Notre Dame Law Review

Volume 75 | Issue 2 Article 6

12-1-1999

Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms

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NOTE

PROTESTERS, EXTORTION, AND COERCION: PREVENTING RICO FROM CHILLING FIRST AMENDMENT FREEDOMS

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The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment.[1]

[N]o one really knows a law thoroughly unless he knows what the courts have made of it.[2]

I. INTRODUCTION

In the tradition of Dr. Martin Luther King, Jr., Americans who disagree with the practices of others have a Constitutional right to protest. Through such protest they can attempt, with zeal, to persuade those who engage in such practices to change their ways. Under the jurisprudence of the United States Supreme Court such protest activity does not fall outside of the protection of the First Amendment "simply because it may embarrass others or coerce them into action."[3]

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

2 MORRIS R. COHEN, LAW AND THE SOCIAL ORDER 133 (1932).

3 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982); *see also id.* at 921 ("To the extent that the [lower] court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment.").

Something is wrong, then, when the following story can take place in America.[4]

One day Joseph Scheidler (a former Benedictine monk and a follower of Dr. King) and three ministers entered an abortion clinic. They went to the clinic to tell its administrator that they would be demonstrating there the next day. Seeing that the administrator's surname was Connor, and guessing that she was a Catholic, Scheidler warned Connor, "Get out of the abortion business. Someday you will have to answer to Almighty God, who has a commandment: 'Thou shalt not kill.'"[5] The next day, following the protest, Scheidler was arrested, found guilty of second-degree trespass, not guilty of harassment, and given a small fine, but commended by the judge for his non-violent approach. Approximately one year later, Connor left her job.

Around that time, another suit was filed against Scheidler. After considerable litigation, including an appeal to the Supreme Court, the Racketeer Influenced and Corrupt Organizations Act (RICO) claims in that suit reached a jury, which found that Scheidler's con-

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4 This story is told in *Hearings on the Civil RICO Clarification Act of 1990 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. 1–2 (1998) (statement of G. Robert Blakey, Professor of Law, Notre Dame Law School) (visited Nov. 5, 1999) <http://www.house.gov/judiciary/35051.htm> [hereinafter *Clarification Hearings*]. Professor Blakey represented defendant Joseph Scheidler before the Supreme Court in *NOW v. Scheidler*, 510 U.S. 249 (1994); consequently, this story is told from Scheidler's perspective. Another version is told by Fay Clayton, counsel for plaintiff National Organization for Women, Inc. (NOW), in that case. *See* Fay Clayton, NOW v. Scheidler*: Protecting Women's Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 978 (1999). According to Clayton,

> In April 1986, shortly after several clinics had been bombed, Scheidler and three other large, burly [Pro-Life Action Network] activists paid a visit on [a clinic]. The clinic administrator—a petite, young woman—was there alone, and the intruders positioned themselves in such a way that they prevented her escape. She asked them to leave, but they refused. One of these men reached over the reception desk, commandeered the telephones and put them on hold, effectively cutting the clinic administrator off from the outside world. Once they had her trapped, they warned her that they were there to "case the place," to make "Delaware . . . the first abortion-free state in the nation," and that she had better leave her job.

Id. (citing Direct Examination of Cathy K. Conner at 1153–54, *Scheidler* (No. 86-C-7888)) (footnotes omitted); *see also id.* at 982 (describing the above as an "invasion" involving "outright thuggery," in which "Scheidler and his colleagues terrorized [Connor] . . . and ultimately caused her to resign"). The trial transcript does not bear out Clayton's version. *See* Direct Examination of Cathy K. Conner at 1153–54, *Scheidler* (No. 86-C-7888); Cross Examination of Cathy K. Conner by Deborah M. Fischer at 1165–71, *Scheidler* (No. 86-C-7888).

5 *Clarification Hearings*, *supra* note 4, at 1.

duct constituted extortion under the Hobbs Act.[6] The jury therefore found him liable under RICO[7] and returned a civil verdict against him and two others for $85,926.[8] The damages awarded were for the increased security costs at the two abortion clinics that flowed from anti-abortion demonstrations. The jury, however, was not required in its deliberation to make detailed findings of which individuals committed the various acts involved in the protest, despite urging from defendant's counsel.[9] Nor was it instructed to differentiate the increased security costs attributable to lawful conduct by Scheidler, as opposed to unlawful conduct by Scheidler or others wholly unrelated

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6 *See* 18 U.S.C. § 1951 (1994); *see also infra* note 84 and accompanying text.

7 *See* 18 U.S.C. § 1961–64 (1994 & Supp. III 1997); *see also infra* notes 35–48 and accompanying text.

8 *See Abortion Foes Say They Can't Pay*, WASH. POST, Apr. 22, 1998, at A7 (discussing the jury verdict in *NOW v. Scheidler*).

9 *See* Trial Transcript at 4495, *Scheidler* (No. 86-C-7888). Counsel for defendant Joseph Scheidler urged the trial court as follows:

> MR. BREJCHA: Your Honor, for the record . . . we would believe and urge that the plaintiff should list in the special interrogatories each particular incident they allege to constitute an act of force, threat, or violence sufficient to be extortion.
>
> THE COURT: Absolutely not. Absolutely not.
>
> MR. BREJCHA: I heard absolutely not. I simply for the record will make the point . . . .

Id. Counsel later reiterated the point, but was no more successful.

> MR. BREJCHA: [The decision] could still be reviewed [without the jury making particularized findings of liability], Judge. We concede that. It's just that the burden being on the plaintiffs to make a clear record as to what is the pattern. We don't know—even if we categorize, which is now proposed as an additional level of specificity, we still don't know which particular predicate acts within those given abstract categories would be found by the jury to constitute [RICO predicate acts giving rise to liability].
>
> . . . .
>
> THE COURT: I think I can safely say all of the [acts].
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> . . . .
>
> MR. BREJCHA: Without knowing which particular incidents constituted predicate acts as found by the jury, we won't know, of course, where there's a pattern because we don't know which particular demonstrations—I will grant you, Your Honor, I think it would be a—just an onslaught of specificity to find one phrase. But I think that's the nature of the case that's been brought that attacks an entire protest movement over 15 years as a "pattern" of particular acts of extortion or whatever. But I think that without having that specificity, how could you tell.
>
> THE COURT: Okay. I will refuse that.

Id. at 4497–98.

to Scheidler. Instead, in a series of "Special Interrogatories," the jury made only generic findings of liability for *all* conduct involved in the fifteen-year long series of protest activities and returned a *lump sum* for *each* plaintiff.[10] The defendants will owe nearly $260,000 when the damages are trebled under RICO.[11] More troubling, though, is that they have already had to pay for discovery and for their own attorneys for the lengthy litigation. And, if they ultimately lose, under RICO the protesters will also have to pay both their opponents' costs and their attorney fees—which currently exceed one million dollars.[12]

Even if this verdict ultimately is reversed on appeal, the message that this extended litigation sends is unequivocal. The line between protected and unprotected protest is vague, and once the line is crossed, at least under the rationale of *Scheidler*, plaintiffs can recover damages for *all* protest conduct by anyone involved in the protest anywhere—not just a defendant's own conduct that exceeds the scope of First Amendment protection. Therefore, the only people who can afford fully to exercise their right to protest are the wealthy, who can afford litigation, and the poor, who are judgment-proof anyway. Others, fearful of the costs of this sort of litigation—even if they ultimately "win"—will be intimidated into limiting the exercise of their rights to some level far below that to which they are entitled under the First Amendment for fear of crossing the murky line from protest to trespass.[13] Clearly, then, the prospect of this kind of litigation threat-

10 *See generally* Special Interrogatories and Verdict Form, *Scheidler* (No. 86-C-7888).

11 *See* Memorandum Opinion and Order at 24 n.10, *Scheidler* (No. 86-C-7888) ("18 U.S.C. § 1964(c) provides that any civil plaintiff shall recover treble damages and a reasonable attorney's fee. Therefore, the monetary damages awarded to [the two corporate plaintiffs] . . . are trebled to $163,413.84 and $94,366.92, respectively.").

12 *See* Abdon M. Pallasch & Judy Peres, *Abortion Foes Suffer Big Setback*, CHI. TRIB., Apr. 21, 1998, at 1.

13 Curiously, one of the groups that should be most concerned about this kind of application of RICO and the Hobbs Act is NOW, the plaintiffs in *Scheidler*. As their counsel observed,

> As an advocacy organization itself, NOW is keenly aware of the role that speech plays in our nation's culture . . . . NOW relies on First Amendment liberties to advocate equality for women, and NOW has long supported the numerous non-violent tools for making a message known [including] [p]icketing, leafleting, and other forms of advocacy . . . .

Clayton, *supra* note 4, at 994. Nevertheless, NOW lawyers were the primary architects of the RICO/Hobbs Act suit for use against political protesters. Edmund Tiryak, counsel for plaintiff in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), outlined the origin of the strategy in a speech to a NOW convention in Philadelphia in 1987. Tiryak began by sharing his belief that "right-to-lifer[s]" are "a bunch of drooling androids." Address of E. Tiryak, Counsel to Northeast Women's

ens to undermine First Amendment rights and values.[14] Remedial action is required.

This Note begins by examining RICO and its legislative history, which reveals that RICO's drafters, in fact, took special care to make sure that it would not be used to abridge civil liberties, particularly in the context of political and social protest activity. It then traces the evolution of extortion from its common law roots and identifies the judicial steps that are transforming it from a powerful weapon to fight racketeering of all kinds into an indiscriminate bludgeon of First Amendment freedoms. Next the Note examines the First Amendment implications of this evolution, including the ways in which it is ignoring specific Supreme Court directives in *NAACP v. Claiborne Hardware Co.*[15] on how courts should treat litigation implicating First Amendment issues. It concludes by suggesting that judicial or legislative action is required to

(1) retrench the judicially expanded definition of "extortion," clarifying that extortionate "obtaining" requires both a "getting" and a "deprivation" of tangible or intangible property;

(2) ensure that "precision of regulation" is used in litigation involving First Amendment freedoms to distinguish protected from unprotected activity and in assessing individual and group liability; and

(3) clarify the concept of "threat."

Center, Inc., N.O.W. Convention (July 14, 1987), *reprinted in* Petition for a Writ of Certiorari, app. A at A-270, McMonagle v. Northeast Women's Ctr., Inc., 493 U.S. 901 (1989) (No. 88-2137). He then went on to explain the genesis of the RICO/Hobbs Act suit:

> Two of my partners do criminal defense work and they were defending somebody in a criminal RICO case. And they were coming back to the office every day complaining saying that it was impossible to defend these cases 'cause the law's so oppressive.
>
> So I went home that night and said, "you know, this would be a great idea—have a Supreme Court have to decide whether they want to oppress people more under RICO or they want to be more right-to-life. You know, what a great prospect."

Id. at A-274 to A-275.

14 Clayton argues that these concerns are quite different from those addressed by the defendants in *Scheidler.* According to her, "[t]hey argued essentially that if speech is an element of their acts of brutality, the First Amendment immunizes those acts." Clayton, *supra* note 4, at 993. Clayton's point, however, proves too much. Clearly illegal acts are illegal whether or not they are combined with speech. Assessing liability for unprotected acts on the basis of other, protected acts, however, is another matter entirely. So, too, is holding one person liable for another's conduct.

15 458 U.S. 886 (1982).

II. RICO AND ITS LEGISLATIVE HISTORY

In 1970 Congress enacted the Organized Crime Control Act (OCCA),[16] Title IX of which is RICO.[17] RICO had its genesis in the work of the Kefauver Committee, the first of many national groups to investigate the problem of organized crime in America following the Attorney General's 1950 Conference on Organized Crime.[18] RICO was drafted to deal with "enterprise criminality";[19] it was seen as a novel approach to solving a novel problem. Congress felt that RICO was necessary because "the sanctions and remedies available" for dealing with enterprise criminality were "unnecessarily limited in scope and impact."[20]

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16 Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970).

17 18 U.S.C. §§ 1961–64 (1994 & Supp. III 1997). Various authors have examined the interplay between RICO and First Amendment freedoms. *See, e.g.*, G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249, 256 (1982) (cited with approval in *Rusello v. United States*, 464 U.S. 16, 28 (1983), and *Reves v. Ernst & Young*, 507 U.S. 170, 180–81 (1993)); Craig M. Bradley, NOW v. Scheidler*: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129; Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 835 (1990); Geri J. Yonover, *Fighting Fire with Fire: Civil RICO and Anti-Abortion Activists*, 12 WOMEN'S RTS. L. REP. 153, 170 (1990); *see also* John P. Barry, Note, *When Protesters Become "Racketeers," RICO Runs Afoul of the First Amendment*, 64 ST. JOHN'S L. REV. 899 (1990); Jennifer Bullock, Note, National Organization for Women v. Scheidler*: RICO and the Economic Motive Requirement*, 26 CONN. L. REV. 1533 (1994); Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341 (1990); Carole Golinski, Comment, *In Protest of* NOW v. Scheidler, 46 ALA. L. REV. 163 (1994); Bryn K. Larsen, Note, *RICO's Application to Noneconomic Actors: A Serious Threat to First Amendment Freedoms*, 14 REV. LITIG. 707 (1995); Timothy S. Millman, Note, *Civil RICO, Protesters, and the First Amendment: A Constitutional Combination*, 60 MO. L. REV. 239 (1995); Steven E. Soule & Karen R. Weinstein, Note, *Racketeering, Anti-Abortion Protesters, and the First Amendment*, 4 UCLA WOMEN'S L.J. 365 (1994); Hao-Nhien Q. Vu, Note, *A Response to Soule & Weinstein:* National Organization for Women v. Scheidler *Is Just Hard Facts Making Bad Law*, 4 UCLA WOMEN'S L.J. 399 (1994); Joel A. Youngblood, Note, NOW v. Scheidler*: The First Amendment Falls Victim to RICO*, 30 TULSA L.J. 195 (1994). For a full history of the legislative process that spawned RICO, co-authored by the statute's drafter, see G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1660 (1996) (app. H).

18 *See* Blakey & Roddy, *supra* note 17, at 1667.

19 *See* United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983) (observing that "enterprise criminality" consists of "all types of organized criminal behavior . . . [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors") (citing with approval G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013–14 (1980)).

20 Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

During the legislative process that produced RICO, several of the bill's opponents objected to its breadth, especially the possibility that RICO might be used against political protesters. Several objections were raised in hearings on Senate Bill 1861, a forerunner of the final statute, which defined racketeering 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."[21] Senators Edward M. Kennedy and Philip A. Hart complained that the bill reached beyond "organized crime."[22] The American Civil Liberties Union (ACLU) also opposed the bill, expressing its concern that social and political protesters might fall within the bill's ambit, subjecting them to its draconian penalties. The ACLU found the breadth of the original definition of racketeering activity "particularly troublesome," citing the anti-war demonstrations at the Pentagon[23] and Columbia University.[24] It feared, in short, that the statute would

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21 S. 1861, 91st Cong. § 2(a) (1969); *see also* 115 CONG. REC. 9569 (1969).

22 *See* S. REP. NO. 91-617, at 215 (1969) ("[T]he reach of this bill goes beyond organized criminal activity.") (individual views of Sen. Philip A. Hart and Sen. Edward M. Kennedy).

23 The ACLU pointed out that

> [l]ast year's massive anti-war demonstration at the Pentagon resulted in a number of arrests for acts 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 .... *[O]ffenses of the kind which resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill* ....

Measures Relating to Organized Crime: Hearings on S.30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475 (1969) [hereinafter *Senate Hearings*] (statement of Lawrence Speiser, director of the Washington office of the ACLU) (emphasis added).

24 The ACLU testified that

> [The protest at Columbia] was a group activity which resulted in arrests, involved the danger of violence to property, and involved offenses for which imprisonment for more than a year was possible. Under S. 1861, Mr. [James Simon] Kunen [author of "Strawberry Statement," describing his participation in the campus disorders] could not lawfully invest the proceeds from his book. Whatever one may think of the offenses or the offenders in these hypotheticals, and *questions of whether or not their activity is in any way protected by constitutional guarantees aside, it is clear that this proposed legislation is in no way intended to subject them to the penalties described. Nevertheless, there is absolutely nothing in the bill to prevent them from being so used.*

Id. at 476 (statement of Lawrence Speiser, director of the Washington office of the ACLU) (emphasis added). This statement, and the statement in note 23, *supra*, clearly demonstrate that the ACLU was determined not merely to exclude constitutionally protected conduct, which could not in any event be reached, but to assure that RICO was not used at all in the context of social or political demonstrations.

be used by the Nixon Administration to suppress anti-war dissent. The Department of Justice, too, objected; it argued that the definition of "racketeering activity" in the bill was "too broad and would result in a large number of unintended applications."[25] Deputy Attorney General Richard G. Kleindienst suggested an amendment to narrow the definition to a list of specific offenses "customarily invoked against organized crime."[26]

In response to these misgivings, the Senate Judiciary Committee eliminated the broad language defining "racketeering activity" ("danger of violence to life, limb or property"). When incorporating Senate Bill 1861 (which became Title IX of the OCCA, or RICO) into Senate Bill 30 (which would become the OCCA), the Committee replaced the initial broad language with a list of designated federal and state offenses. The new language was virtually identical to that recommended by the Justice Department.[27] The Senate passed the changed bill by a vote of seventy-three to one.[28] The House then made minor amendments—with which the Senate concurred[29]—and President Richard M. Nixon signed the bill into law on October 15, 1970.[30]

With the narrowing of "racketeering activity," apparently no one believed that RICO posed a threat to political protesters. Satisfied

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25 Senate Report, *supra* note 22, at 121–22 (statement of Deputy Attorney General Richard Kleindeinst).

26 *Id.* at 122; *see also id.* at 158.

27 *Compare* S. REP. No. 91-617, at 215 (1969), *with Senate Hearings*, *supra* note 23, at 405. A piece by the statute's drafter, Professor G. Robert Blakey, Chief Counsel for the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee at the time that RICO was drafted, indicates that the resemblance is not coincidental. Blakey has reported that RICO's chief sponsor, Senator John L. McClellan, instructed him to "strike the language that gave the senators concern." Blakey asserts, as a result of his doing just that,

> [n]o offense relating to trespass or vandalism in the context of protests was included [in the version of RICO which was ultimately enacted] . . . . The offense of "extortion" ("obtaining property by fear") was included, but it was modeled on the early English common law, which emphasized "obtaining" property . . . , not "depriving" someone of property . . . . Pointedly, the offense of . . . "coercion" ("forcing another to act against his or her will") [was] excluded from the list of RICO offenses to preclude any possibility that RICO might be used against demonstrators.

G. Robert Blakey, *The RICO Racket*, NAT'L REV., May 16, 1994, at 62; *see also* Blakey & Roddy, *supra* note 17, at 1665 ("The senators and congressmen who drafted RICO knew the difference between 'extortion' and 'coercion.' Had they meant to include 'coercion,' they would have said it.").

28 *See* 116 CONG. REC. 972 (1970).

29 *See id.* at 36,296.

30 *See id.* at 37,264.

that the amendment incorporated its proposed changes, the Justice Department made no further comment on RICO's breadth or the possibility of unintended application of the statute. Significantly, although the ACLU continued to oppose Title X (sentencing) of the OCCA, it noted the responsive changes in Title IX (RICO) with pleasure, observing that "[t]he substantive provisions of [RICO] have been substantially revised so as to eliminate most of the previously objectionable features."[31] Leading Senators and House members also united on the same point: the bill was narrowly drafted to avoid treading on civil liberties. Senator John L. McClellan, RICO's chief sponsor, informed his colleagues in the Senate that "[RICO] offers the first major hope of beginning to eradicate the growing organized criminal influence in legitimate commerce, while posing no real threat to civil liberties."[32] Representative Richard H. Poff, who sponsored the bill in the House of Representatives, stated that RICO "does not violate the civil liberties of those who are not engaged in organized crime, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime."[33] Senator Kennedy, too, apparently believed that RICO would not reach political protest.[34]

As enacted, RICO makes unlawful the commission of four types of activities. These include (i) investing income derived from a pat-

31 116 CONG. REC. 854 (1970) (ACLU statement put into the record by Sen. Young).

