unless an individual not only commits . . . a crime but engages in a pattern of such violations, and uses that pattern to *obtain or operate an interest in* . . .

89. See Blakey & Gettings, *supra* note 60, at 1021.

90. See generally Gregory J. Wallace, *Outgunning the Mob*, A.B.A. J., Mar. 1994, at 60-61 (discussing Professor Blakey's association with RICO and the statute's development as a tool with which to confront organized crime).

91. Blakey, *supra* note 78, at 62.

92. Blakey, *supra* note 78, at 61.

93. Blakey, *supra* note 78, at 76.

94. Blakey, *supra* note 78, at 62.

95. Blakey, *supra* note 78, at 62.

96. Blakey, *supra* note 78, at 62.

business, he is not made subject to proceedings under title IX.”⁹⁷ Referring to civil RICO, the Supreme Court itself has noted that “[it] is evolving into something quite different from the original conception of its enactors.”⁹⁸

III. SCHEIDLER’S EFFECT ON SOCIAL PROTEST

A. Protected Expression: Free Speech

Following the Supreme Court’s ruling in *Scheidler*, the question remains: How much of the cost to control that small portion of political protest which turns violent will be borne by First Amendment freedoms? Although several amici and the respondents raised the issue before the Supreme Court, it was held that, since respondents failed to do so in the Court of Appeals, the constitutionality of the statute as it applied to the instant circumstances would be the only treatment given that question.⁹⁹

Justice Souter, in his concurring opinion,¹⁰⁰ did address the issue and opined that those who fear RICO’s use in suppression of free speech need not worry. He stated that “an economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling.”¹⁰¹ The concurrence further reasoned that such a requirement was unnecessary because legitimate free speech claims could be raised and addressed in individual cases as they are brought before the court.¹⁰²

This logic fails to acknowledge that a vast number of persons engaged in ideological protest, or desiring to affiliate themselves with an organization doing so, will now be deterred from legitimate, protected expression due to fear of being labeled a “racketeer” and subjected to prosecution under RICO. The stigma attached to such a charge, not to mention the financial burden associated with its defense, are not lessened by the opportunity to claim the First Amendment as a defense once the action has gone to trial.¹⁰³ Furthermore, “[m]any a

97. 116 CONG. REC. 18,940 (1970) (emphasis added) (supporting a requirement of economic motive for proceedings under section 1962(a), as well as, by implication, subsections (b) and (c)).

98. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1984).

99. *NOW v. Scheidler*, 114 S. Ct. 798, 806 n.6 (1994).

100. *Id.*

101. *Id.* at 807.

102. *Id.*

103. Professor Melissa Harrison, herself a former federal prosecutor, notes that “First Amendment defenses to RICO actions . . . are generally unsuccessful.” Marcia Coyle, *Clinics*

prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit"¹⁰⁴ Ultimately, the Supreme Court's ruling has the potential for devastating results and may very well change the face of advocacy as many Americans have come to know and cherish.

The First Amendment protects the freedom of persons to petition and to assemble.¹⁰⁵ Many historians and legal scholars maintain that its provisions were of unsurpassed importance in the minds of the drafters of the Constitution.¹⁰⁶ Because of this emphasis placed upon free expression, political protest has become ingrained in the nation's consciousness as the method by which social reform is affected.¹⁰⁷

The necessity of expressive civil liberties in a pluralistic, democratic society has led the courts to formulate the doctrine of chilling effect, an approach whereby all other legal concerns are generally subordinated to those of free speech.¹⁰⁸ The doctrine of chilling effect is predicated upon the legal system's belief that any harm occasioned by limiting free speech is comparatively greater than that which results from limiting other activities.¹⁰⁹ This philosophy dictates that legal rules should be constructed in a manner that places the greater risk of legal error upon those activities competing with speech, thereby minimizing any such risk to protected expression.¹¹⁰ In granting abortion providers such a daunting weapon so easily employed,¹¹¹

Win One: Justices Accept RICO Use Against Protestors; Free Speech Challenge Lies Ahead, NAT'L L.J., Feb. 7, 1994, at 37.

104. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1984) (Marshall, J., dissenting) (stating that "[C]ivil RICO has been used for extortive purposes, giving rise to the very evils it was designed to combat").

105. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." See also *Thomas v. Collins*, 323 U.S. 516 (1945). A thorough treatment of First Amendment issues as they relate to political protest, in general, and antiabortion protest, in particular, is obviously beyond the scope of this Note. Therefore, only those basic concerns regarding RICO's implications for civil liberties are discussed.

106. Califa, *supra* note 5, at 832.

107. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 105 (1985) (discussing the role that political protest, in general, and civil disobedience, in particular, play in American political life).

108. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect."* 58 B.U. L. REV. 685 (1978).