32 *Id.* at 18,941 (remarks of Sen. McClellan).

33 *Id.* at 35,344 (remarks of Rep. Poff).

34 Senator Kennedy's continued fears of misuse of the OCCA, even after the amendment of Title IX, prompted him to argue against Title X of the OCCA, a dangerous special offender sentencing provision. Senator Kennedy expressed concern that Title X could apply, not only to organized criminals, but to anyone who committed any significant federal crime. Specifically, he feared that Title X would apply to someone like Dr. Benjamin Spock, a pediatrician who was tried and convicted for violation of the Selective Service Act after staging sit-ins at armed services recruiting centers, draft-card burnings, and other anti-war demonstrations. *See* 116 CONG. REC. 845, 845–46 (1970); *see also* United States v. Spock, 416 F.2d 165, 168 n.2 (1st Cir. 1969). To ensure that the sentencing provisions of Title X would not reach anti-war demonstrators, Senator Kennedy proposed an amendment to limit Title X, substituting for "any felony" the list of offenses designated under Title IX (RICO). *See* 116 CONG. REC. 845 (1969). Senator McClellan argued to the contrary. "It seems to me," Senator McClellan said, "that it would be a grave mistake to restrict dangerous offender sentencing to any list of specified offenses supposedly typical of organized crime." *Id.* at 845.

This exchange demonstrates that both Kennedy and McClellan understood that RICO was narrower than "any felony," and in fact did not apply to political protest—Kennedy believed, and McClellan accepted, that if Title X were limited to the offenses contained in Title IX, Dr. Spock would be excluded from Title X. Kennedy's amendment ultimately failed. *See id.* at 849.

tern of racketeering activity in the acquisition, establishment, or operation of any enterprise engaged in interstate commerce;[35] (ii) acquiring or maintaining any interest in an interstate enterprise through a pattern of racketeering activity;[36] (iii) participating in the conduct of an interstate enterprise through a pattern of racketeering activity;[37] and (iv) conspiring to violate any of the above provisions.[38] "Racketeering activity," no longer "any act involving the danger of violence to life, limb, or property,"[39] comprises various narrowly targeted state and federal crimes,[40] which are commonly referred to as "predicate acts" or "predicate offenses."[41] A "pattern of racketeering activity" requires the commission of at least two "predicate acts,"[42] which must be both "related" and "continuous."[43]

RICO provides for both criminal[44] and civil[45] sanctions for violations. The criminal penalties for RICO violations are severe; they include fines, imprisonment, and forfeiture of assets derived from racketeering activity.[46] Moreover, under RICO's civil component, "[a]ny person injured in his business or property by reason of a viola-

35 *See* 18 U.S.C. § 1962(a) (1994). Each of RICO's provisions can also be violated through collection of an "illegal debt" without the requirement of a "pattern of racketeering activity." *Id.* This "illegal debt" collection element of the provisions, however, is not relevant to the purposes of this Note, and therefore is not discussed.

36 *See id* § 1962(b).

37 *See id* § 1962(c).

38 *See id* § 1962(d).

39 S. 1861, 91st Cong. § 2(a) (1969); *see also* 115 CONG. REC. 9569 (1969).

40 *See* 18 U.S.C. § 1961(1)(a) (1994). The crimes that constitute "racketeering activity . . . may . . . be grouped into four broad, but not mutually exclusive categories: (1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials; and (4) commercial and other forms of fraud." Blakey, *supra* note 17, at 302–06. Thus, "racketeering activity" includes such crimes as murder, kidnapping, bribery, robbery, extortion, dealing in obscene matter, wire fraud, mail fraud, securities fraud, embezzlement, bribery, obstruction of justice and numerous other state and federal crimes. *See* 18 U.S.C. § 1861(1)(a) (1994). This extensive list of predicate offenses does not, however, include the offenses of "trespass," "riot," or "vandalism" in the context of social or political protest, nor does it include the offense of "coercion."

41 *See* Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265–66 n.9 (1992) (discussing the "predicate offenses" listed in 18 U.S.C. § 1961 (1994)).

42 18 U.S.C. § 1961(5) (1994).

43 *See* H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237–244 (1989); *see also* Joseph E. Bauerschmidt, Note, *"Mother of Mercy—Is This the End of RICO?"—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern,"* 65 NOTRE DAME L. REV. 1106, 1108–10 (1990) (discussing "pattern").

44 *See* 18 U.S.C. § 1963 (1994).

45 *See id.* § 1964.

46 *See id.* § 1963(a).

tion of [RICO]" can bring suit against the violator.[47] The potential liability under a civil RICO claim is significant; victorious claimants in such suits may recover treble damages, costs, and reasonable attorneys' fees.[48]

Despite the narrowing of RICO in the legislative process to prevent its use to abridge social or political protest activities, the statute is beginning to be used successfully against political and social protesters. Anti-abortion protesters have been the main targets of the suits using RICO in this way.[49] Yet, although some plaintiffs have charged that anti-abortion demonstrators are involved in a violent national conspiracy, the successful cases have not based the protesters' RICO liability on proven allegations of violent crime.[50] (In fact, after seeing all of the evidence presented by the National Organization for Women (NOW), the district court in *Scheidler* specifically held on a motion for summary judgment that the evidence—supposedly connecting Scheidler and his codefendants to murder or kidnapping—was insufficient as a matter of law.)[51] Instead, extortion is the predicate offense upon which the decisions predicate RICO liability for these protesters.

For this reason, the offense of "extortion" merits closer examination. Both state and federal extortion are predicate offenses under RICO.[52] While the following analysis concentrates on the history of

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47 *Id.* § 1964(c).

48 *See id.*

49 Under the approach used in these cases, however, RICO could be used against *any* group of social or political protesters—not just anti-abortion protesters. *See infra* Part V.

50 Notably, none of the decisions have involved proven allegations of murder or kidnapping (each a RICO predicate offense) against the demonstrators, although murders and arsons have, in fact, occurred at abortion clinics throughout the nation. To date, despite the best efforts of the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, and Firearms (A.T.F.) to establish a national conspiracy, these acts have been shown to be the conduct of misguided individuals, not that of any nation-wide conspiracy. *See* Letter from James L. Brown, Chief, Explosives Division, Department of the Treasury, A.T.F., to Clarke Forsythe, Americans United for Life 1 (Dec. 1, 1993) (on file with the *Notre Dame Law Review*) ("There is no indication that any particular group has acted in unison on the abortion clinic arsons and bombings. These incidents have been the work of single individuals or small, closed groups.").

51 NOW v. Scheidler, No. 86-C-7888, 1997 WL 61078, at *18 (N.D. Ill. Sept. 23, 1997) ("[P]laintiffs are noticeably strained in their attempt to implicate the defendants in the attempted murder of Dr. George Tiller, and the murders of Dr. John Britton and James Barrett.").

52 *See* 18 U.S.C. § 1961(1) (Supp. III 1997).

extortion under the Hobbs Act,[53] it is equally applicable to state extortion statutes: the proponents of the Hobbs Act, in fact, viewed its definition of extortion as representative of the extortion laws of the various states.[54]

III. THE EVOLUTION OF EXTORTION: FROM "EXTORTION" TO "COERCION"

The crime of extortion is evolving in dramatic contrast to its common law roots. The common law roots of the offense under federal law[55] are unquestionable; nonetheless, the courts are uprooting the present definition from its common law soil. This evolution is causing the offense to expand in scope: it now effectively sweeps within its ambit of proscribed acts, not only those activities that the common law conceived of as "extortion," but also those that are more appropriately dealt with under the rubric of "coercion."

To begin, it is essential to understand the traditional definitions of "extortion" and "coercion" and the distinctions between the two. With those definitions in mind, the evolution in meaning that extortion is undergoing can be fully appreciated. The combined effect of two fundamental changes in the meaning of extortion is working the subsuming of "extortion" by "coercion." The first of these changes, the extension of "property" to include intangible as well as tangible interests, is eminently reasonable. To be sure, this change would have broadened the meaning of "extortion," but the enhanced scope would have only reflected modern economic realities. However, the second change, in conjunction with the first, effected the swallowing of "extortion" by "coercion." This second change resulted from the courts' first dissecting the requirement of "obtaining . . . from another" into its component parts of a "getting" of something by a person, for himself or a third party, from another, and a consequent "deprivation" of the other person of that thing, then eliminating the "getting" portion. Upon careful examination of this transformation of the "obtaining . . . from another," the error in this process is apparent. Moreover, the result of the judicial transformation, i.e., that "extortion" requires only a "deprivation" rather than both a "getting" and a "deprivation," is illegitimate. If "extortion" is to be subsumed by "coercion," that is a job for Congress, not the courts.

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53 *See id.* § 1951 (1994).

54 *See infra* note 87 and accompanying text.

55 *See* § 1951.

A. *Basic Definitions: The Model Penal Code*

The *Model Penal Code* contains a useful set of definitions from which to begin this analysis.[56] According to the *Model Penal Code*, extortion—originally a common law offense—is properly included within the consolidated offense of theft. "Extortion" is defined as obtaining of the property of another where threat "is the method employed to deprive the victim of his property."[57] In contrast, "coercion"—originally a statutory offense[58]—is defined as making "specified categories of threats . . . with the purpose of unlawfully restricting another's freedom of action to his detriment."[59]

While making threats is a common element of each crime, the distinction between the crimes concerns the interest each was conceived to protect: "extortion" proscribes threats made in order to *obtain the property of another*, while "coercion" proscribes threats made in order to *limit another's freedom of action.*[60] Put simply, "extortion" protects *property* while "coercion" protects *autonomy.*

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56 *See* MODEL PENAL CODE AND COMMENTARIES (1980). The choice to appeal to the *Model Penal Code* for these foundational definitions should be relatively uncontroversial. *See* Sandford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 521 (1988) ("[The *Model Penal Code*] has become . . . the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes."); *id.* at 538 ("The success of the *Model Penal Code* has been stunning. Largely under its influence, well over half the states have adopted revised penal codes . . . .").

57 MODEL PENAL CODE AND COMMENTARIES § 223.4 cmt. 1, at 201 (1980). Under the *Model Penal Code*, "extortion" is one of the forms of the consolidated offense of "theft." Section 223.1(1) of the Code "provides that an accusation of theft may be supported by evidence that it was committed in any manner that would be theft under Article 223." *Id.* § 223, Introductory Note, at 122. The Code replaces the offenses of "larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like . . . with a unitary offense." *Id.* Consequently, the "obtaining" required for extortion under the Code means, "in relation to property, to bring about a *transfer* or *purported transfer* of a *legal interest in the property*, whether *to the obtainer or another.*" *Id.* § 223.0(5)(a), at 124 (emphasis added). The Code adopts a modern (*see infra* note 91 and accompanying text), broad definition of the kind of "property" which can be extorted, including "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power." *Id.* § 223.0(6), at 124.

58 The crime of coercion was unknown to the common law; instead, its origins are statutory. *See, e.g.*, State v. Ullman, 5 Minn. 1, 2 (1861); *see also* Blakey & Roddy, *supra* note 17, at 1660.

59 MODEL PENAL CODE AND COMMENTARIES § 212.5 cmt. 2, at 264 (1980).

60 Notably, this influential Code itself explicitly endorses this distinction at various points in its commentary. At one point the Code states,

B. The Historical Development of Extortion

1. The Common Law

Federal extortion law is rooted in the common law.[61] A statutory term is usually presumed to maintain its common law meaning.[62] Supreme Court jurisprudence reflects this traditional rule.[63]

> Behavior prohibited by this section [theft by extortion] is closely analogous to that proscribed as criminal coercion under Section 212.5. . . . [T]he major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made "with purpose unlawfully to restrict another's freedom of action to his detriment" while extortion is included within the consolidated offense of theft because it is restricted to one who "obtains property of another by" threats.

See id. § 223.4 cmt. 1, at 203. At another, it observes,

> It is arguable that these categories of threat [theft by extortion] should be included in the offense of criminal coercion . . . . The judgment underlying the Model Code, however, is that the underlying wrong in extortion—obtaining property to which the actor knows he is not entitled—provides a more reliable basis for punishment than does the Section 212.5 requirement of a "purpose unlawfully to restrict another's freedom of action to his detriment."

Id. at 266; *cf.* Blakey & Roddy, *supra* note 17, at 1660 ("*[O]btaining of property* distinguishes *extortion* from *coercion* as coercion involves the restriction of another's freedom of action by threat.") (emphasis added).

61 For a detailed examination of the history of what became the common law offense of extortion, beginning with the Magna Carta, see James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988); *cf.* Evans v. United States, 504 U.S. 255, 259–60 (1992) (citing Lindgren with approval).

62 *See Evans*, 504 U.S. at 260 (interpreting Hobbs Act extortion: "It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning'" (quoting Taylor v. United States, 495 U.S. 575, 592 (1990))). *See generally* Neder v. United States, 119 S. Ct. 1827, 1840 (1999) ("Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989))) (alterations in original); United States v. Turley, 352 U.S. 407, 411–12 (1957) (construing steal); Morissette v. United States, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . ."); Standard Oil Co. v. United States, 221 U.S. 1, 59 (1910) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense."); United States v. Carll, 105 U.S. 611, 612–13 (1881) (dealing with counterfeiting/forgery); United States v. Smith, 18 U.S. (5 Wheat.) 153, 155–56 (1820) (interpreting piracy).

63 *See Evans*, 504 U.S. at 269 (discussing Hobbs Act extortion, the Court observed that "[t]he silence of [Congress, which is] the body that is empowered to give us a

English common law writers largely agreed on the definition of "extortion."[64] For instance, Lord Coke viewed extortion "in [its] proper sense, [as] a great misprison, by wresting or unlawfully *taking* by any officer, by colour of his office, any money or valuable thing . . . either that is not due, or more than is due, or before it be due."[65] William Hawkins (whose opinion later became very influential throughout England and even spread to America)[66] believed that extortion

> in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the *taking* of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.[67]

And William Blackstone,[68] in turn, defined extortion as an "abuse of public justice which consists in an officer's unlawfully *taking*, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due."[69]

Two features common to all three definitions stand out. First, in each, the person extorting (the "extortionist") effects a "taking" from

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'contrary direction' if it does not want the common-law rule to survive[,] is consistent with an application of the normal presumption identified in *Taylor* and *Morissette*").

64 As might be expected, these proposed definitions largely tracked those found in the case law of the time. *See, e.g.*, Regina v. Woodward, 88 Eng. Rep. 949, 949 (Q.B. 1707) ("Indictment against several . . . stating that they threatened to send [a man] to [prison] and to indict him of perjury, unless he would *give them* money and a note; which he did through their threats.") (emphasis added); Rex v. Burdett, 91 Eng. Rep. 996, 997 (K.B. 1696) ("[I]t is not the injury to 'free liberty to sell their wares in the market' or 'the extorsive agreement' . . . [which] is . . . the offense, but the *taking*. . . .") (emphasis added); Rex v. Wadsworth, 87 Eng. Rep. 489, 489 (K.B. 1694) (refusing to quash an indictment for extortion, where the indictment was against a miller for "*taking* too great toll") (emphasis added); Rex v. Roberts, 87 Eng. Rep. 286 (K.B. 1692) ("The crime is the *taking* . . . ."); Rex v. Troy, 86 Eng. Rep. 686 (K.B. 1669) (quashing an indictment against an attorney for taking too much money in fees from his client on grounds of insufficient evidence).

65 3 A SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE 586 (J.H. Thomas ed., Philadelphia, Robert H. Small 1826) (emphasis added).

66 *See* Lindgren, *supra* note 61, at 864–65 ("Hawkins's definition of extortion was cited, paraphrased, or followed by the *Crown Circuit Companion*, Matthew Bacon in *A New Abridgment of the Law*, William Russell in *A Treatise on Crimes and Misdemeanors*, and Francis Wharton in his influential American treatise, *A Treatise on the Criminal Law*.") (footnotes omitted).

67 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 316 (Thomas Leach ed., 6th ed., London, His Majesty's Law-Printers 1787) (emphasis added).

68 Blackstone is one of the most influential early writers on extortion. *See* Lindgren, *supra* note 61, at 862.

69 4 WILLIAM BLACKSTONE, COMMENTARIES 141 (Univ. of Chicago Press 1979) (emphasis added).

the person being extorted (the "victim").[70] That is, the extortionist both "gets" something and "deprives" the victim of that thing.[71] Second, whatever is "taken" by the extortionist (and thus "gotten" by the extortionist, and of which the victim is "deprived") is a tangible interest of economic value; each definition also names that tangible interest as either "money" or some "thing of value" or "valuable thing." These elements, necessary to the definition of extortion at common

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70 The "taking" required for common law "extortion" is the kind of "taking" required for common law "larceny" or "robbery." *See generally* CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES 837–70, 886–88, 897–98 (Marian Quinn Barnes ed, 7th ed. 1967); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 715, 776, 789–90 (2d ed. 1986). "Larceny" was the first of these crimes to be recognized at common law. *See* LAFAVE & SCOTT, *supra*, at 702. It was defined as "the (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it." *Id.* at 706; *see also* CLARK & MARSHALL, *supra*, at 798 ("[L]arceny at common law is the taking and carrying away of the personal goods of another . . . with . . . intent to steal the same.").

"Robbery" developed later to punish "larceny" committed in a more aggressive manner; it "may be thought of as aggravated larceny." LAFAVE & SCOTT, *supra*, at 776. It consists of the elements of "larceny" "plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished by means of force or putting in fear." *Id.*; *see also* CLARK & MARSHALL, *supra*, at 882 ("The aggravating circumstances necessary to constitute robbery, as distinguished from simple larceny, are: (1) The property must be taken from the person of another . . . ; (2) the taking must . . . be accomplished either by violence or by putting him in fear.").

While "robbery" reached many kinds of "larceny" committed by the "aggravated" means of threats, it was insufficient to punish all kinds of wrongful "taking" so accomplished. For while

> to obtain another's property by means of a threat of immediate bodily harm to the victim (or to someone in his company) is robbery; and robbery is held to embrace also a threat to destroy the victim's home or a threat to accuse him of sodomy[;] [t]hat was, however, as far as robbery by threats went—doubtless because the severe penalty for robbery, long a capital offense, restrained the courts from expanding robbery to include the acquisition of property by means of other effective threats—such as a threat to inflict future rather than immediate bodily harm, or to destroy the victim's property other than his house, or to accuse him of some crime other than sodomy, or to expose his failings or secrets or otherwise to damage his good name or business reputation.

LAFAVE & SCOTT, *supra*, at 789–90. The crime of "extortion, . . . generally carrying a penalty less severe than for robbery," was therefore developed to fill this gap, covering "takings" accomplished by these kinds of threats. *Id.* at 790.

71 In each of the above definitions, *both* a deprivation *and* a getting that results from the deprivation are required. Either by itself is not sufficient; a *deprivation* is a *necessary* but *not a sufficient* condition of "taking." *See* LAFAVE & SCOTT, *supra* note 70, at 790 n.5 ("If the property is *not actually obtained*, then there must be a prosecution for attempted extortion.") (emphasis added).

law, are precisely the elements required under the definition of extortion proposed in the *Model Penal Code* (although under the Code "property" can include "intangible" as well as "tangible" interests). The *Model Penal Code*'s definition of "coercion," on the other hand, requires neither of these elements.

2. New York Law: The Field Penal Code of 1865

The American colonists brought with them the English common law. Subsequently, many grew discontented with the common law and agitated for codification. This agitation found favor in New York,[72] where David Dudley Field was one the chief proponents of codification. Largely under his influence, the State in 1857 set up a commission to "reduce into a written and systematic code the whole body of the law of this state or so much and such parts thereof as shall seem to them practical and expedient."[73] Field, William Curtis Noyes, and Alexander W. Bradford served as the project's commissioners.[74] The draft penal code, which was initially assigned to Noyes, was presented in 1864.[75] Field, however, was responsible for the final draft, which the commissioners reported in 1865.[76]

Not surprisingly, Field's Penal Code contained an extortion provision. "Extortion" consisted of the "*obtaining of property from another*, with his consent, induced by a wrongful use of force or fear, or under color of official right."[77] While New York never adopted Field's Penal Code, the Code served as the prototype for the Penal Code that New

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72 *See* 3 ROSCOE POUND, JURISPRUDENCE 709 (1959). Pound observed,

> Agitation for codification in New York was in part a phase of the legislative reform movement of the fore part of the nineteenth century and influenced by the wide attention given to the writings of Bentham. In part it grew out of the hostility toward English institutions and English law in the period after the Revolution and favor toward things French which went along with Jeffersonian democracy. Both were well marked in New York.

Id.

73 *Id.* at 710–11 (citing 1857 N.Y. LAWS ch. 266, 552).

74 *See id.* at 711.

75 *See id.*

76 *See id.*

77 PENAL CODE OF THE STATE OF NEW YORK § 613, at 220 (1865) (emphasis added) (citing People v. Whaley, 6 Cow. 661 (N.Y. 1827)); *see also* People v. Whaley, 6 Cow. 661, 663 (N.Y. 1827) ("Extortion . . . signifies the taking of money" with corrupt intent.). The Code does not define either "obtaining" or "property"; however, later cases interpreted those provisions. *See infra* notes 80–81 and accompanying text.

"Extortion" under the Field Penal Code, reflecting its common law roots, is part of the "larceny" series. *See* PENAL CODE OF THE STATE OF NEW YORK, § 584 cmt. at 210–11 (1865) ("larceny"). The Field Penal Code stated,

York did adopt in 1881;[78] the amendments that transformed the Field Penal Code to the 1881 code did not change the definition of extortion.[79]

Thus, the two distinguishing features of common law extortion (i.e. (i) the requirement of a "getting" of something from another and the "deprivation" of the other of that thing, and (ii) the requirement that a tangible property interest be taken) survived codification in New York essentially intact. First, while New York law uses the term "obtaining" where the common law used the term "taking," the terms are synonymous.[80] Second, although Field Code extortion referred to

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> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement . . . . All four include the criminal *acquisition* of the property of another . . . . In extortion, there is again a *taking* . . . . Thus extortion partakes in an inferior degree of the nature of *robbery* . . . .

Id. (emphasis added).

78 *See* United States v. Mazzei, 521 F.2d 639, 654 (3d Cir. 1975) (stating that the Field Code "served as a prototype for a new penal statute, the Penal Code of 1881").

79 *See* N.Y. PENAL LAW § 552 (1881) ("Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.").

80 "Obtaining . . . from another," like "taking," requires both a "getting" of property by the extortionist from the victim and a "deprivation" of the victim of that property; the terms are interchangeable. Thus, New York "extortion" law requires both a "getting" as well as a "deprivation" for an extortionate "obtaining" to occur. The cases in support of that proposition are legion. *See, e.g.*, United States v. Enmons, 410 U.S. 396, 406 n.16 (1973) (interpreting New York law: "extortion requires an intent 'to *obtain* that which in justice and equity the party is not entitled to *receive*'"; the accused cannot be guilty of extortion unless "actuated by the purpose of *obtaining* a financial benefit such as "*receiv[ing]* a payoff" (quoting People v. Cuddihy, 271 N.Y.S. 450, 456 (Crt. Gen. Sess. 1934))) (emphasis added); Printers II, Inc. v. Professionals Publ'g, Inc., 615 F. Supp. 767, 773 (S.D.N.Y. 1985) (interpreting New York law: "[e]xtortion requires the *taking* of property") (emphasis added); People v. Ryan, 133 N.E. 572, 573 (N.Y. 1921) (noting that an intent "to extort" requires an accompanying intent to "gain money or property"; a mere threat to harm a business is not sufficient); *Whaley*, 6 Cow. at 663; People v. Squillante, 185 N.Y.S.2d 357, 361 (App. Div. 1959) (stating that extortion requires an "*obtaining of property from another*," where "'*obtaining of property from another*' imports *not only that he give up something but that the obtainer receive something*") (emphasis added); People v. Weinseimer, 102 N.Y.S. 579, 588 (App. Div.) (stating that in an extortion prosecution, the material issue to be determined is whether the defendant "*receive[d]* [money] *from* the complainant") (emphasis added), *aff'd*, 83 N.E. 1129 (N.Y. 1907); People v. Barondess, 16 N.Y.S. 436, 438 (App. Div. 1891) (describing the effect of codification on common law extortion: "At common law, extortion . . . was defined to be the *taking* of money . . . . [As codified in New York's Code, it] completes the legislation against robbery"), *rev'd on other grounds*, 133 N.Y. 649 (1892); People v. Griffin, 2 Barb 427, 429–30 (N.Y. App. Div. 1848) ("[I]ntent to extort" is interpreted, as in a robbery-type offense, to mean "to *obtain*

the thing taken as "property," it appears that this property constitutes the same sort of thing, i.e. "money" or other tangible "thing of value," contemplated by the common law.[81] New York law, then, reflects the historical distinction between "coercion" and "extortion" as it has from its original Field codification.[82]

3. The Hobbs Act

In 1946, Congress passed the Hobbs Act.[83] The Hobbs Act, as presently in force, reads in relevant part:

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that which in justice and equity the party is not entitled to *receive*.") (emphasis added); People v. Cuddihy, 271 N.Y.S. 450, 456 (Crt. Gen. Sess. 1934) (same), *aff'd*, 277 N.Y.S. 960 (App. Div. 1935). *Compare* BLACK'S LAW DICTIONARY 1453 (6th ed. 1990) (defining "take": "[i]n the law of larceny [of which extortion is part], to *obtain* or *assume possession of* a chattel unlawfully"), *with id.* 1078 (defining "obtain": "[t]o *get hold of* by effort, to *get possession of*; to *procure*; to *acquire*, in any way").

81 *See generally Ryan*, 133 N.E. at 573 (equating an intent "to extort" with an intent to "gain *money* or *property*"; a mere threat to harm a business is not sufficient) (emphasis added); *Whaley*, 6 Cow. at 663 ("Extortion . . . signifies the taking of *money*.") (emphasis added); *Weinseimer*, 102 N.Y.S. at 588 (arguing that the material issue was whether the defendant "receive[d] [money] from the complainant"); *Barondess*, 133 N.Y. at 653–54 ("At common law, extortion . . . was defined to be the taking of *money*. . . . [In the Field Code, it] completes the legislation against robbery.") (emphasis added). In fact, the argument that the something obtained must be tangible is even stronger under New York Law than under the common law: the New York provision, rather than referring to the something taken as a thing of value or the like, actually uses the term "property."

82 The distinction lives even today. In fact, modern New York extortion law is even more explicit than earlier versions on the distinction, as well as on both the "obtaining" (where it hews to traditional roots) and "property" (where it adopts an expanded modern definition) requirements of extortion. *Compare* N.Y. PENAL LAW § 135.65 (McKinney 1999) (defining "Coercion in the first degree" as consisting of "Coercion in the second degree" plus aggravating elements) *and* N.Y. PENAL LAW § 135.60 (McKinney 1999) (defining "Coercion in the second degree": "[a] person is guilty of coercion in the second degree when he *compels* or *induces* a person to *engage in conduct* which the latter *has a legal right to abstain from engaging in*, or to *abstain from engaging in conduct* in which he *has a legal right to engage*, by means of instilling in him a fear") (emphasis added), *with* N.Y. PENAL LAW § 155.05(2)(e) (McKinney 1999) (defining "Larceny by extortion": "A person *obtains* property by extortion when he compels or induces another person to *deliver* such property *to himself or to a third person* by means of instilling in him a fear") (emphasis added) *and* N.Y. PENAL LAW § 155.00(1) (McKinney 1999) ("'Property' [for the purposes of "larceny" offenses] means any money, personal property, real property, computer data, computer program, thing in action, evidence of debt or contract, or any article, substance or thing of value, including any gas, steam, water or electricity, which is provided for a charge or compensation.").

83 *See* Hobbs Act, 60 Stat. 420 (1946) (codified as 18 U.S.C. § 1951 (1994)). Congress changed the form of the definition of extortion in 1948. However, this change

> (a) Whoever obstructs, delays, or affects commerce . . . by . . . extortion or attempts or conspires to do so, 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 under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . . .
>
> (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.[84]

The definition of extortion in the Hobbs Act is drawn from its predecessor, the Anti-Racketeering Act of 1934 (1934 Act).[85] The language of the 1934 Act, in turn, was largely fashioned after the definition of extortion under then current New York law.[86] In addition, what was apparent became explicit when Representative Hobbs himself acknowledged in the House debates the New York law roots of the definition of extortion in the Hobbs Act.[87] Not surprisingly, the lan-

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was a consolidation and not a revision. *See* 18 U.S.C. § 1951 (1994) (This "[s]ection consolidates sections 420a to 420e–1 of Title 18, U.S.C., 1940 ed., with changes in phraseology and arrangement necessary to effect consolidation."). *Compare* Act of Jun. 25, 1948, ch. 95, 62 Stat. 793 (1948) *with* 60 Stat. 420 (1946).

84 18 U.S.C. § 1951 (1994) (emphasis added).

85 *See id.* §§ 420a–e (1934). The 1934 Act provided penalties for any person who

> (b) [o]btains property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or
>
> (c) [c]ommits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsection [(b)].

Id. § 420a(b)–(c). Although the 1934 Act does not contain the word "extortion," it is quite clear that Congress meant the statutory language to describe what it viewed as the essence of extortion; the report of the Senate Judiciary Committee discussing the bill that would become the 1934 Act stated that it was aimed at "persons who commit acts of violence, intimidation and *extortion*." S. REP. NO. 73–532, at 1 (1934) (emphasis added).

86 *See* N.Y. PENAL LAW § 850 (Consol. 1930) ("Extortion is the *obtaining* of property from another . . . with [his] consent, induced by a wrongful use of force or fear, or under color of official right.") (emphasis added). This definition has remained essentially unchanged from its original codification in 1865. *See supra* note 77 and accompanying text.

87 *See* United States v. Jackson, 180 F.3d 55, 69 (2d Cir. 1999) ("Representative Hobbs[,] [the sponsor of the Hobbs Act,] stated that the term[] extortion . . . '[has] been construed a thousand times by the courts. Everybody knows what [it means].'" (quoting 91 CONG. REC. 11,912 (1945))); *see also* 91 CONG. REC. 11,900 (1945) (state-

guage used in the definition of extortion under the Hobbs Act is the same as the language used in New York law: extortion requires the *obtaining of property from another.* The Supreme Court has held that when a legislature borrows the language of a statute from the jurisprudence of another jurisdiction, the language must be construed in the sense in which the other jurisdiction used it.[88] Therefore, under the Hobbs Act, "extortion" should require the same two key elements that it requires under New York law: (i) the extortionist must effect an "obtaining . . . from another," i.e., the extortionist must "get" something from another and the other must be "deprived" of that thing, and (ii) the "thing" obtained must be the kind of interest protected under New York Law which, in turn, comprised the kind of interest protected under the common law, i.e., money or some other tangible thing of value.

4. Judicial Interpretation of the Hobbs Act

In the fifty-plus years that followed the passage of the Hobbs Act, the courts were called upon to construe various aspects of it. When the issue was squarely raised, they unequivocally recognized the dis-

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ment of Rep. Hobbs) ("The definitions in this bill are copied from the New York Code substantially."); *id.* at 11,914 (statement of Rep. Russell); *id.* at 11,905 (remarks of Rep. Robsion); *id.* at 11,843 (remarks of Rep. Michener); *id.* at 11,842 (remarks of Rep. Walter). The relevant legislative materials are thoroughly discussed in *United States v. Mazzei*, 521 F.2d 639, 651–55 (3d Cir. 1975) (Gibbons, J., dissenting).

88 *See* Willis v. E. Trust & Banking Co., 169 U.S. 295, 307–08 (1897) (holding that the words of such borrowed language must be "construed in the sense in which they were understood at the time in that system from which they were taken"); Metro. R.R. Co. v. Moore, 121 U.S. 558, 572 (1887) (same); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."); *cf.* Evans v. United States, 504 U.S. 255, 259–60 (1992) (dealing with Hobbs Act extortion). In *Evans*, the Court observed,

> As we have explained: "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Id. (alteration in original) (citations omitted). In *Evans*, the Court recognized the New York law roots of Hobbs Act extortion. *See id.* at 261–62 n.9. It did the same in *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1972). Consequently, those elements of the common law imported into the New York Law were also imported into the Hobbs Act.

tinction between "extortion" and "coercion."[89] Nevertheless, two lines of cases have recently emerged that are leading to the obliteration of the distinction.

a. Property

In the first of these lines, the federal courts gradually altered the kind of property that must be obtained to constitute extortion.[90] As

89 *See, e.g.*, United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1131–32 (E.D.N.Y. 1992) (finding erroneous the government's contention that the difference between coercion and extortion is an "irrelevant" distinction: "*[E]xtortion* requires the *taking of property from a person* whereas *coercion* simply requires the *forcing of a person to do something against his will. The distinction is not trivial*" (citing *Enmons*, 410 U.S. at 406 n.16, and United States v. Nardello, 393 U.S. 286, 296 (1969))) (emphasis added); Center Cadillac, Inc. v. Bank Leumi Trust Co., 808 F. Supp. 213, 232 (S.D.N.Y. 1992) ("'*[C]oercion* [in contrast to *extortion*] . . . is not among the . . . laws . . . providing a basis for RICO liability.") (emphasis added).

90 The expansion of the notion of "property" or "thing of value" is not unique to extortion. Extortion is one of many offenses under Title 18 of the U.S.C. that uses some variation of "property" or "thing of value." *See, e.g.*, 18 U.S.C. § 201 (1994) ("anything of value") (bribery); *Id.* § 1341 ("property") (mail fraud); *Id.* § 1951 ("property") (extortion). These concepts are the source of much of the modern growth of federal criminal law. *See, e.g.*, United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) (finding law enforcement information to be a "thing of value" within 18 U.S.C. § 641 (stolen property)). *Girard* collected a wide range of decisions on "thing of value"; it concluded that "[t]he word 'thing' not withstanding, the phrase is generally construed to cover intangibles as well as tangibles." *Girard*, 601 F.2d at 71 (citing decisions construing "thing of value" to include amusement under a gambling statute, sexual intercourse under a bribery statute, and the testimony of a witness under an extortion statute); *see also* United States v. Gorman, 807 F.2d 1299, 1304–05 (6th Cir. 1986) (finding that loans and promises of future employment constitute "things of value" within 18 U.S.C. § 201); United States v. Schwartz, 785 F.2d 673, 679 (9th Cir. 1986) (finding that assistance in arranging a union merger constitutes a "thing of value" within 18 U.S.C. § 1954). *Compare* United States v. Croft, 750 F.2d 1354, 1361–62 (7th Cir. 1984) (finding that the labor of a government employee constitutes a "thing of value" within 18 U.S.C. § 641), *with* Chappell v. United States, 270 F.2d 274 (9th Cir. 1959) (finding contra; criticized in *Schwartz*, 785 F.2d at 681 n.4, and *Croft*, 750 F.2d at 1362). *But see* United States v. Sandoval, 20 F.3d 134, 136–37 (5th Cir. 1994) (finding that a taxpayer who offered information on other tax evaders did not offer a "thing of value" within 18 U.S.C. § 201).

One author in particular observed that, while property offenses ("larceny," "robbery," etc.) traditionally focused on acquisitive behavior, modern offenses typically focus on aspects of the political and economic order (government corruption, schemes to defraud, etc.). *See* Sandford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425 (1963) (arguing that while the traditional offenses restricted the behavior of some to free the behavior of others to enjoy what they had, modern offenses, in contrast, control public and private behavior rather than free it, so that a particular kind of political and economic order may be achieved); *cf.* Francis A. Allen, *The Erosion of Legality in Ameri-*

noted above, the Hobbs Act, by importation of the gloss of the New York law (which in turn imported considerations of the common law), envisions "property" as either money or some other like tangible "thing of value." Initially, the courts expressed a general willingness to extend the notion of "property" or "thing of value" to interests that were intangible.[91] For the Hobbs Act, this expansion brought within its scope such intangible interests as the right to hire employees and the right to solicit business accounts.[92]

The courts then broadened this notion further to include interests that seem to border on civil liberties, such as the right to conduct a business free from threats and violence.[93] *United States v. Local 560*[94] is an instructive example of this tendency. There, the court found that a union membership collectively held an "intangible property

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can Criminal Justice: Some Latter-Day Adventures of the Nulla Poena *Principle*, 29 ARIZ. L. REV. 385 (1987) (arguing that this extension of the traditional offenses violates the principle of *nulla poena sine lege*).

91 *See, e.g.*, THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 183 (Oxford, Clarendon Press, 6th ed. 1890) ("[T]he idea of ownership has been so far extended as to make it applicable to certain closely coherent masses of rights; which are thus, by a legal fiction, treated, for certain purposes, as if they were tangible objects."); *id.* at 181 ("Ownership is exercised, in its primary and fullest sense, over physical objects only. It is also exercised, in a secondary and conventional sense, over certain collections of rights which it is convenient to treat upon the analogy of physical objects.").

92 *See, e.g.*, United States v. Lewis, 797 F.2d 358, 363–64 (7th Cir. 1986) (protecting the right to hire employees); United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980) (finding that a victim's right to solicit business free from threatened destruction and physical harm falls within the scope of protected property rights under Hobbs Act); United States v. Nadaline, 471 F.2d 340, 344 (5th Cir. 1973) (discussing the right to solicit business: "such intangible property has been held to be included within those rights protected by the [Hobbs] Act"); United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969) ("[P]roperty . . . includes . . . any valuable right considered as a source or element of wealth.").

93 *See, e.g.*, United States v. Arena, 180 F.3d 380, 394 (2d Cir. 1999) (stating that property includes the "*right to conduct a business free from threats of violence and physical harm*") (emphasis added), *aff'g* United States v. Arena, 918 F. Supp. 561, 568 (N.D.N.Y. 1996) ("The court starts from the uncontested proposition that the right to conduct a lawful business free from threats and violence is property within the meaning of the Hobbs Act." (citing Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2d Cir. 1990), and *Tropiano*, 418 F.2d at 1077)); United States v. Hoelker, 765 F.2d 1422, 1425 (9th Cir. 1985) (protecting not only the money extorted from the victim by those who forced him to buy a life insurance policy naming them as the beneficiaries, but also the victim's "*right to make personal and business decisions about the purchase of life insurance on his own life free of threats and coercion*") (emphasis added); United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978) (protecting the right to make business decisions free from outside pressure wrongfully imposed).