109. Califa, *supra* note 5, at 833.

110. Schauer, *supra* note 108, at 705.

111. Mr. Califa writes:

Facile pleading requirements readily subject an organization or individuals, with little relation to the predicate acts or enterprise, to the threat of [RICO] [T]he suit often accomplishes the objective of threatening an ideological opponent Indeed, plaintiffs intolerant of a group's opinions may file suit, realizing that their allegations will be very difficult to prove, with the sole intention of inhibiting the activities that they consider to be an imposition:

Califa, *supra* note 5, at 834-35.

and thus subject to abuse,¹¹² the Court has ignored this system of hierarchy devised to protect our most sacred of liberties. Instead, it has chosen to grant property rights¹¹³ a preference over what is the cornerstone of our society, those civil liberties guaranteed by the First Amendment.

Various commentators favoring the statute's use as a means of addressing the more questionable aspects of clinic protest invariably caution those who would employ it to avoid its wrongful use in suppression of First Amendment freedoms.¹¹⁴ In fact, this concern was reflected in Justice Souter's own admonition to the federal courts.¹¹⁵ This solicitude is a sobering admission of the potential for damage RICO poses to protected expression — picketing,¹¹⁶ coercive speech¹¹⁷ and even offensive speech¹¹⁸ — from those who are its strongest proponents in the abortion-rights context.

B. *Unprotected Expression: Civil Disobedience*

No one could reasonably contend that protestor activities which go beyond true expression, such as forceful entry¹¹⁹ and obstruction of access,¹²⁰ should go unpunished. However, it is reasonable to suggest that RICO and its "big gun" approach are not the answer to such

112. Califa, *supra* note 5, at 836 n.162 (noting that FED. R. CIV. P., which dictates that attorneys submit only those pleadings which they, in good faith, believe to be true, is an inadequate safeguard to protect those civil liberties placed at risk by RICO).

113. Bruce Ledewitz, *RICO's Latest Victim-Social Protest*, WALL ST. J., Feb. 2, 1994, at A19.

114. Attorneys Henn and Del Monaco write: "[W]omen and clinics who sue under this statute should nevertheless be careful to avoid infringing upon first amendment rights." Henn & Del Monaco, *supra* note 6, at 275-76. The author would like to know the likelihood that ordinary citizens and clinic operators will be familiar with the various theories underlying proper application of the First Amendment, and correspondingly, when a claim under RICO, in consideration of those theories, is properly asserted? Answer: doubtfully ever (most are aware that many attorneys will bring forth almost any suit, especially one capable of yielding treble damages, under the elastic provisions of FED. R. CIV. P. 11). See also Gale, *supra* note 71, at 1370 (admitting that "[t]he First Amendment may nevertheless preclude the use of RICO against antiabortion protestors").

115. NOW v. Scheidler, 114 S. Ct. 798, 807 (1994) (Souter, J., concurring) (stating that "I think it prudent to notice that RICO actions could deter protected advocacy and to caution the courts applying RICO to bear in mind the First Amendment interest that could be at stake").

116. See *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

117. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

118. See *Street v. New York*, 394 U.S. 576 (1969).

119. See *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1348-50 (3d Cir.), cert. denied, 493 U.S. 901 (1989) (finding liability of defendants who entered clinic's facilities without permission).

120. See *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (holding that picketing which obstructs access may properly be prohibited by law).

minor offenses. Nor are they the answer to protest which turns violent.¹²¹ There are, and have always been, adequate state and federal laws to address such lawlessness.¹²²

While any violation of the law should carry an appropriate sanction, some forms of peaceful violation are necessary in order to dramatically call attention to a cause.¹²³ Admittedly, such behavior is not protected expression.¹²⁴ At best, it is a mixture of both protected speech and unprotected conduct.¹²⁵ Such behavior is nevertheless an effective tactic that has been used by political protestors for decades.¹²⁶ Under threat of RICO prosecution, the costs associated with such methods will become too high for all but the most ardent keeper of the faith to bear. *Scheidler*, in effect, is a direct affront to the role that civil disobedience has played in developing the social and legal structure of this nation.¹²⁷

Civil disobedience, defined as predominantly nonviolent, open and illegal conduct designed to attract the attention of the community,¹²⁸ is often the last resort for those whom society will not accommodate. The protestor engaged in civil disobedience and society "differ radically over the legitimacy of the alleged right at stake."¹²⁹ Pro-choice advocates view this right as one to choose termination of a pregnancy; as a woman's right to personal autonomy. In contrast, anti-abortion activists do not see the existence of any right whatsoever. They view the "right" to abortion as simply legalized homicide and resort to what is believed to be a higher law in their attempts to combat its exercise.¹³⁰

121. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (holding that "[t]he First Amendment does not protect violence [in protest]").