94 780 F.2d 267 (3d Cir. 1985).

right to democratic participation in the affairs of their union," and the right was "properly considered extortable 'property' for purposes of the Hobbs Act."[95] *Local 560* thus reaches a questionable result, underscoring that once the concept of property is extended beyond tangible property, the crucial distinction becomes the elusive difference between "intangible property" and "intangible rights."[96]

The courts have also struggled with the distinction between "property" and "rights" under other provisions of Title 18 of the U.S. Code. The path of the decisions is not straight. Nor is it even consistent between provisions. For example, while frequent flyer mileage,[97] shareholder information,[98] spending control,[99] and postal services[100] are all property within the mail and wire fraud statutes,[101] market share[102] is excluded—a result that is disconcerting, given that decisions under the Hobbs Act would find that it is "property."[103] Fortu-

95 *Id.* at 282.

96 *See* McNally v. United States, 483 U.S. 350, 352, 355–60 (1987) (construing 18 U.S.C. § 1341 (1970) and 18 U.S.C. § 1343 (1956) and holding that the right of honest governmental service is an "intangible right," and not "intangible property"), *set aside by* 18 U.S.C. § 1346 (1989) (rendering it unlawful "to deprive another of the intangible right of honest services"). *McNally*, though decided under the mail fraud statutes, is instructive on the issue of distinguishing between intangible rights and intangible property. The decision is a much unappreciated effort by the Supreme Court to curtail the exuberance of federal prosecutors unchecked by the lower judiciary to transform the mail fraud statute from a nineteenth-century property-based offense into a twentieth-century all-purpose corruption tool. *See generally* John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983). Congress, however, agreed with the prosecutors, not the Court, in enacting almost immediately § 1346—as the Court itself acknowledged was the legislature's prerogative. *See McNally*, 483 U.S. at 360.

Dowling v. United States, 473 U.S. 207, 216–19 (1985), was a similar effort by the Supreme Court, set aside by Congress in 18 U.S.C. § 2320 (1996). *Dowling* excluded bootleg records under 18 U.S.C. § 2314 (1968) from RICO; that decision, however, was supplanted by § 2320, which also set aside the result in *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996) (finding copyright violations outside the scope of RICO).

97 *See* United States v. Loney, 959 F.2d 1332, 1336 (5th Cir. 1992) (construing "property" and "thing of value"); United States v. Schreier, 908 F.2d 645, 647 (10th Cir. 1990).

98 *See* United States v. Wallach, 935 F.2d 445, 464–66 (2d Cir. 1991).

99 *See* United States v. Shyres, 898 F.2d 647, 651–52 (8th Cir. 1990).

100 *See* United States v. Gelb, 881 F.2d 1155, 1162 (2d Cir. 1989).

101 Both of which are RICO predicate offenses. *See* 18 U.S.C. § 1961(1) (Supp. III 1997).

102 *See* Lancaster Community Hosp. v. Antelope Valley Hosp., 940 F.2d 397, 405–06 (9th Cir. 1991).

103 *Lancaster* cannot be squared with decisions under the Hobbs Act. *See, e.g.*, United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986) (finding that the right to make business decisions free from threats constitutes extortable "property"); United

nately though, while the "rights"/"property" distinction may generally be convoluted under Title 18, for the limited purposes of Hobbs Act extortion it is not so troublesome. As noted above, under the extortion statute the courts have consistently confined property interests to those interests having some concrete value which, although possibly somewhat speculative, is ascertainable in terms of dollars and cents within the limits of argument (for example, the value of being able to hire a particular employee, the value of a particular business account, or the value of a particular business decision made correctly instead of under threat).

The extension of the meaning of extortable "property" or "thing of value" in this first line of cases, then, is eminently reasonable. The question turns on what is meant by "property" or "thing of value," which, in turn, depends initially on how those terms were used at common law. Certainly, these terms included "tangible" interests. Whether the common law meaning was necessarily limited to "money" or some like "tangible" thing, or extended to all "things" that might have "value" is debatable. Nevertheless, this broadening of the concept to include "tangible" property interests and "intangible" property interests when they reflect modern forms of wealth is surely reasonable—at least to the extent that those rights, in fact, comprise "a source or element of wealth"[104] with a reasonably certain economic value. And as indicated above, this expanded definition of property is the one adopted by the *Model Penal Code.* Thus, the judicial extension of "property" is justifiable based on the changes that have occurred in the ways in which wealth is owned in a modern society.[105] The protection of ownership was, after all, the purpose of extortion.

b. Obtaining

In contrast, the judiciary's treatment of the "obtaining" requirement of extortion is illegitimate. In a second line of cases, the courts have radically changed that requirement by reading out the "getting" element of "obtaining" and requiring only that a victim show a "depri-

States v. Tropiano, 418 F.2d 1069, 1075–76 (2d Cir. 1969) (finding that a garbage pick-up stop constitutes extortable "property").

104 *Tropiano,* 418 F.2d at 1075.

105 Thomas Holland wrote,

> The notion that nothing is property which cannot be ear-marked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it are also simple, but it is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated.

HOLLAND, *supra* note 91, at 183.

vation." This line of decisions represents, not a reasonable growth of the offense, but a departure from its common law roots—and, in fact, a re-definition of the offense.

The path followed may be traced in two steps. In the first step, courts were willing to find extortion when the "getting" and "deprivation" that are both required for an extortionate "obtaining" were achieved by two different actors. That is, courts found extortion in cases where the extortionist "deprived" the victim of his property but directed that a person other than himself "get" it. This made sense, as in such a case the property is still "obtained" just as surely as if the extortionist himself "got" it; both elements, the "depriving" and the "getting," are present.

United States v. Green[106] was the seminal case in this line. Two defendants, a union and a union representative, were charged with extortion under the Hobbs Act. The prosecution alleged that the defendants had attempted to obtain money from an employer by threatening to use force.[107] The employer paid the money not to the defendants but to others (known as "swampers") in exchange for "imposed, unwanted, superfluous and fictitious services."[108] The defendants argued that the evidence was insufficient to convict them of extortion, because they did not in any way benefit from their actions. The trial judge agreed and arrested a judgment of conviction against the defendants for insufficiency of the indictment.[109] The Supreme Court, however, reversed, holding that "extortion as defined in [the Hobbs Act] . . . in no way depends upon having a *direct* benefit conferred on the person who obtains the property."[110]

United States v. Provenzano[111] marks the second step in the evolution of "obtaining." Anthony Provenzano was an officer of a trucking union that held a labor contract with the Dorn Company. Under Provenzano's influence, truck drivers in the union refused to perform certain functions and brought the Dorn Company's terminal to a standstill. When Dorn, Vice President of the company, spoke to Provenzano about resolving the difficulties, Provenzano suggested that the drivers would perform the required functions if Dorn would agree to pay an extra $100 per week. Rather than have the money transferred directly to him, Provenzano directed Dorn to put an attor-

106 350 U.S. 415 (1956).
107 *See id.* at 417.
108 *Id.*
109 *See id.* at 418.
110 *Id.* at 420 (emphasis added).
111 334 F.2d 678 (3d Cir. 1964).

ney, recommended by Provenzano, on retainer for that amount. When Dorn began to pay, the truckers resumed their duties.

At his trial, despite *Green*, Provenzano argued that he did not commit extortion because he did not receive any benefit, either direct or indirect, from Dorn. The Third Circuit disagreed. It began by quoting *Green* for the proposition that "extortion as defined in the statute in no way depends upon having a *direct* benefit conferred on the *person who obtains the property*."[112] Then, the court took a wrong turn. Acknowledging the roots of the Hobbs Act, the court looked to New York law in an effort to refute the defendant's contention that extortion required that at least some *indirect* benefit be conferred.[113] The court relied on two New York cases, *People v. Fichtner*[114] and *People v. Scheppa*,[115] observing that in both of those cases, the money extorted was paid to a third person (i.e., someone other than the extortionist).[116] The court concluded that "[i]nsofar as we are able to ascertain[,] there is no statutory or common law of New York requiring that the extortioner benefit. *The gravamen of the offense is loss to the victim.*"[117] The court thus mistakenly linked two distinct ideas: (i) an extortionist need not benefit from the extortion, and (ii) the gravamen of extortion is loss to the victim.

The two ideas state a valid proposition when so linked, taking the first idea as primary and the second idea as modifying the first. Even so, this holding sweeps within the ambit of extortion those acts in

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112 *Id.* at 686 (citing *Green*, 350 U.S. at 417) (first emphasis added).

113 The defendant had argued that, given the Supreme Court's choice of language in *Green* to the effect that no "direct" benefit need be conferred on one who obtains the property, the Hobbs Act required that at least some indirect benefit be conferred. *See Provenzano*, 334 F.2d at 686.

114 118 N.Y.S.2d 392, 394 (App. Div. 1952) (affirming conviction of defendants, clerks in a grocery store who extorted $25 from a customer by threatening to prosecute him for shoplifting, stating that "[i]t is not disputed that the $25 taken from Smith was 'rung up' on the store register; that the money went into the company funds and that defendants received no part of the money").

115 67 N.E.2d 581 (N.Y. 1946) (affirming Scheppa's conviction for extortion, despite the fact that the jury had acquitted Calabria, Scheppa's co-defendant). In affirming the conviction, the court noted that

> [t]he money was later actually paid to Calabria, to be turned over to appellant, and there is no proof that Calabria did turn it over. But there was testimony from which the jury could find that Calabria was acting not as an agent for, or collaborator with, appellant, but as a friend of complainant, believing, however mistakenly, that discretion in compliance would serve complainant better than valor in resistance.

Id. at 582.

116 *Provenzano*, 334 F.2d at 686.

117 *Id.* (emphasis added).

which an extortionist receives nothing at all, but instead causes a victim to give property to a third person. Thus, it expands the meaning of *Green* from "one who obtains property need not himself benefit" to "one who extorts property need not himself get it." Still, the proposition contained in these two ideas when they are read together is defensible—it preserves the requirement that there be both a "getting" and a consequent "deprivation" for an extortionate "obtaining" to occur, and it opens up liability to both the "depriver" and the "getter."

The sweeping language of the second proposition when taken alone, however, is erroneous. First, the statement in isolation does not reflect the holding in *Provenzano*, which contradicts the sweeping language:

> [W]e hold that it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof. *It is enough that payments were made at the extortioner's direction to a person named by him.*"[118]

Second, the statement is a misreading of *Fichtner*. The holding of *Fichtner* deals with the difference between the words "gain" and "obtain." *Fichtner* teaches that to be convicted of extortion, property must be "obtained," but the property need not constitute a "gain" to the defendant; an individual can commit extortion even if the money "obtained" thereby is legitimately owed to the extortionist, so that he realizes no "gain." In *Fichtner*, the court held that it would not have mattered if the defendant, a store clerk, reasonably believed that the victim had actually stolen the amount of money the defendant extorted from him from the clerk's store. Third, the sweeping language was based upon a poorly worded jury instruction, which the *Provenzano* court took out of context,[119] and which the *Fichtner* court did not in fact adopt.[120] Finally, the court, although purporting to

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118 *Id.* (emphasis added).

119 *See Fichtner*, 118 N.Y.S.2d at 395–96. The court charged, without exception, that

> it is immaterial that the person who obtains the money retains no part of the proceeds; the gist of the crime is the loss of money by Smith by reason of a criminal act on the part of defendants .... As heretofore stated, defendants were found guilty on both counts.

Id. (emphasis added).

120 In fact, the court implicitly rejected it as being too liberal in favor of the defendant:

> In our opinion, the extortion statutes were intended to prevent *the collection of money* by the use of fear induced by means of threats to accuse a debtor of crime, and it makes no difference whether the debtor stole any goods, nor

state New York law concerning extortionate "obtaining," plainly did not do so.[121]

The flaws in the sweeping language of *Provenzano* did not prevent it from being picked up by other courts. Only seven years after *Provenzano* was decided, the Fifth Circuit used the sweeping language. In *United States v. Hyde*,[122] Joseph Gantt was accused of extortion by forcing a company to sell its stock to a third person, one Bowen. Upholding Gantt's extortion conviction, the court quoted *Provenzano* for the proposition that "[o]ne need receive no personal benefit to be guilty of extortion; *the gravamen of the offense is loss to the victim.*"[123] As in *Provenzano*, this sweeping language in *Hyde* was dicta; the third party did, in fact, "get" the stock of which the extortionist had "deprived" the company.

The sweeping language of *Provenzano* soon spread like wildfire through the pages of the federal reporters.[124] The result of this con-

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how much he stole, and that defendants may properly be convicted even though they believed that the complainant was guilty of the theft of their employer's goods . . . .

Id. at 396 (emphasis added).

121 *See supra* note 80 and accompanying text.

122 448 F.2d 815 (5th Cir. 1971).

123 *Id.* at 843 (emphasis added).

124 As in *Provenzano* and *Hyde*, the sweeping language is inapposite in each of these cases; in each the extortionist himself or some third party clearly "got" the property of which the extortionist "deprived" the victim. *See, e.g.*, United States v. Hairston, 46 F.3d 361, 365 (4th Cir. 1995) (involving defendants who forced three different companies to make contributions to charitable and political organizations and stating, in dicta, that the "gravamen of the offense is loss to the victim") (citing United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978)); United States v. Carlock, 806 F.2d 535, 555 (5th Cir. 1986) (involving a defendant who ordered a victim to make payments of money to a company owned by defendant's daughter-in-law and stating, in dicta, that "the gravamen of the offense is loss to the victim") (citing *Hyde*, 448 F.2d at 843, and *Provenzano*, 334 F.2d at 686); United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986) (involving a defendant who ordered the victim to deposit one million dollars into the account of a third party and stating, in dicta, that "[l]oss to the victim is the gravamen of the offense") (citing United States v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977), United States v. Lance, 536 F.2d 1065, 1068 (5th Cir. 1976), and *Hyde*, 448 F.2d at 843); *Santoni*, 585 F.2d at 673 (involving a defendant who forced the victim, a company, to award a subcontract to another company and stating, in dicta, that "the gravamen of the offense is loss to the victim") (citing *Frazier*, 560 F.2d at 887); *Frazier*, 560 F.2d at 887 (involving a defendant who attempted to extort $150,000 from a bank by having an accomplice—who was to receive the extorted money—strap an explosive device to the bank manager and stating, in dicta, that "[t]he gravamen of the offense is loss to the victim") (citing United States v. Jacobs, 451 F.2d 530, 535 (5th Cir. 1971), *Hyde*, 448 F.2d at 843, and *Provenzano* 334 F.2d at 686); *Lance*, 536 F.2d at 1068 (involving a defendant who extorted money from an individual; the defendant claimed that his intent was only to borrow the money and

flagration is astonishing: the sweeping language, standing alone, effectively discards the requirement that an extortionist or some other third party "get" the property of which the victim is "deprived." Instead, extortionate "obtaining" now requires *only* that the victim be "deprived" of something. In short, to "obtain" now means only to "deprive."

The mantra that "one need receive no personal benefit to be guilty of extortion because the gravamen of the offense is loss to the victim" was repeated so frequently that eventually courts took it literally. Courts began to find extortion, without any analysis, in cases where no one—neither the extortionist nor a third party—"got" the property of which the extortionist "deprived" the victim. *United States v. Anderson*[125] exemplifies this trend. Don Anderson kidnapped and threatened a doctor who performed abortions. He threatened that, unless the doctor could convince him of the doctor's sincerity in promising to cease performing abortions, the doctor and his wife would be killed. In affirming the defendant's Hobbs Act conviction, the Seventh Circuit did not examine whether anyone had "gotten" anything as a result of the alleged extortion. It summarily held that because the threats were directed toward forcing an abortion provider to cease performing abortions, the evidence was sufficient to support the conviction.[126] This approach ignores the fundamental nature of extortion, which has been confirmed time and again from its common law roots through its Hobbs Act codification: extortion is a larceny-type offense protecting "property." To remove the "getting" requirement is to transform the crime from one prohibiting an extortionist or a third party to "get" from a victim to one prohibiting an extortionist to force a victim to act inconsistently with the victim's best

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stating, in dicta, that "the gravamen of the offense is loss to the victim") (citing *Hyde*, 448 F.2d at 843, and *Provenzano*, 334 F.2d at 686); *see also* United States v. Haimowitz, 725 F.2d 1561, 1577 (11th Cir. 1984) (involving a defendant who ordered the victim to pay money to a third party, and, while not quoting the key language, finding extortion because the defendant "participated in the scheme to induce [the victim] to part with his property") (citing *Hyde*, 448 F.2d at 843); *Jacobs*, 451 F.2d at 535 (involving a defendant who forced the victim to buy a bus license and, while not quoting the key language, explaining that Hobbs Act extortion does not require that the extortionist benefit from his acts) (citing *Provenzano*, 334 F.2d at 685).

125 716 F.2d 446 (7th Cir. 1983).

126 *See id.* at 450. Yet, even this egregious holding is justifiable on the facts of the record, though the court did not discuss the key facts in any detail. The record included evidence that the victim, a doctor who performed abortions, was actually extorted of $300. *See id.* at 447. The *Anderson* court did not discuss this fact in its analysis. Instead, the court found it sufficient that the defendant attempted to force an abortion provider to cease performing abortions.

interests by "giving up" something. In short, dropping the "getting" requirement changes extortion from an offense protecting "property" to one protecting "autonomy." Clearly, that kind of "extortion" is uprooted from its common law and New York law soil.[127]

5. The Result: "Extortion" Becomes "Coercion"

When the modification of "obtaining" is combined with the expansion of "property," "extortion" becomes not only "the *obtaining* of *property* from another"[128] through the use of threats, but also the use of threats to *deprive* another of his *right to make decisions free from outside*

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127 In a climate which encourages the reading out of "getting" from extortion, it is probably not shocking to learn that one author suggested that the Hobbs Act can be applied even further. *See* Craig M. Bradley, NOW v. Scheidler*: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129 (1994). Caught up in the expanded extortion fever, Bradley, agreeing with the analysis that rejects reading "getting" out of extortion, nevertheless suggested the following alternative approach:

> [T]here 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! . . .
>
> 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).

Id. at 142–43. Although this novel approach would eliminate the "getting" requirement by allowing the use of the Hobbs Act to reach situations in which no property was "gotten," it clearly violates the meaning of this section. So far, the courts have not followed Professor Bradley's suggestions. *See* United States v. Yankowski, 184 F.3d 1071, 1072 (9th Cir. 1999). The court observed,

> The government . . . argues that . . . the Hobbs Act criminalizes any act of violence to person or property that has an effect on commerce, even if the alleged violent act had no connection to any executed or planned robbery or extortion. The government's position is untenable in light of the clear language of the Hobbs Act.

Id.; *see also id.* at 1073 ("The statutory language is clear: A person may violate the Hobbs Act by committing or threatening a violent act against person or property, *but only if it is in furtherance of a plan to interfere with commerce by extortion or robbery.*") (emphasis added).

128 18 U.S.C. § 1951(b)(2) (1994) (emphasis added).

pressure wrongfully imposed. Using threats wrongfully to pressure a person to make decisions in a way that he otherwise would not, however, is the same thing as using threats for the purpose of "unlawfully restricting another's freedom of action to his detriment." Thus, under this new definition, extortion becomes a kind of coercion; or, more precisely, "coercion" swallows "extortion."

This subsumption of "extortion" by "coercion," besides just muddling two formerly distinct offenses, also works another important change: it expands the list of "racketeering activities" to those that touch on social and political protest. In the past, extortion generally would not have reached such activity, so long as the protesters involved seek (as is typically the case) not to "get" business for themselves or others, but to put others out of business—to "deprive" them of "property." It does now. In sum, the two changes in extortion combine to threaten First Amendment freedoms.

IV. Expanded Extortion and RICO Liability

RICO can now be used against persons who commit Hobbs Act extortion—including people whose behavior would otherwise be deemed coercive—as a "pattern of racketeering activity."[129] Because RICO violation can subject a defendant to liability for treble damages and attorneys' fees, this liability can be enormous—espeically after the Third Circuit's decision in *Northeast Women's Center v. McMonagle.*[130]

In *McMonagle,* the court reasoned by analogy to the award of attorneys' fees pursuant to 42 U.S.C. § 1988 in civil rights cases under 42 U.S.C. § 1983, and concluded that the attorneys' fees awarded pursuant to RICO provision § 1964(c) need not be in any way "proportional" to the amount of damages recovered.[131] The analogy seems strained, as extortion—and thus RICO with extortion predicates—protects property interests, not civil rights.[132] Even so, the result might be defensible, at least to the extent that such rights bear a discernable monetary value, were it not for the chilling effect on First Amendment protest this gives the RICO/Hobbs Act combination.[133]

The combined effects of the subsumption of extortion by coercion can be seen in the use of RICO and the Hobbs Act to silence social and political protest over the past ten years.

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129 *See supra* note 43 and accompanying text.

130 889 F.2d 466 (3d Cir. 1989).

131 *Id.* at 475. ("We thus conclude that the district court properly refused to apply a proportionality rule to reduce the RICO fee award in this case.").

132 *See supra* note 96 and accompanying text.

133 *See infra* Part VI.B.

A. *RICO and the Hobbs Act Applied to Political Protesters*

Since 1989, five circuits have applied the provisions of the Hobbs Act—and all but one of those, the Hobbs Act as a RICO predicate—to the activities of social and political protesters. These decisions illustrate the problems that occur when the expanded definitions of "property" and "obtaining" are incorporated into extortion.

1. *Northeast Women's Center, Inc. v. McMonagle*[134]

McMonagle was the first decision in which a circuit court found anti-abortion protesters liable to clinics under civil RICO. It has also been the foundation of several later decisions. Consequently, this decision and its supporting analysis merit a close examination.

Prior to *McMonagle*, the Third Circuit's Hobbs Act jurisprudence was unremarkable; it was contained in two major cases. In the first, *United States v. Nedley*,[135] the defendant was accused of robbery in violation of the Hobbs Act. The Government contended that because the Hobbs Act required only an "obtaining" whereas the common law required a "taking," the Hobbs Act was broader than common law "robbery."[136] Consequently, the Government argued that the Hobbs Act covered Nedley's actions—even though Nedley had not tried to "take" anything from his victim, but had only threatened to put him out of business if he did not comply with the Nedley's wishes. The Third Circuit flatly rejected the Government's argument. It carefully traced the roots of the Hobbs Act. First, it observed that the Hobbs Act was largely based on New York law,[137] which did not distinguish between "obtaining" and "taking."[138] The court then observed that New York law largely codified the common law, which also required a "taking."[139] The court therefore refused to expand the definition of "robbery" under the Hobbs Act in the way requested by the Government, instead holding to the common law and New York law outlines of the offense.[140]

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134 868 F.2d 1342 (3d Cir. 1989).

135 255 F.2d 350 (3d Cir. 1958).

136 *Id.* at 354.

137 *Id.* at 355.

138 *Id.*

139 *Id.* at 356.

140 *See id.* at 357 ("'Robbery' under the Hobbs Act, is common law robbery, and robbery as defined by the New York Penal Laws and construed by the courts of that State.").

One year later, the Third Circuit decided *United States v. Sweeney*.[141] In that case, it found that the definition of "extortion" in the Hobbs Act was constrained by the same limitations as the definition of "robbery." The *Sweeney* court admonished the lower court, on retrial, to "keep in mind the opinion[] of this Court" in *Nedley*[142] because *Nedley* involved an offense which, like Hobbs Act extortion, is a "larceny-type offense[]."[143] It also recognized that Hobbs Act extortion was "derived from the New York Code."[144] At least in the Third Circuit, then, *Nedley* and *Sweeney* mandate that Hobbs Act extortion reflect its common law roots and its New York heritage. *McMonagle* ignored this precedent, however, and reached its holding in a vastly different manner.

The facts of *McMonagle* are as follows. The Northeast Women's Center (Center) in Philadelphia, Pennsylvania provided various gynecological services, including pregnancy testing and abortions.[145] Anti-abortion demonstrators picketed the Center, trying to block access and dissuade patients from entering, as often as three days a week for nine years.[146] Their conduct also included demonstrations, picketing in public fora, chanting, leafleting, and other activities unquestionably protected by the First Amendment. During the demonstrations, the protesters also trespassed on the clinic's premises on four different occasions. In July 1986, the Center lost its lease and moved to a new location; the protests continued at the new location. As a result of the protests, the Center brought suit against thirteen protesters,[147] but later amended its complaint to include forty-two defendants.[148]

At trial, the Center offered evidence of all the protected conduct as well as the four instances of trespass. The Center also introduced

141 262 F.2d 272 (3d Cir. 1959).

142 *Id.* at 275.

143 *Id.*

144 *Id.* at 275 n.3 (citing United States v. Nedley, 255 F.2d 350, 355 (3d Cir. 1958)); *see also id.* ("In the House debate on the bill, Representative Hobbs, its sponsor, stated that 'the definitions in this bill are copied from the New York Code substantially.'"). The court reaffirmed this thinking as late as 1985, when in *United States v. Agnes*, 753 F.2d 293, 297 (3d Cir. 1985), it declared that "[t]he legislative history leaves no doubt that the definition of extortion under the Hobbs Act was to be the same as that under the New York Code as construed by the New York courts in 1946, when the Act became effective."

145 Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1345 (3d Cir. 1989).

146 Linda Greenhouse, *Abortion Foes Lose Plea for Hearing on Their Racketeering Law Penalties*, N.Y. TIMES, Oct. 11, 1989, at A23.

147 Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 468 (3d Cir. 1989).

148 *Id.*

evidence that the protesters, besides invading the Center, subjected three employees to repeated picketing at their homes, and that two of those employees quit their jobs.[149] The Center alleged a number of theories of liability, but only those of common law tort and RICO with Hobbs Act extortion predicates went to the jury.

Regarding the RICO claim, the plaintiffs invoked 18 U.S.C. § 1962(c), alleging that the defendants were participating in the conduct of an enterprise engaged in Hobbs Act extortion.[150] The jury found twenty-seven defendants liable under the RICO claim and assessed $887.00 in damages, the cost of repairing medical equipment broken by protesters.[151] Pursuant to the statute, the court trebled the award to $2,661.78.[152] Even trebled, the actual damages pale in comparison to the attorneys' fees and costs awarded to the plaintiff pursuant to the statute—those totaled $64,946.11.[153]

On appeal, the Third Circuit acknowledged that RICO "was being applied in contexts far beyond those originally intended."[154] Nevertheless, the court upheld the award. First, it found that "economic motive" is not an element of a RICO violation itself; rather, as long as a defendant commits the acts proscribed by the statute, he is liable regardless of his reason for committing those acts. In the court's words, "Defendants argue that because their actions were motivated by their political beliefs, civil RICO is inapplicable. Defendants' description of their conduct as 'civil disobedience' does not thereby immunize it from statutes proscribing the very acts the jury found Defendants committed."[155]

Next, the court addressed the defendants' objections that their actions did not constitute extortion. Predictably, the court highlighted the expansion of property for the purposes of extortion. It noted that, although no tangible property was extorted, the right of the Center to conduct its business, of which the defendants had

149 *McMonagle*, 868 F.2d at 1346.

150 *Id.* at 1347.

151 *Id.* In the end only 26 defendants were actually held liable; the trial court dismissed one defendant post-trial. *Id.* at 1345 n.2.

152 *Id.* at 1347.

153 *McMonagle*, 889 F.2d at 470. The court justified this award of attorney's fees by a questionable analogy to the civil rights laws. *See supra* note 131 and accompanying text.

154 *McMonagle*, 868 F.2d at 1348 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499–500 (1985)).

155 *Id.* at 1348.

sought to deprive the Center, constituted a property interest for the purposes of the Hobbs Act.[156]

Strangely, the court never directly addressed the "obtaining" requirement of extortion, though it was argued by the defense.[157] Instead, it rested its analysis on an issue not argued at trial, though, according to the court, raised on appeal by the defendants—whether "motive," and specifically an "economic motive," is an element required for a Hobbs Act violation.[158] The court decided that "economic motive" is not an element of a Hobbs Act violation, just as it found "economic motive" was not an element of a RICO violation. The court began by stating that under "well-established precedent . . . lack of economic motive does not constitute a defense to Hobbs Act crimes."[159] To buttress this assertion, the court quoted from *United States v. Cerilli*,[160] a case in which the court upheld a Hobbs Act conviction for solicitation of political contributions, stating, "It is well-established that a person may violate the Hobbs Act without himself receiving the benefits of his coercive actions."[161] It concluded by citing *United States v. Starks* for the proposition that "there is no exception to the Hobbs Act" permitting extortion "for a

156 *Id.* at 1350 ("Rights involving the conduct of a business are property rights." (citing United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), United States v. Nadaline, 471 F.2d 340 (5th Cir. 1973), and United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969)).

157 *See* Petition for a Writ of Certiorari, app. A at A-163, McMonagle v. Northeast Women's Ctr., Inc., 493 U.S. 901 (1989) (No. 88-2137) (Defendants Exhibit 5-5—Points for Charge on Extortion). In fact, counsel for the defendant also objected to a proposed jury instruction on obtaining as incorrectly defining that requirement:

> MR. STANTON: Your Honor, I have a comment on the extortion [instruction]. I am looking at the jury instruction from New York, New York Standard Criminal Jury Instruction on extortion and it does say that the property can't be just surrendered. The property has to be appropriated by the alleged extortee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion or then transferred to a third-party and that [sic] the problem I have with this instruction. It leaves the instruction if somebody surrendered something that [sic] all that's necessary.

Id. at 26 n.29.

158 *See McMonagle*, 868 F.2d at 1349–50 ("Defendants argue that the court's charge failed to deal 'with the economic motivation behind the crime of extortion'. . . . Defendants point to no charge proffered by them on economic purpose.") (citation omitted).

159 *Id.* at 1350.

160 603 F.2d 415 (3d Cir. 1979).

161 *McMonagle*, 868 F.2d at 1350 (quoting *Cerilli*, 603 F.2d at 420).

religious purpose,"[162] and *United States v. Anderson*, which it read as upholding a Hobbs Act conviction of an anti-abortion activist for threatening a doctor to induce him to cease performing abortions.[163]

The result in *McMonagle* highlights the consequences of the expanded meaning of extortion. Regarding the first change, the court found that "intangible property" interests, like "tangible property" interests, are protected by the Hobbs Act. That intangible property interests are sufficient for the purposes of the Hobbs Act is not problematic of itself. If the protesters were in the business of providing women's services and attempted to secure the business of the Center for their own clinic, the application of the Hobbs Act and RICO would be straightforward. Alternatively, if they were trying to secure the business for some third-party clinic, that too would fall squarely within the controlling precedent.

The court's opinion did not, however, discuss the second change—the change in the requirement of "obtaining." Nor did the court squarely face, distinguish, or overrule *Nedley* or *Sweeney*. The court did not, in fact, expressly decide that the defendants had "obtained" anything.

The court's silence is perplexing for several reasons. First, the main support for the court's argument comes from an extortion case in which someone did indeed "get" the property extorted. Second, the language from that case does not support the proposition that "obtaining" requires only a "deprivation" and not a "getting" as well. That "a person may violate the Hobbs Act without himself receiving the benefits of his coercive actions"[164] means only that the *extortionist himself* need not receive the benefits of the extortion, not that a "getting" *and* a "depriving," as opposed to just a "depriving," need not both occur. Finally, nowhere in its opinion did the court recognize the New York law or common law roots of Hobbs Act extortion or its character as a larceny-type offense, as it had in both *Nedley* and *Sweeney*—the controlling precedents. Had the court done so, it would have had to admit that because extortionate "obtaining" requires both a "getting" *and* a "deprivation," the defendants' actions did not constitute extortion. It therefore would have had to overturn the trial court verdict. Because it did not, though, the protesters' coercive actions

162 *Id.* (quoting United States v. Starks, 515 F.2d 112, 124 (3d Cir. 1975)).

163 *Id.* (citing United States v. Anderson, 716 F.2d 446 (7th Cir. 1983)). As discussed *supra*, however, the record in *Anderson* included evidence that the victim, a doctor who performed abortions, was actually extorted of $300. It is not surprising that the *McMonagle* court failed to recognize this fact; the Seventh Circuit apparently only noted the fact in passing. *See supra* note 126.

164 *McMonagle*, 868 F.2d at 1350.

(i.e., pressuring the clinic to close its doors and thus to alter its behavior to its detriment through the use of threats) proved sufficient to make them liable under civil RICO.

2. *NOW v. Scheidler*[165]

Three years after *McMonagle*, a similar case came before the Seventh Circuit. In *NOW v. Scheidler*, NOW, along with two women's health care centers that performed abortions, filed suit against a coalition of anti-abortion groups known as the Pro-Life Action Network (PLAN). PLAN's membership included Joseph Scheidler, a prominent anti-abortion activist, and Operation Rescue.[166] The plaintiffs, in their amended complaint, proffered various state and federal claims; they asserted that the activities of Scheidler and PLAN—including trespass upon and damage to clinic property, arson and attempted arson, physical blockades of clinics, fire bombings, physical and verbal intimidation and harassment of clinic personnel, burglaries and thefts, and extortionate interference with contractual relations—constituted a "pattern" of "racketeering activity" in violation of RICO.[167] In analyzing the plaintiffs' RICO claims, the district court dismissed the RICO count on the grounds that the defendants exhibited no economic motive.[168]

On appeal, the Seventh Circuit did not reach either "property" or "obtaining"[169] under Hobbs Act extortion. It did not have to; it disposed of the case at the level of the RICO claim. While *Scheidler* like

165 968 F.2d 612 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994).

166 *Id.* at 615.

167 Brief for Petitioners at 3–4, NOW v. Scheidler, 510 U.S. 249 (1994) (No. 92-780).

168 NOW v. Scheidler, 765 F. Supp. 937, 944 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994).

169 The Seventh Circuit did state that it "agree[d] with the Third Circuit's interpretation of the Hobbs Act." *Scheidler*, 968 F.2d at 629. The meaning of this statement, however, is opaque. In a cryptic footnote, the court explained its understanding of the Third Circuit's interpretation of the Hobbs Act to be that "[t]he Hobbs Act, . . . which punishes obstruction of interstate commerce through extortionate means, does not require that the defendant profit economically from the extortion." *Id.* at 629 n.17. For this proposition the court cited—with no independent analysis—*McMonagle*, the two decisions cited by *McMonagle* in its discussion of the absence of an "economic motive" requirement in the Hobbs Act, and *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101–02 (2d Cir. 1990)—which merely repeats the unremarkable mantra that "[t]here is no requirement that the perpetrator of an extortion receive the benefit of his act" and cites for that proposition a case in which the extortioner did not seek personally to profit from his crime but instead caused his victim to pay money to a third person. This language hardly constitutes an adoption of the notion that for extortion, "obtain" means "deprive."

McMonagle found that the Hobbs Act does not require an "economic motive," unlike *McMonagle*, *Scheidler* affirmed the district court and held that an "economic motive" was an element of RICO. Consequently, the court "decline[d] to follow [*McMonagle's*] holding that, in these circumstances involving a non-economic enterprise committing non-economic predicate acts, plaintiffs may invoke the provisions of RICO."[170]

3. The United States Department of Justice

In 1993, the Department of Justice (DOJ) recognized the success that civil litigants were enjoying in pursuing RICO claims against anti-abortion protesters using the Hobbs Act. In a letter dated October 7, 1993, and addressed to all United States Attorneys, then Acting Assistant Attorney General John C. Keany advised of the availability of various statutes for the prosecution of abortion clinic threats including, especially, RICO and the Hobbs Act. Keany advised his readers, "When confronted with abortion clinic threats . . . in your district, you should promptly consider the application of these statutes in determining whether there is an appropriate basis for a federal response."[171]

A memorandum that accompanied the letter outlined the elements of a Hobbs Act extortion violation as including "that the de-

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At least two authors—including Professor G. Robert Blakey, who argued *Scheidler* before the United States Supreme Court—believe that in this footnote the Seventh Circuit addressed the "obtaining" requirement of extortion and settled the issue by adopting its expanded form, i.e., that extortion requires only a "deprivation." *See* Blakey & Roddy, *supra* note 17, at 1662–64 (arguing that *McMonagle* adopted the expanded version of "obtaining," and that *Scheidler* tracked that result). A more careful analysis, however, reveals that *Scheidler* expressly couches the footnote in terms of its agreement with *McMonagle*, a case that in fact never addressed "obtaining." *McMonagle* addressed *only* the lack of "economic motive" under the Hobbs Act. *See supra* notes 157–68 and accompanying text. Moreover, the cases cited by *Scheidler* for the "meaning" of the Hobbs Act derived from *McMonagle* are the two cases cited by *McMonagle*, plus one case in which the extortionist did not act for his own personal benefit. Consequently, the better reasoned view is that *Scheidler* merely adopted *McMonagle's* view that "economic motive" is not an element of a Hobbs Act violation, while rejecting *McMonagle's* view that "economic motive" is not an element of a RICO violation. The court, in fact, did not reach the "obtain" versus "deprive" issue.

170 The decision, however, was later overturned on this ground. *See* NOW v. Scheidler, 510 U.S. 249 (1994). Interestingly, not even the Supreme Court reached the issue of "obtaining." *See id.* at 253 n.2 ("Respondents contend that petitioners are unable to show that their actions violated the Hobbs Act . . . . We do not reach that issue and express no opinion upon it.").

171 Letter from John C. Keany, Acting Assistant Attorney General, to All United States Attorneys 2 (Oct. 7, 1993) (on file with the *Notre Dame Law Review*).

fendants induce their victims *to part with property*."[172] It underscored that the Hobbs Act "does not require that the defendants acted to receive, either directly or indirectly, the proceeds of the extortion or any benefit therefrom,"[173] and that "loss to the victim is the gravamen of [extortion]."[174] The memorandum also emphasized that "the courts are generally in agreement that the Hobbs Act protects both tangible and intangible property."[175]

This analysis seriously misreads the statute and the controlling precedent. While the extension of property within the Hobbs Act to include intangible as well as tangible property is settled law, its combination with the changed meaning of "obtaining"—now requiring only a "deprivation" and not a simultaneous "getting" by either the extortionist or some third person—is a result without a rationale, ultimately based on nothing more than misinterpreted dicta. The level of deference that should be afforded to an official position of the DOJ regarding its interpretation of a criminal statute—especially an expansive reading such as this—is hardly settled.[176] Nevertheless, no court

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172 United States Department of Justice, Memorandum on the Applicability of Hobbs Act to Certain Activities of Anti-Abortion Protesters at Women's Clinics 2 (Sept. 3, 1993) (on file with the *Notre Dame Law Review*) (emphasis added).

173 *Id.* at 2 (citing United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986); United States v. Haimowitz, 725 F.2d 1561, 1577 (11th Cir. 1984); United States v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977)).

174 *Id.* (citing United States v. Hyde, 448 F.2d 815, 843 (5th Cir. 1971)).

175 *Id.* (citing United States v. Local 560, 780 F.2d 267, 281 (3d Cir. 1985), *Lewis*, 797 F.2d at 364, and United States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir. 1969)).

176 *See* NOW v. Scheidler, 510 U.S. 249, 261 (1994). Although the Court left open the question of what deference should be afforded to the guidelines of the U.S. Department of Justice regarding statutory interpretation, it cited with approval *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). Discussing the interpretation of 18 U.S.C. § 209(a) (1986) by the Department of Justice, Justice Scalia observed,

> The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but *we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference . . . . [The] expansive administrative interpretation [proposed by the Department of Justice]* of § 209(a) is *not even deserving of any persuasive effect.* Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely apparent. That tendency is reinforced when the advice-giver is the Justice Department, which knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. Thus, *to give persuasive effect to the Government's expansive advice-giving interpretation . . . would turn the normal con-*

ought to feel constrained by the DOJ's memorandum; courts should face the issue itself on the merits.