122. Professor Ledewitz commented: "RICO was never needed to combat truly violent protest. Murder, assault and arson already carry severe state and federal penalties. RICO lawsuits will not be aimed at them. Rather, they will be aimed at illegal but essentially peaceful protest." Ledewitz, *supra* note 113, at A17 (referring to traditional types of civil disobedience). See also Gale, *supra* note 71, at 1343 (noting that federal authorities are often unresponsive in the prosecution of violent clinic protestors).

123. Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 *HOFSTRA L. REV.* 67, 70-71 (1990).

124. *Id.* at 67.

125. See generally *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971); *United States v. O'Brien*, 393 U.S. 900 (1968).

126. Ledewitz, *supra* note 123, at 68.

127. See generally Philip Soper, *Legal Theory and the Obligation to Obey*, 18 *GA. L. REV.* 891 (1984); Rolf Sartorius, *Political Authority and Political Obligation*, 67 *VA. L. REV.* 3 (1981).

128. Ledewitz, *supra* note 123, at 70-71.

129. Ledewitz, *supra* note 123, at 87.

130. See Rice, *supra* note 8, at 16-18 (noting anti-abortion activists' claimed resort to the common law and statutory doctrines of justification and necessity in furtherance of divine will).

Regardless of the position one takes on the abortion-rights issue in general, civil disobedience on the part of pro-life demonstrators serves as a necessary outlet for the frustration felt by a great number of persons who believe the current abortion laws are immoral. The interest of the activists' victim, the abortion provider, is purely commercial.¹³¹ Accordingly, remedies are available for those economic injuries suffered.¹³² With this in mind, the "right to do business unimpeded is not sufficiently vital to risk the loss of the rich political tradition of civil disobedience."¹³³ Allowing clinics to bring suits against antiabortion activists under RICO will risk such a loss.

Civil disobedience becomes more difficult to justify when it begins to interfere with the rights of another; specifically, a woman's constitutional right to obtain an abortion. This is, of course, the criticism leveled at many pro-life activist organizations.¹³⁴ However, civil disobedience which threatens individual rights does not, nor do its advocates suggest that it should, enjoy full constitutional protection.¹³⁵ As indeed its practitioners intend, civil disobedience inevitably leads to arrest.¹³⁶ Thus, while antiabortion advocacy may render a woman's attempt to obtain an abortion more difficult, it does not deny her the ultimate exercise of that right.¹³⁷

As applied to illegal, though nonviolent, political protests, RICO ignores the existence of laws capable of addressing the problems posed by such conduct. Further, it threatens to undermine civil disobedience; a practice that has produced some of the most sweeping reform in our nation's history. RICO's use against antiabortion protestors is simply not warranted by the minimal threat these groups pose to the free exercise of abortion rights.

131. Ledewitz, *supra* note 123, at 87.

132. See, e.g., *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1347-48 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 683-84 (9th Cir. 1988).

133. Ledewitz, *supra* note 123, at 87-88.

134. See Tamar Lewin, *With Thin Staff and Thick Debt, Anti-Abortion Group Faces Struggle*, N.Y. TIMES, June 11, 1990, at A16 (reporting statement of Kate Michelman, Executive Director of the National Abortion Rights Action League, who claims that "Operation Rescue violate[s] the civil rights of women . . .").

135. Ledewitz, *supra* note 123, at 89.

136. Due to the presence of various media covering such events, antiabortion demonstrators often welcome arrest as a method by which to publicize their campaign. These arrests create a nuisance for the criminal justice system, making their protests more burdensome. See, e.g., *Henn & Del Monaco*, *supra* note 6, at 259-60.

137. Ledewitz, *supra* note 123, at 89.

IV. CONCLUSION

The Supreme Court has given its approval to RICO's use in civil prosecution of pro-life demonstrators. *Scheidler* is likely a response to the increasingly hostile confrontations between abortion rights advocates and those who oppose them. Regardless, that ruling is in direct disregard of the legislative history attendant to Title IX of the Organized Crime Control Act and one which threatens to overwhelm the convictions of those who believe strongly in unconventional ideologies.

It is important to note that RICO lends itself only to the prosecution of acts that are already criminalized.¹³⁸ The statute's legislative history clearly indicates its intended use as one against organized crime, not social protest. Statements made and documents generated pursuant to RICO's enactment are replete with evidence of an intent only to confront those potential defendants motivated by economic concerns.

It is contrary to both congressional intent and the Constitution to allow RICO to be employed against demonstrators. Though the context of *Scheidler* is one of antiabortion protest, a far-reaching and dangerous precedent has been set. The threat of treble damages and the stigma attached to being labeled a racketeer will deter all but the most hardy of advocates. Inevitable is a chilling of free speech and deterrence of civil disobedience, two forms of expression which are crucial to the maintenance of our societal fabric.

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138. Gale, *supra* note 71, at 1372.