4. *Libertad v. Welch*[177]

A First Circuit case, *Libertad* demonstrates just how firmly ensconced in judicial lore the expanded definition of extortion is becoming. A group of individuals and organizations representing women who sought or planned to seek family planning services in Puerto Rico, as well as organizations who provided such services, sued various individuals and organizations that had staged protests at plaintiff abortion clinics. The defendants held these protests on five different occasions; the demonstrations involved acts of trespass upon and damage to clinic property, physical blockades of clinics, and physical and verbal intimidation and harassment of clinic personnel and patients.[178] The plaintiffs claimed that these alleged acts constituted, *inter alia,* Hobbs Act extortion as a RICO predicate.[179] The trial court granted summary judgment for the defendants on all counts.

The First Circuit reinstated the RICO count. In so doing, though, it did not address fully the elements of extortion. It reached "property," observing that "[t]he intangible right to freely conduct one's lawful business constitutes 'property' for purposes of [the Hobbs Act]."[180] The court did not address the question of an "economic motive" in the Hobbs Act, nor the Act's "obtaining" requirement. Instead, citing no precedent at all, the court summarily concluded,

> [T]he record clearly shows that [the defendants] used force (physical obstruction, trespass, vandalism, resisting arrest), intimidation, and harassment of clinic personnel and patients, with the specific, uniform purpose of preventing the clinics from conducting their normal, lawful activities. The record also amply shows that [the defendants'] tactics include the intentional infliction of property dam-

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struction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.

Id. at 177–78 (emphasis added). *But see* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421, 465–66 (1986) ("Our reading of the scope of the district court's [statutory] remedial powers . . . is confirmed by the contemporaneous interpretation[] of the . . . Justice Department.").

177 53 F.3d 428 (1st Cir. 1995).

178 *Id.* at 433–34.

179 *Id.* at 441.

180 *Id* at 438 n.6 (citing Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989)).

> age, and directly result in the clinics' loss of business. *It is difficult to conceive a set of facts that more clearly sets forth extortion* [under the Hobbs Act].[181]

Thus *Libertad* missed a prime opportunity to explain the "obtaining" requirement. Based on these facts, an orthodox interpretation of the requirement would have led to an affirmation of the district court's decision. While the clinics may have been "deprived" of "property" under its expanded meaning, nothing in the record establishes that any of the defendants "got" anything of which their "victims" were "deprived." Unhappily, like *McMonagle* and *Scheidler*, *Libertad* passed up the chance to clarify the law. It now remains a holding that RICO, through the Hobbs Act, applies to social and political protest.

5. *Palmetto State Medical Center v. Operation Life Line*[182]

In *Palmetto*, the plaintiff was the Palmetto State Medical Center, a provider of gynecological services—including abortions. The plaintiff brought suit against sixty-six individuals and two entities—Operation Rescue and Operation Lifeline—that opposed abortion.[183] The Center claimed that during two demonstrations by the defendants at the clinic, defendants trespassed on the Center's property, blockaded the entrance, and prevented patients from entering the clinic. The Center lodged a RICO count against four of the individual defendants and Operation Rescue, claiming a violation of 18 U.S.C. § 1962(c) re-

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181 *Id.* (emphasis added). This language, however, is deceptively broad. In fact, in a subsequent case in which a Union representative brought RICO claims against his former employer for coercive activities similar to those involved here, the First Circuit did not follow this line of thinking. Without referring to *Libertad*, the court held in *Camelio v. American Federation*, 137 F.3d 666 (1st Cir. 1998) that

> Camelio alleges that defendants, acting in various combination: denied him the right to attend a union hearing; changed the means of collecting union dues so as to put his dues in arrears and thereby deprive him of his status as a union member; rebuffed his subsequent efforts to pay his dues; declared him ineligible to seek office within the union and removed his name from the ballot; and denied his repeated requests for a hearing on the issue of his membership. Such . . . acts, though possibly unlawful on some other grounds, do not fall under the express terms of the Hobbs Act, which prohibits only "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear."

Id. at 671 n.5. Perhaps, then, *Libertad* does not mean that the First Circuit has adopted the expanded definition of "extortion" that also includes "coercion"; if it does, it would be difficult to square these two decisions.

182 117 F.3d 142 (4th Cir. 1997).

183 *Id.* at 144–45.

sulting from multiple Hobbs Act violations.[184] The Fourth Circuit reversed a trial court finding of liability due to insufficient evidence. Although the court did not address any of the elements of the Hobbs Act, it did not question whether the Hobbs Act—and thus RICO—might have been applicable.[185]

6. *United States v. Arena*[186]

While not a RICO case, a recent decision by the Second Circuit, *Arena*, contains the most thorough decision by a Federal Court of Appeals on the application of Hobbs Act extortion in the context of social or political protest. In fact, it is the first court of appeals opinion directly to address the "obtaining" requirement of extortion, as well as the "property" and "economic motive" requirements, in that context.

At trial, defendants John Arena and Michelle Wentworth were each convicted of two counts of extortion and one count of conspiracy to commit extortion under the Hobbs Act in connection with two butyric acid attacks on medical facilities providing abortion services.[187] On appeal, the defendants argued that the government's evidence was insufficient to support Hobbs Act convictions.[188]

The Second Circuit affirmed the convictions, addressing "property," "economic motive," and "obtaining." Regarding "property," the court performed a thorough analysis of the term, demonstrating how expansively the term is currently read.[189] The court agreed that plaintiffs' "property rights to engage in the business of providing abortion services [free from] . . . fear of future attacks" constituted a sufficient property right for the purposes of the Hobbs Act.[190] The court then addressed, under the heading "Obtaining," both the "economic motive" and "obtaining" requirements.[191] On the question of "economic motive," the court did no more than cite *McMonagle* with approval for the proposition that "lack of economic motive does not constitute a defense to Hobbs Act crimes."[192] The court then turned to the question of "obtaining." It began by citing *United States v. Clemente*[193] for

184 *Id.* at 148.
185 *Id.* at 148–49.
186 180 F.3d 380 (2d Cir. 1999).
187 *Id.* at 385.
188 *Id.* at 389.
189 *See id.* at 392.
190 *Id.* at 393.
191 *See id.* at 394.
192 *Id.* (citing Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989)).
193 640 F.2d 1069 (2d Cir. 1981).

the proposition that "whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act."[194] Again, this proposition in itself is not problematic; in *Clemente*, the extortionist forced the victim to pay money to a third person, who thus "obtained" (i.e., "got"), while the victim was "deprived" of, the money. The question then turned on the definition of "obtain." Strangely, the court did not look to the legislative history of the Hobbs Act, its New York law heritage, or its common law roots to construe "obtain."[195] Instead, it merely cited a *Webster's Dictionary* published in 1976 for the proposition that "obtaining includes 'attain[ing] . . . disposal of.'"[196] Armed only with that definition, the court concluded,

> In sum, where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm

194 *Arena*, 180 F.3d at 394. The court also cited *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101–02 (2d Cir. 1990), for this proposition; however, that case merely cites *Clemente* for the unremarkable mantra that "[t]here is no requirement that the perpetrator of an extortion receive the benefit of his act." *Id.*

195 This approach is perplexing, as the common law and New York law background of the Hobbs Act were made known to the court. *See* Brief of Amicus Curiae, The American Center for Law and Justice at 4–14, United States v. Arena, 180 F.3d 380 (2d Cir. 1999) (No. 97-1081). Curiously, the Court chose to ignore these more complex points in favor of its simpler alternative analysis—an approach that makes the result significantly less convincing. *See* LEARNED HAND, SPIRIT OF LIBERTY 131 (Dillard ed. 1960) (extolling the genius of Justice Cardozo's legal reasoning and explaining how Cardozo's opinions derive their persuasive force: "[Cardozo] never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table: like John Stuart Mill, he would often begin by stating the other side better than its advocate had stated it himself").

196 *Arena*, 180 F.3d at 394 (citing and quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1559 (1976)) (alterations in original). Again, this approach is unorthodox. First, the court should have looked to the common law history of extortion rather than to a lay dictionary to divine its meaning. Further, the Supreme Court has opined that the relevant meaning of a word for the purposes of statutory construction is its meaning at the time a statute is enacted. *See, e.g.*, Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 532 (1983) (construing "by reason of" in section 4 of the Clayton Act, whose predecessor was originally enacted as section 7 of the Sherman Act: "Just as the substantive content of the Sherman Act draws meaning from its common-law antecedents, so must we consider the *contemporary legal context* in which Congress acted when we try to ascertain the intended scope of the private remedy created by . . . § 7") (emphasis added); Perrin v. United States, 444 U.S. 37, 42 (1979) (construing "bribery": "we look to the ordinary meaning of the term '*bribery' at the time Congress enacted the statute*") (emphasis added). Thus, if the court felt it should use a dictionary, it should have used a legal dictionary dating from 1946 (although even a modern legal dictionary, as opposed to a 1976 lay dictionary, would have led to the proper result, *see supra* note 80).

> in order to induce abandonment of that right has obtained . . . property within the meaning of the Hobbs Act.[197]

Reading out the "getting" requirement of extortion using a modern lay dictionary without looking at legislative history, let alone the term's New York law and common law roots, is a less than careful analysis. Sadly, that approach to extortion is now binding on the Second Circuit. Worse, because Hobbs Act extortion is a RICO predicate, its construction opens political and social protesters in that Circuit to massive potential liability if they trespass or commit some other minor but wrongful act while picketing—which turns their rightful and, in fact, constitutionally-protected protest into wrongful "extortion."

B. Analysis

With the exception of *Arena*, each of these cases began as a civil dispute brought by a business claiming economic injury at the hands of social and political protesters. Each case involved a social or political demonstration that, in fact, exceeded constitutional protections by acts of trespass, vandalism, or petty assault. Each was decided under Hobbs Act extortion, and in all but *Arena*, extortion was used as a predicate offense under RICO. The actions of the protesters, however, are far more accurately described as "coercion" rather than "extortion." The goal of the protesters, in short, was to put the abortion clinics out of business.[198] By use of threats and picketing, the protesters desired to restrict the abortion clinics' freedom to conduct business. They did not seek to "get" the business of the abortion clinics for themselves or for others; they sought only to "deprive" the clinics of the business. Under the traditional definition of extortion, then, their conduct does not constitute that offense since they did not "get" anything of which the plaintiffs were "deprived," either for themselves or others. If these actions are to be included within extortion, a court must find that "property" includes the right to conduct a business free from fear and threats and that "obtaining" really requires no more than a "deprivation." That each court did not, in fact, face and resolve these questions[199] using the standard techniques of legal analysis

197 *Arena*, 180 F.3d at 394.

198 *See, e.g.*, NOW v. Scheidler, No. 86-C-7888, 1999 WL 571010, at *4 (N.D. Ill. July 16, 1999) ("The stated purpose of [the defendants] . . . was 'to put clinics out of business.'").

199 By way of review, (1) *McMonagle* adopted the expanded definition of "property," found no "economic motive" required for extortion or RICO, but did not reach "obtaining," *see supra notes* 154–63, (2) *Scheidler* did not reach "property," found no "economic motive" required for extortion, but found an "economic motive" required for RICO (a point which the Supreme Court reversed), and did not reach "ob-

mandated by the Supreme Court is a matter that these courts should reconsider—or, alternatively, the Supreme Court should review these decisions.

No one quarrels with using the criminal or civil process to deal with unlawful protests—that is, those protests that cross the line between picketing and trespass. Traditionally, however, these petty offenses are matters for state police courts; all that is involved are petty fines, days in jail, and civil injunctions. The Hobbs Act, in contrast, with or without RICO, is a federal felony. With RICO, massive sanctions are authorized—including forfeiture of property, treble damages, and opponents' costs and counsel fees. Society can ill afford to raise the stakes in these matters that touch First Amendment freedoms through the covert encroachment of the judiciary. If the criminal law is to be expanded in this way, Congress is the proper body to do so.

V. THE SUBSUMPTION OF EXTORTION BY COERCION IS NOT AN "ABORTION" ISSUE

At this point, a brief pause for perspective is in order. In all five of the decisions detailed in the previous section, courts used either RICO with the Hobbs Act or the Hobbs Act alone to silence anti-abortion protesters. In reality, anti-abortion protesters are merely a small subset of all political or social protesters, making the RICO and the Hobbs Act equally powerful against any other member of the set. Sadly, because anti-abortion protesters were the first group to face suit under RICO and the Hobbs Act, the courts—and others—may see the expansion of extortion solely as an abortion issue. Consequently, courts might occasionally abandon judicial restraint to reach the "right" outcome rather than perform the requisite historical analysis, thereby further distorting the issues involved. Two recent decisions from the Second Circuit may well illustrate this disturbing point.

On June 9, 1999, the Second Circuit issued its opinion in *United States v. Jackson*.[200] Autumn Jackson claimed to be the daughter of celebrity Bill Cosby, and she threatened to reveal her relationship to

taining," *see supra notes* 169–70, (3) *Libertad* adopted the expanded definition of "property," but did not explicitly reach either "economic motive" for extortion or "obtaining" (its holding that the facts constitute extortion includes both of these points implicitly, though), *see supra notes* 180–81, (4) *Palmetto* did not reach any of the four elements, *see supra note* 185, and (5) *Arena*, the only pure Hobbs Act decision, adopted the expanded definition of "property," found no "economic motive" required for extortion, and adopted the expanded definition of "obtaining," *see supra notes* 189–97.

200 180 F.3d 55 (2d Cir. 1999).

Cosby to the media if he did not pay her $40 million.[201] At trial, Jackson and an accomplice, Jose Medina, were convicted on three counts of extortion.[202] On appeal they argued, *inter alia*, that the district court gave an erroneous jury charge on the elements of extortion as prohibited by 18 U.S.C. § 875(d) because "it omitted any instruction that, in order to convict, the jury must find that the threat to injure Cosby's reputation was 'wrongful.'"[203] The Second Circuit, in an opinion by Judge Amalya L. Kearse, agreed with the defendants' argument. The court reversed the convictions against Jackson and Medina, and it remanded the case for a new trial.[204] The court admitted that 18 U.S.C. § 875(d) does not contain the word "wrongful."[205] Nonetheless, it did not stop with this purely textual analysis; instead, it appealed to the history of the Hobbs Act for an understanding of the term extortion in § 875(d), as the predecessors of both were enacted contemporaneously.[206] The court then observed that the definition of extortion in the Hobbs Act was derived from New York Law, which did contain a "wrongfulness" requirement.[207] Next, the court turned to the common law roots of extortion, which also included a requirement of "wrongfulness." It cited *Morissette v. United States*[208] for the proposition that

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.[209]

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201 *Id.* at 60–62.

202 *See id.* at 64. The defendants were not convicted under the Hobbs Act. Instead, they were convicted on the following three counts: (1) conspiracy to violate 18 U.S.C. § 875(d) (1994), and the Travel Act, 18 U.S.C. § 1952(a)(3) (1994), in violation of 18 U.S.C. § 371 (1994); (2) interstate transmission of threats to injure another person's reputation with the intent to extort money, in violation of 18 U.S.C. §§ 2, 875(d) (1994); and (3) interstate travel to promote extortion, as prohibited by § 875(d) (1994), and the New York State extortion statute, N.Y. PENAL LAW § 155.05(2)(e)(v) (McKinney 1988), in violation of the Travel Act, 18 U.S.C. §§ 2, 1952(a)(3). *Id.*

203 *Id.* at 64–65.

204 *Id.* at 76.

205 *Id.* at 66.

206 *See id.* at 68.

207 *Id.* at 69 (citing N.Y. PENAL LAW § 850 (Consol. 1930)).

208 342 U.S. 246 (1952).

209 *Jackson*, 180 F.3d at 69 (quoting *Morissette*, 342 U.S. at 263).

After examining the common law and the history behind the Hobbs Act, the court read a "wrongfulness" requirement into the facially silent provision of § 875(d).[210]

Jackson arrived at a correct result, and its approach was generally unremarkable. *Jackson* is interesting, however, because it contrasts sharply with *United States v. Arena*.[211] Handed down on June 7, 1999 (only two days before *Jackson*) and authored by the same judge that penned *Jackson*, the *Arena* decision also dealt with the Hobbs Act. Unlike in *Jackson*, however, in *Arena* the Hobbs Act was applied to anti-abortion protesters. Also unlike in *Jackson*, the court in *Arena* did not look to the New York law or the common law history of the Hobbs Act in interpreting the statute. Rather, it used a 1976 lay dictionary to expand extortion, reading out the "getting" requirement and requiring only a "deprivation."[212] The approach of the same judge to extortion in each case was, therefore, radically different.

How the same judge, in cases decided only two days apart, can analyze extortion in such markedly different ways is not apparent from the text of the opinions. In fact, the only readily apparent distinction between the two cases is that one involved a celebrity while the other involved anti-abortion protesters; otherwise, both were routine extortion prosecutions. Yet, the same judge carefully sifted through the legislative and common law history of extortion in the Hobbs Act to *import* a "wrongfulness" requirement into an otherwise *silent statute*, but ignored that history completely when construing "obtain," a word that *did* appear *in the statute*. Because Judge Kearse—whose reputation is that of one of the most able persons sitting on the Second Circuit—never offers a reason for her wholly different approaches, and no such reason is apparent on the face of the decisions, perhaps the two decisions simply cannot be squared.

Even if some people might be tempted to applaud the judicial morphing of the Hobbs Act's "obtaining" requirement to sanction anti-abortion protesters, they should pause to consider the implications of this new form of extortion for all social and political protesters. Nothing in the language of the statute limits its applicability to anti-abortion protesters. Rather, anyone who wants to silence *any* social or political protest can draw and wield the RICO/Hobbs Act weapon created by the expansion of Hobbs Act extortion.

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210 *Id.* at 70.

211 180 F.3d 380 (2d Cir. 1999). For a complete discussion of this case, see *supra* Part IV.A.6.

212 *See supra* note 199 and accompanying text.

Two businesses have, in fact, used this weapon to silence protesters who demonstrated against something wholly unrelated to abortion—cruelty to animals. In 1997 Huntington Life Sciences, a New Jersey-based vivisection laboratory, brought suit against People for the Ethical Treatment of Animals (PETA) over PETA's demonstrations at the laboratory.[213] And this past summer the owners of Ferber Furs, a fur showroom in Philadelphia, filed a RICO claim against animal rights activists who had demonstrated outside their store.[214] In short, the illegitimate judicial expansion of the Hobbs Act is not an abortion issue. It is an issue of First Amendment freedoms, and more specifically, of the right to social and political demonstration.

VI. THE FIRST AMENDMENT

A. *What the First Amendment Protects*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble."[215] Social and political protesters, therefore, enjoy basic rights to meet and to speak their minds. The protection afforded them applies even to "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[216]

The First Amendment protects more than just speech; it also extends to other kinds of protest activities. Such activities as demonstrating,[217] leafleting,[218] and publishing and disseminating literature[219]

213 The lawsuit settled, and the terms of the settlement agreement limit disclosure of its content. Jeffrey Kerr, General Counsel to PETA, did, however, discuss the suit in limited detail in testimony before Congress. *See Hearings on the Civil RICO Clarification Act of 1990 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. 3–8 (1998) (statement of Jeffrey S. Kerr, General Counsel to PETA) (visited Nov. 5, 1999) <http://www.house.gov/judiciary/35055.htm>.

214 *See* Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999); *see also* Michael Rubinkam, *Fur Wars Between Stores, Animal Rights Activists Rage, Ferber Coat Company Sues Protesters for Alleged Cases of Destruction of Property*, HARRISBURG PATRIOT & EVENING NEWS, Jun. 20, 1999, at A4.

215 U.S. CONST. amend. I.

216 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

217 *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (striking down an ordinance governing the issuance of parade permits because it gave police officials too much discretion in determining who could demonstrate).

218 *See, e.g.*, United States v. Grace, 461 U.S. 171, 183 (1983) (striking down a statute which prohibited all leafleting and picketing on a sidewalk adjoining the U.S. Supreme Court building); Schneider v. Irvington, 308 U.S. 147, 165 (1939) (striking

are within its safe harbor. Marches and demonstrations are also quintessential First Amendment activities;[220] so, too, is picketing,[221] which is not unlawful even if picketers encourage others to take action that is harmful to the target of the picketing.[222] Likewise the First Amendment protects the right to show visual representations[223] and to engage in symbolic conduct—such as burning the American flag.[224] Obnoxious and harassing speech is also protected,[225] as is speech that attempts to persuade others to action.[226] Even *coercive* speech is protected: the Supreme Court has specifically held that speech "does not

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down several ordinances that prohibited leafleting on public streets and in other public places).

219 *See, e.g.*, Jamison v. Texas, 318 U.S. 413, 414 (1943) (finding distribution of handbills to pedestrians on a public street protected by the First Amendment).

220 *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (finding a march and demonstration protected by the First Amendment).

221 *See, e.g.*, Carey v. Brown, 447 U.S. 455, 460 (1980) (striking down a statute which prohibited the picketing of residences or dwellings except when the dwelling was used as a place of business, was a place of employment involved in a labor dispute or the place of holding a meeting on premises commonly used to discuss subjects of general public interest); Police Dep't v. Mosley, 408 U.S. 92, 94 (1972) (striking down an ordinance which banned all picketing within 150 feet of a school building while classes were in session and one half-hour before and afterwards except the peaceful picketing of any school involved in a labor dispute); *cf.* Clayton, *supra* note 4, at 994. Clayton argued,

> Picketing, leafleting, and other forms of advocacy—the classic tools of social protest movements—were never a part of the *Scheidler* case. The plaintiffs never claimed that speech, even the ugly speech that the defendants used—calling the patients, staff and volunteers "murderers," and "baby killers"—was a RICO violation. The plaintiffs recognized that unpleasant speech is an important part of the free speech protected by the First Amendment. For this reason, the defendants' threats that abortion providers and recipients would "go to hell" played no role in the extortion for which they were sued.

Id. Of course, the "go to hell" threats might be hard to litigate in any event, unless one is prepared to name God as a RICO defendant. Nevertheless, while the question of whether the activities mentioned herein ultimately led to defendants' liability in *Scheidler* is unclear—as the jury returned only a general verdict—this statement by plaintiff's counsel in that case strongly indicates that even plaintiffs in RICO litigation against political protesters whose activities cross the protected boundary understand the value of First Amendment freedoms.

222 *See* Thornhill v. Alabama, 310 U.S. 88 (1940). *But see* Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding a town ordinance prohibiting focused picketing at an individual house).

223 *See* Eisenstadt v. Baird, 405 U.S. 438, 460 (1972) (Douglas, J., concurring).

224 *See* Texas v. Johnson, 491 U.S. 397, 420 (1989).

225 *See, e.g.*, Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

226 *See* Thomas v. Collins, 323 U.S. 516, 537 (1945).

lose its protected character simply because it may embarrass others or coerce them into action."[227]

Moreover, these rights apply equally to individuals *qua* individuals as to individuals *qua* members of a group. Freedom of assembly and association are integral parts of the First Amendment's guarantees.[228]

The First Amendment does not protect all organized protest activity; the Supreme Court has upheld limitations on such activity. Restrictions as to time, place, and manner may be acceptable when necessary to protect the public.[229] Such limitations must not, however, restrict the content or form of the expression.[230] The Court has enforced two sets of standards in the review of time, place, and manner restrictions. First, the Court has held that

> government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[231]

Second, the Court has held that such restrictions are constitutional when they "are content-neutral, are narrowly tailored to serve a

227 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982); *see also id.* at 921 ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on [a realtor] does not remove them from the reach of the First Amendment."); Watts v. United States, 394 U.S. 705, 708 (1969) ("The language of the political arena . . . is often vituperative, abusive, and inexact."); Cox v. Louisiana, 379 U.S. 536, 551–52 (1965) ("[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger.") (citations omitted); New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open").

228 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("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.")

229 *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

230 *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–12 (1975).

231 United States v. O'Brien, 391 U.S. 367, 377 (1968).

significant government interest, and leave open ample alternative channels of communication."[232] As the Court has observed, the two variations of the standard for determining the validity of time, place, and manner restrictions are essentially the same.[233] Thus, the First Amendment does not protect violent acts.[234] Nor does it protect trespass.[235] Unauthorized entry constitutes trespass, and it will not receive First Amendment protection.[236] Similarly, blocking access to property, be it private or public, is not protected by the First Amendment.[237]

B. The Risk to First Amendment Freedoms Posed by the RICO/Hobbs Act Weapon

Determining where the boundary between protected and unprotected activity under the First Amendment lies in the context of a social or political protest is a difficult task. On the one hand, protesters

232 United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

233 *See, e.g.*, F.W./P.B.S., Inc. v. City of Dallas, 493 U.S. 215, 244 (1990) (White, J., concurring in part and dissenting in part).

234 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (holding that violent demonstrations lose First Amendment protection); *see also* RAV v. City of St. Paul, 505 U.S. 377, 380 & n.1 (1992) (finding cross burning punishable as arson, criminal damage to property, and a terrorist threat while striking down a city ordinance prohibiting cross burning and other behavior "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990))).

235 *See* Hudgens v. NLRB, 424 U.S. 507, 519 (1976) (admonishing that the First Amendment does not protect the right of free speech against limitations imposed by "action by the owner of private property used nondiscriminatorily for private purposes only" (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972))); *see also* Town of West Hartford v. Operation Rescue, 726 F. Supp. 371, 383 (D. Conn. 1989) ("[A] bright line is crossed at the threshold of private property."), *vacated on other grounds by* Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990).

236 As noted above, in *McMonagle*, the court affirmed the liability of defendants who had entered the clinic's facilities without authorization. *See* Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989).

237 *See* Cameron v. Johnson, 390 U.S. 611, 617 (1968) (upholding law prohibiting picketing that "obstructs or unreasonably interferes with ingress or egress to or from a courthouse"); Cox v. Louisiana, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off . . . [an] entrance to a public building, and allow no one to pass who did not agree to listen to their exhortations."); *see also* New York State NOW v. Terry, 886 F.2d 1339, 1364 (2d Cir. 1989) ("[B]locking access to public and private buildings has never been upheld as a proper method of communication in an orderly society.").

engaged in pure political or social speech no doubt fall within the protections of the First Amendment, while on the other hand, those engaged in purely criminal conduct just as surely are not protected. Protests that involve elements of both protected and unprotected speech, however, present more difficult issues. In this nebulous area of hybrid activity, composed of both protected and unprotected activity, lurks the potential for the abrogation of protected freedoms in the name of reaching unprotected behavior. When the tool of prosecution is RICO with Hobbs Act extortion predicates, the stakes are at their highest.

Extortion, under the expanded judicial interpretation, occurs when the perpetrator deprives another of his property, tangible or intangible. But suppose, for example, a protest group peacefully pickets and distributes leaflets for months or even years outside a business, but sometimes its members block access to the clinic's driveways or doors or (rarely) injure its clients.[238] Suppose further that the group's protest activities against the business eventually succeed, driving it out of business. Under this scenario, a finding that "extortionate" activity caused the business economic loss runs the substantial risk of sanctioning the protesters for conduct that was, in fact, protected. Protesters engaging in protected activity risk losing their protected status when later they or others with whom they are associated engage in unprotected acts, since the line between protected and unprotected activities is fuzzy. The effect is a chilling of free speech.

The Supreme Court and various authors have observed that "chilling" free speech is undesirable. One author (who is also the Legislative Counsel for the ACLU) explained,

> [T]he harm caused by the chilling of free speech is comparatively greater than the harm resulting from the chilling of other activities . . . . [Therefore,] [t]he logical mandate of the chilling effect doctrine is that legal rules should be formulated to allocate the risk

238 This hypothetical mirrors the activities of the protesters in *NOW v. Scheidler*, 510 U.S. 249 (1994), as explained by Fay Clayton, Counsel for Plaintiff in that case:

> Abortion opponents who protested outside the clinics ran the gamut from lawful protesters who prayed, sang, and passed out leaflets, to lawful but obnoxious protesters who screamed "murderer" and "baby-killer," to outright thugs who physically assaulted the women and the clinic escorts and barricaded the doors. While the first two types of protests are, of course, protected by the First Amendment, the third is not.

Clayton, *supra* note 4, at 971.

of error away from the preferred value, thereby minimizing the occurrence of the most harmful errors.[239]

With prescience, the ACLU commented in 1989 that RICO's "potential for chilling First Amendment rights of expression is enormous."[240] Peaceful protesters will be afraid to engage in *protected* protest for fear of facing a RICO suit *despite being protected by the First Amendment.* Such fear is understandable. First, RICO provides for significant sanctions (treble damages, costs, and reasonable attorneys' fees).[241] Second, the stigmatic label of "racketeer" affixes to anyone against whom a RICO claim is brought—even if that person's First Amendment rights are ultimately vindicated.[242] A particular social or protest movement can thus be delegitimized by its association through RICO with mafia dons and Wall Street swindlers. Third, the intrusive discovery proceedings that follow the mere filing of a suit hold damaging potential for social or political protest groups. A well-pleaded RICO complaint gives plaintiffs the right to depose individuals and call for the production of documents.[243] Moreover, because the pleading requirements for a RICO and Hobbs Act claim sufficient to survive a motion to dismiss are minimal, individual protesters might well have to bear the enormous costs of litigation (the detailed discovery[244]—necessary in most types of civil litigation—would impose crushing costs on protesters) even if their protests are fully-protected

239 Califa, *supra* note 17, at 833; *see also* Reno v. ACLU, 521 U.S. 844, 871 (1997) (finding the provisions of the Communications Decency Act unconstitutional, the Court observed that "[t]he vagueness of [the] . . . regulation, . . . coupled with its increased deterrent effect as a criminal statute, . . . raises special First Amendment concerns because of its obvious chilling effect on free speech"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 156 (1969) (concluding that protest marchers had good reason to fear legal liability even though their actions were protected by the First Amendment; it "would have taken extraordinary clairvoyance" for protest marchers to predict a narrowing construction of parade ordinance); *cf.* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 688 (1978) (arguing that the doctrine of "chilling effect may be seen not as the nonconceptual generalization . . . but rather as a specific substantive doctrine lying at the very heart of the first amendment") (footnote omitted).

240 Rorie Sherman, *Courts Deal Blockaders Big Setbacks,* NAT'L L.J., Nov. 13, 1989, at 30, 32 (quoting Antonio Califa, Legislative Counsel for the ACLU, Washington, D.C.) (citation omitted).

241 *See* 18 U.S.C. § 1964(c) (Supp. III 1997).

242 *See* Mike Robinson, *Racketeer Verdict Angers Opponents of Abortion, Sets Stage for More Claims,* BUFFALO NEWS, Apr. 21, 1998, at A6 (quoting Joseph Scheidler: "We wanted to come out as a legitimate force in America and not as racketeers. There is no honor in being a racketeer and we're not racketeers").

243 *See* Fed. R. Civ. P. 26(a)(5).

244 *See id.*

by the First Amendment.[245] Finally, overbreadth,[246] vagueness,[247] and

245 *See Editorials Free to Protest—Without Violence*, ATLANTA J. CONST., Apr. 23, 1998, at A22 (quoting Joseph Scheidler on how a finding of RICO liability would change his protest activities: "We're still going to be at the abortion mills . . . but in a more prayerful spirit"); *cf.* NOW v. Scheidler, 510 U.S. 249, 264 (1994) (Souter, J., concurring) (recognizing that "entities engaging in vigorous but fully protected expression might . . . be . . . exposed to harassing RICO suits"). Protesters simply won't know which acts—if indeed any at all are required beyond association—might subject them to liability. *See* Cam Simpson, *NOW Aims to Apply Victory Nationwide*, CHICAGO SUN-TIMES, Apr. 22, 1998 at 10 (quoting Joseph Scheidler who, after being found liable under RICO for protest activities, stated "I think they're taking away our First Amendment rights. What if you have already written a pamphlet that suggests blockades are not a bad idea? Would that be in violation of [RICO]?").

246 A statute is "overbroad" if in addition to prohibiting activities that may be constitutionally proscribed, it also reaches activity that is protected by the First Amendment. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (stating that overbreadth occurs when a statute, targeting unprotected activities, "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech"); *see also* City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 & n.19 (1984) (arguing that when a statute "attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack" (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975))); Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (comparing "overbreadth" to a "sword of Damocles"). *See generally* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 23–39. The extent of protection offered by the doctrine is, however, limited. To succeed, a First Amendment challenge must show that the overbreadth "not only [is] real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); *cf.* New York v. Ferber, 458 U.S. 747, 773 (1982) (extending the *Broadrick* requirement to pure speech; upholding a state law banning child pornography, even though the statute could also reach "some protected expression, ranging from medical textbooks to pictorials in the *National Geographic*," because the "arguably impermissible applications of the statute amount to no more than a tiny fraction of the materials within the statute's reach").

Even under the *Broadrick* standard, a strong argument can be made that the RICO/Hobbs Act combination is overbroad in its current form. The Hobbs Act reaches many protest activities, and RICO increases the potential liability of protesters for repeated acts of protest. Thus, when, as in *McMonagle* and *Scheidler*, *see* discussion, *supra* Parts IV.A.1. & 2., these provisions are made to apply not to just to unprotected acts, but to all acts of a protest or series of protest—including the protected acts—once the protesters involved commit one or more unprotected acts, substantial liability is imposed for protected as well as unprotected activity. Undeniably, when months of peaceful picketing can become actionable after two accidental footsteps onto private property, the impermissible applications of the statute constitute an enormous fraction of the materials within its reach.

247 The doctrine of "vagueness" may be invoked to strike down a statute that poses a serious threat to First Amendment freedoms. This doctrine is rooted in two different kinds of constitutional considerations: those relating to fair notice-adequate guidelines under the due process clauses of the Fifth and Fourteenth Amendments,

see U.S. CONST. amend. V, XIV, and those relating to separation of powers under Article III, *see* U.S. CONST., art. III.

One purpose of the vagueness doctrine is to ensure that "ascertainable standards of guilt" are provided. Winters v. New York, 333 U.S. 507, 515 (1948); *see also* Jordan v. DeGeorge, 341 U.S. 223, 230 (1951) ("The essential purpose of the 'void-for-vagueness' doctrine is to warn individuals of the criminal consequences of their conduct.") (citations omitted). Thus, conduct may not be made criminal under a "statute sweeping a great variety of conduct under a general and indefininte characterization, and leaving to the executive and judicial branches too wide a discretion in its application." Cantwell v. Connecticut, 310 U.S. 296, 308 (1940). The doctrine also serves a second purpose: the corollary of fair notice to the defendant is the requirement of a guiding standard for law enforcement. Indeed, "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Kolender v. Lawson, 461 U.S. 352, 358–59 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)). *See generally* Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984). In *Roberts*, the Court recognized that

> [t]he void-for-vagueness doctrine . . . require[s] that [the] government articulate its aims with a reasonable degree of clarity[,] ensure[s] that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.

Id. (citations omitted).

A finding of First Amendment vagueness carries more significance than other findings of vagueness: "[v]agueness challenges in the First Amendment context, like overbreadth challenges, typically produce facial invalidations, while statutes found vague as a matter of due process typically are invalidated 'as applied' to a particular defendant." GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1338 (13th ed. 1997). Thus, in determining whether a law is void for vagueness in the First Amendment context, the following inquiries are appropriate: "(1) Does the statute in question give fair notice to those persons potentially subject to it? (2) Does it adequately guard against arbitrary and discriminatory enforcement? and (3) Does it provide sufficient breathing space for First Amendment rights?" LAFAVE & SCOTT, *supra* note 70, at 92. Also, courts must read statutes not merely on their face, but in light of any "limiting construction." *Kolender*, 461 U.S. at 355 (citing Village of Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489, 494 n.5 (1982)). This is especially the case when words have a well-settled common law meaning. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (citing Nash v. United States, 229 U.S. 373, 376 (1913)).

The present state of the RICO/Hobbs Act combination is vague in the context of the First Amendment. Since protected protest can become unprotected simply because of later unprotected activity, protesters do not have proper notice concerning the liability to which they may be subject. Moreover, under the expanded definition of extortion—unlike under the normal common law understanding of the term—protesters are subject to arbitrary and discriminatory enforcement; protesters who participate in weeks, months, or years of protected conduct can be held liable for that conduct if, the following day, they engage in unprotected conduct. This risk of un-

the possibility of improperly imposing vicarious liability[248] exacerbate the chilling effect of the combination of RICO and the Hobbs Act, a formidable weapon in its expanded form. The threat of RICO and Hobbs Act suits under the present approach, then, necessarily chills constitutionally protected free speech.

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foreseen liability for otherwise protected acts does not leave sufficient breathing space for the vigorous exercise of First Amendment rights. This vagueness would be corrected by hewing to the traditional, common law construction of the term—a far more limited construction than that of expanded extortion.

248 The provisions of RICO impose liability on both principals and conspirators. *See* 18 U.S.C. § 1962(c)–(d) (1994). Also, because RICO is a part of Title 18, § 2 imposes liability on persons who aid and abet in its violation; a person who willfully causes an act to be performed "which if directly performed by him or another would be an offense against the United States" will incur liability as a principal. *See id.* § 2(b) (1994). Thus, RICO may be used to hold leaders and advocates of protests responsible for their agents' activities. *See, e.g.*, Cam Simpson, *Judge Clamps Down on Abortion Protests*, CHI. SUN-TIMES, Jul. 17, 1999, at 8 (reporting on an order issued against Joseph Scheidler and others, stemming from a case in which they were found guilty of RICO violations via Hobbs Act predicate offenses; the order banned them from "'inducing, directing or inciting' their followers to obstruct abortion clinics under a nationwide injunction"). Moreover, RICO's conspiracy liability can be very broad. The Supreme Court has ruled that a defendant need only agree to participate in the affairs of an enterprise through a pattern of racketeering activity rather than specifically agree to commit personally any predicate act. *See* Salinas v. United States, 522 U.S. 52, 63 (1997). Political protesters could therefore be liable as conspirators under RICO, even if they agreed only to participate indirectly in the illegitimate objectives of the enterprise, and did not agree personally to commit the predicate acts.

First Amendment jurisprudence, however, demands a stricter standard. Under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the state must prove that (1) the speaker subjectively intended incitement, (2) in context, the words used were likely to produce imminent, lawless action, and (3) the words used by the speaker objectively encouraged and urged such lawless action. Moreover, as explained in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982), "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected." Instead, those who "assist in the conduct of [meetings for peaceable political action] cannot be branded as criminals on that score." *Id.* (quoting De Jonge v. Oregon, 299 U.S. 353, 365 (1937)). Rather, "[f]or liability 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." *Id.* at 920. Thus, the extended use of RICO against those who are not principals in the first degree allowed by the expanded Hobbs Act is inconsistent with established First Amendment jurisprudence.

C. NAACP v. Claiborne Hardware Co.:[249] *The Correct Way to Apply the RICO and Hobbs Act Provisions in the Context of Political Protest, But Not the Complete Answer*

1. The Lesson of *Claiborne Hardware*

Claiborne Hardware holds great potential for clarifying how to harmonize RICO and the First Amendment in the context of political demonstrators. In that case, which grew out of a seven year boycott organized by the National Association for the Advancement of Colored People (NAACP), seventeen white merchants filed suit for malicious interference with trade against Charles Evers (the field secretary of the NAACP in Mississippi and a principal organizer of the boycott), Mississippi Action for Progress (MAP), Aaron Henry (President of the Mississippi State Conference of the NAACP), the NAACP itself, and 144 other individuals.[250] The purpose of the boycott was to secure equality and racial justice.[251] Unfortunately, the boycott was marred with instances of violence: shots were fired into people's homes, bricks were thrown through windows, and a "violator" of the boycott was publicly whipped.[252] At trial Evers, principally based on his public speeches, and the NAACP, for whom he worked, were held responsible for *all* business lost by the merchants during the seven-year period.[253] In all, 130 of the 148 defendants originally named were found jointly and severally liable for these damages.[254] On appeal, the Mississippi Supreme Court rejected the defendants' reliance on the First Amendment, stating,

> The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime.[255]

Without dissent, the Supreme Court reversed the decision.[256] The Court found that the non-violent conduct was privileged by the

249 458 U.S. 886 (1982).
250 *Id.* at 889–90.
251 *Id.* at 899–900.
252 *Id.* at 904–05.
253 *Id.* at 893.
254 *Id.*
255 393 So.2d 1290, 1301 (Miss. 1980). The Court did, however, overturn the liability finding with respect to 38 of the defendants on the ground that the plaintiffs at trial "did not establish their case" with respect to those defendants. *Id.* at 1302.
256 *Claiborne Hardware*, 458 U.S. at 886.

First Amendment and could not be made the basis of suit,[257] even though the means employed included social pressure and coercion.[258] The Court thus refused to impose blanket liability for all acts in the boycott just because some were violent and thus unprotected. Instead, it instructed that, in deciding which conduct is compensable "in the context of constitutionally protected activity, . . . *precision of regulation* is demanded."[259] This "precision of regulation" requires courts, in jury instructions and verdicts, to determine which specific acts within a general protest were protected and which were unprotected—since only specific damage proximately caused by unlawful (and thus unprotected) conduct may be remedied.[260] Or, in the Court's words, "Only those losses proximately caused by unlawful conduct may be recovered."[261]

Recognizing that this showing of proximate causation is not an easy task, the Court observed,

> [I]t is of prime importance that no constitutional freedom, least of all guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality . . . . [T]he right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force.[262]

Consequently, the Court concluded,

> The burden of demonstrating that [the taint of violence that colored some acts] colored the entire collective effort . . . is not satisfied by evidence that violence occurred or even that violence

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257 *Id.* at 911–15. The Court stated,

> [T]he boycott clearly involved constitutionally protected activity . . . [and] [w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. . . . We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment.

Id.

258 *Id.* at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."); *cf. id.* ("The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945))).

259 *Id.* at 916 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)) (emphasis added).

260 *See id.* at 917–18.

261 *Id.* at 918.

262 *Id.* at 924 (quoting Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941)).

> contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. . . . The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.[263]

The Court further opined that, in the context of political protest, the First Amendment mandates that *individual* liability generally be based on *individual* conduct.[264] Consequently, mere membership in a group that commits unlawful activities cannot itself lead to liability. If individual liability is to be based on group conduct, it must be established that the alleged group possessed unlawful goals,[265] that the individual knowingly joined the alleged group,[266] and that the individual held a specific intent to further its unlawful objectives.[267]

Claiborne Hardware addresses many of the problems posed by protest activity. Certainly, political and social protesters like the NAACP or Joseph Scheidler, who seek not economic gain but social change, attempt to coerce or socially pressure businesses to stop engaging in certain practices—if not to drive them from the market entirely. But *Claiborne Hardware* teaches that this, without more, is insufficient to render otherwise protected speech unprotected. Moreover, under

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263 *Id.* at 933. *But see id.* at 923 n.64 (noting, as a caveat, that if "'special facts . . . appeared in an action for damages after picketing marred by violence had occurred,' they might "'support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered'" (quoting Mine Workers v. Gibbs, 383 U.S. 715, 731–32 (1966) and citing *Meadowmoor Dairies*, 312 U.S. 287, as an example of a case with such special facts).

264 *Id.* at 918 ("The First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another.").

265 *Id.* at 920 ("For liability to be imposed by association alone, it is necessary to establish that the group itself possessed unlawful goals.").

266 *Id.* at 919–20 ("The government has the burden of establishing a knowing affiliation with [the] organization . . . ." (quoting Healy v. James, 408 U.S. 169, 186 (1972))).

267 *Id.* at 920. The Court instructed,

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by 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.

Id.

Claiborne Hardware, a court must examine the individual acts involved in a protest with "precision of regulation," separating the unprotected acts from the protected acts and imposing individual liability based on individual conduct only for protesters who commit unprotected acts. Thus, under *Claiborne Hardware* the jury in *Scheidler*, for example, should have been required to examine *all* acts that occurred in the fifteen years of protest activity. Then, it should have been required to separate unprotected acts (on which liability can be based) from protected acts (which cannot be reached), instead of just returning a blanket verdict finding that, in sum, all of the defendants' acts—protected or otherwise—generally constituted "extortion." Further, under *Claiborne Hardware* those who join a protest but do not themselves engage in violent acts cannot be found liable for damages—unless they knowingly joined a group with unlawful goals and held a specific intent to further those goals. This protects people who, like some of the protesters who marched with Scheidler, do not engage in unprotected conduct, but belong to or associate with a group, one or more of whose members do engage in unprotected conduct. Consequently, the "precision of regulation" and the vicarious liability standard mandated by *Claiborne Hardware* relieve from liability protesters who, while members of or associated with a protest movement, do not engage in unprotected acts or consciously seek to further any unlawful goals of the organization.

2. *Claiborne Hardware* Is Not a Panacea

Claiborne Hardware is undoubtedly useful in addressing cases in which the RICO/Hobbs Act combination and the First Amendment collide. However, *Claiborne Hardware* represents the bare minimum that should be done when addressing such issues. It does not resolve all of the problems created by expanded extortion.

First, while as yet no Supreme Court majority decision has directly addressed whether and how the First Amendment applies in RICO/Hobbs Act suits against political protesters,[268] in a separate concurrence to the *Scheidler* decision[269] Justices Souter and Kennedy suggested that the First Amendment considerations in such cases are properly considered as a defense to be analyzed on the facts of each case.[270] Specifically, Justice Souter observed that alleged violations of

268 *Scheidler* came the closest; however, the majority declined to decide the issue. *See* NOW v. Scheidler, 510 U.S. 249, 262 n.6 (1994).

269 *See Scheidler*, 510 U.S. at 263.

270 *Id.* at 264 (Souter, J., concurring). Civil liberties advocates were justifiably concerned that the other seven Justices did not feel this clarification significant enough

the Hobbs Act or one of the other "somewhat elastic RICO predicate acts" might be defeated as barred by the First Amendment, entitling a defendant to dismissal.[271] Alternatively, he noted, "[W]here a RICO violation has been otherwise validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression."[272] This approach might solve the problems of overbreadth, as RICO with Hobbs Act predicates would not extend to protected acts of political protesters. It would also help to avoid the improper imposition of group liability, and might go a long way towards clearing up the vagueness problem by clarifying exactly which protest activities could be sanctioned under RICO with Hobbs Act predicates. It would not, however, solve the compelling problem of the chilling effect; if the role of the First Amendment is limited to that of an affirmative defense, and it is not considered in statutory construction itself, opponents can still file RICO claims that will survive a motion to dismiss. The threat of such a suit, as well as the costs it would entail, is enough to chill protected protest activity. The fact that potential protesters might prevail—as they should—only after expending substantial sums of time and money on a full trial on the merits would almost certainly discourage potential protesters from fully exercising their rights.[273]

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to join in the concurrence. *See* Harvey Silvergate, *Court's Double Standard*, BOSTON GLOBE, Jan. 31, 1994, at 11.

271 *Scheidler*, 510 U.S. at 264 (Souter, J., concurring) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 917 (1982) and holding that a state common law prohibition on malicious interference with business could not, under the circumstances, be constitutionally applied to a civil-rights boycott of white merchants).

272 *Id.* (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) and invalidating, on First Amendment grounds, a court order compelling production of the NAACP's membership lists issued to enforce Alabama's requirements for out-of-state corporations doing business in the state).

273 If followed, however, another line of cases could remedy this deficiency in *Claiborne Hardware* by requiring heightened pleading for cases where the pendancy of the action itself threatens to chill First Amendment freedoms. Justice Souter recognized this possibility in his concurrence in *NOW v. Scheidler*. *See* NOW v. Scheidler, 510 U.S. 249, 264–65 (1994) (Souter, J., concurring) ("[T]he First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression" (citing, *inter alia*, Oregon Natural Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991))). Although Justice Souter neglected to identify the root of this line of cases, the seminal case is *Franchise Realty v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976). That decision states,

> [I]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the

Second, despite the status of *Claiborne Hardware* as binding precedent, two major cases, *McMonagle*[274] and *Scheidler*,[275] ignored its instruction in assessing liability for RICO and Hobbs Act violations in

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action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Id. at 1082–83. In fact, courts in all but two circuits (the Fourth and the Fifth) have adopted the rule of *Franchise Realty*. *See* Federal Prescription Serv. v. American Pharm. Assoc., 471 F. Supp. 126, 129 (D.D.C. 1979), *aff'd on other grounds*, 663 F.2d 253 (D.C. Cir. 1981); Cash Energy v. Weiner, 768 F. Supp. 892, 899 (D. Mass. 1991); Caplan v. American Baby, 582 F. Supp. 869, 871 (S.D.N.Y. 1984) (copyright and trademark); WIXT Television v. Meredith Corp., 506 F. Supp. 1003, 1035 (N.D.N.Y. 1980); Newark v. Delmarva Power & Light Co., 497 F. Supp. 323, 326–27 (D. Del. 1980); Realco Servs. v. Holt, 479 F. Supp. 880, 884 (E.D. Pa. 1979); Miller & Son Paving v. Wrightstown Township Civic Ass'n., 443 F. Supp. 1268, 1273 (E.D. Pa.), *aff'd on other grounds*, 595 F.2d 1213 (3d Cir. 1978); Bethlehem Plaza v. Campbell, 403 F. Supp. 966, 971 (E.D. Pa. 1975); Letica Corp. v. Sweetheart Cup Co., 790 F. Supp. 702, 705–06 (E.D. Mich. 1992); Premier Elec. Constr. Co. v. International Bhd. of Elec. Workers, 627 F. Supp. 957, 966 (N.D. Ill. 1985), *rev'd sub nom on other grounds*, Premier Elec. Constr. Co. v. National Elec. Contractors Assoc., 814 F.2d 358 (7th Cir. 1987); Mark Aero v. Trans World Airlines, 580 F.2d 288, 297 (8th Cir. 1978); Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056, 1063 (9th Cir. 1998); Oregon Natural Resources Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991); Hydro-Tech. Corp. v. Sundstrand Corp., 673 F.2d 1171, 1177 n.8 (10th Cir. 1982); Spanish Int'l Communications Corp. v. Leibowitz, 608 F. Supp. 178, 182–84 (S.D. Fla. 1985), *aff'd*, 778 F.2d 791 (11th Cir. 1985); St. Joseph's Hosp. v. Hospital Auth., 620 F. Supp. 814, 833 & n.22 (S.D. Ga. 1975), *vacated on other grounds*, 795 F.2d 948 (1986); Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1266–67 (S.D. Fla. 1980).

Because RICO and the antitrust laws are *in pari materia*, the rule in *Franchise Realty* should apply to RICO as well. Thus, if courts faithfully applied both *Franchise Realty* and *Claiborne Hardware*, the heightened particularity in pleading, jury instructions, and verdicts that these decisions together require might well prevent the use of RICO against protected First Amendment political and social protest.

274 *See* Califa, *supra* note 17, at 840. Califa wrote,

> In *McMonagle* RICO resulted in an 887 dollar judgment turning into a nearly 68,000 dollar judgment. Twelve trespassed when somebody damaged property. Only those demonstrators who were involved in violent activities should have been held liable for the damages proximately caused. The use of RICO destroyed the careful attempts of *Claiborne Hardware* to protect the [F]irst [A]mendment in mixed conduct situations. The group of defendants liable was expanded. Only twelve caused damages, but fourteen others were held liable because they trespassed. In effect, the Court found all trespassers guilty of extortion. Second, *Claiborne Hardware's* precision of regulation rule is violated in the amount of damages for which defendants are liable. RICO mandatorily trebles damages and awards attorneys' fees, which are otherwise unavailable. Thus, defendants who legitimately were liable for 887 dollars were held liable for nearly 68,000 dollars because of RICO. Such a result is untenable and chills [F]irst [A]mendment rights.

Id. (footnotes omitted).

275 *See supra* note 9 and accompanying text.

the context of political protest, resulting in enormous awards for plaintiffs.

Furthermore, after *Madsen v. Women's Health Center*,[276] it is questionable whether even the Supreme Court will be receptive to the most iron-clad First Amendment argument.[277] In *Madsen*, the Court was called upon to determine the constitutionality of an injunction restraining the demonstration activities of anti-abortion protesters that had been upheld by the Florida Supreme Court.[278] The injunction, among other things, prohibited the protesters from demonstrating on private or public land within thirty-six feet of the property line of the clinic[279] and imposed noise restrictions on the protesters.[280]

As a threshold issue, the Court was asked to determine which standard would apply to the injunction:[281] strict scrutiny, the standard applied to content-based restrictions (the restriction must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end"[282]) or intermediate scrutiny, the standard applied to content-neutral restrictions (which allows regulations on the "time,

276 512 U.S. 753 (1994).

277 *Id.* at 785 (Scalia, J., dissenting). Decrying the Court's decision, which upheld part of an injunction against anti-abortion demonstrators, Justice Scalia argued that "[t]he entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal." *Id.* But in the context of abortion, Scalia observed, the rules are different:

> [N]o legal rule or doctrine is safe from ad hoc nullification by [the Supreme] Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it.

Id. (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting)).

278 *Id.* at 759.

279 *Id.* (stating that the injunction barred the protesters "[a]t all times and on all days, from congregating, picketing, patrolling, demonstrating, or entering that portion of the public right-of-way or private property within [36] feet of the property line of the Clinic") (first alteration in original).

280 *Id.* at 760 (stating that the injunction prohibited the protesters "[d]uring the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds . . . within earshot of the patients inside the Clinic").

281 *See id.* at 762.

282 Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

place, and manner" of expression so long as they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication"[283]). The Court, recognizing that injunctions "carry greater risks of censorship and discriminatory application"[284] than do content-neutral ordinances, refused to apply the intermediate standard.[285] Surprisingly, it also declined to apply the strict standard.[286] Instead, the Court invented and applied a sort of "intermediate-intermediate" scrutiny standard,[287] one somewhere between intermediate and strict—namely, that the restriction must "burden no more speech than necessary to serve a significant government interest."[288] It then used that standard to uphold the restriction prohibiting the anti-abortion protesters from demonstrating within thirty-six feet of clinic property[289] and the noise restriction.[290]

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283 *Id.*

284 *Madsen*, 512 U.S. at 764.

285 *See id.* at 765 ("We believe that [the differences between a content-neutral ordinance and an injunction] require a somewhat more stringent application of general First Amendment principles . . . .").

286 *See id.* at 762–64. While admitting that the injunction regulated only the speech of anti-abortion protesters, the Court argued that to find strict scrutiny applicable on that basis alone "would be to classify virtually every injunction as content or viewpoint based." *Id.* The Court reasoned that such a classification was not necessary; ignoring the reality that the issued injunction discriminatorily restricted only the speech of those opposed to abortion, the Court surmised that "[t]here is no suggestion . . . that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion," and on that basis concluded that "none of the restrictions imposed by the court were directed at the contents of petitioner's message." *Id.* In dissent, however, Justice Scalia observed,

> The real question in this case is not whether intermediate scrutiny . . . should be supplemented because of the distinctive characteristics of injunctions; but rather whether those distinctive characteristics are not, for reasons of both policy and precedent, fully as good a reason as "content basis" for demanding strict scrutiny. . . . [T]he central element of the answer is that a restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is *at least* as deserving of strict scrutiny as a statutory, content-based restriction.

Id. at 792–93 (Scalia, J., dissenting) (emphasis in original); *see also id.* at 792–97 (Scalia, J., dissenting) (explaining why injunctions are deserving of strict scrutiny).

287 *See id.* at 791 (Scalia, J., dissenting).

288 *Id.* at 765.

289 *See id.* at 769–70 (citing the need to protect unhampered ingress and egress to and from the clinic).

290 *See id.* at 772 (deeming the restriction necessary to ensure the health and well-being of the patients at the clinic).

Such general restrictions ignore the "precision of regulation" demanded by *Claiborne Hardware*. They restrict all speech in a given area (in the case of the thirty-six-foot restriction) or of a given kind during given hours (in the case of the noise restriction), rather than teasing out and prohibiting only the unprotected speech within those classifications. Thus, after *Madsen*, it is uncertain whether the constitutional rights of protesters would be fully protected in a RICO/Hobbs Act case, even at the Supreme Court.[291] This uncertainty is exacerbated by the fact that the application of RICO in the context of social and political protest is coming to be seen as an abortion issue—which, due to apparent judicial hostility to anti-abortion protesters, seems to have led to a suspension of standard First Amendment jurisprudence in this area.[292]

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291 *See* Golinski, *supra* note 17, at 196. Golinski observed,

> In *Madsen*, the Supreme Court compromised the rights of free speech to an extreme degree, allowing some aspects of peaceful protest to be enjoined. The majority, in essence, found freedom of speech interests inferior to rights associated with clinic access, protecting the speech of protesters only when enjoining the speech was not necessary to further the state's interest. Under *Madsen*, it is unlikely that a First Amendment defense to a RICO statute can provide a complete buffer against the destructive RICO remedies.

Id. (footnotes omitted).

292 *Madsen*, although disturbing, is not the only example of a federal court abrogating First Amendment rights in the context of abortion protest. In fact, the First Amendment rights nullified in *Madsen* seem trivial when compared with those assailed in a recent case. *See* Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998) (denying defendant's motion for summary judgment). Space prohibits a full analysis of the broad implications of this decision for First Amendment freedoms, but even a cursory examination of the issues gives cause for alarm.

American Coalition extended RICO liability to "extortionate" speech activities committed outside the victims' presence via various media. In that case, several individual doctors and two clinics brought suit against two anti-abortion protest organizations and various individuals who were "actively involved" in their activities. *Id.* at 1185. The plaintiffs alleged that certain "speech" made by the defendants constituted "true threats" for which those threatened were entitled to damages. *Id.* at 1186. The attacked "speech" included, *inter alia*: (1) a poster entitled "THE DEADLY DOZEN," (2) a poster of plaintiff Crist, and (3) an internet site called the "Nuremberg Files," the stated purpose of which was to "collect[] dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity"—the site listed over 200 people labeled as "ABORTIONISTS" and over 200 others including clinic workers, judges, politicians, law enforcement, and "MISCELLANEOUS BLOOD FLUNKIES." *Id.* at 1186–88. In three areas the site bore drawings of what appear to be lines of dripping blood; a line was drawn through the name of each person who had been killed by anti-abortion protesters (the web site is described in Rene Sanchez, *Abortion Foes' Internet Site on Trial*, WASH. POST, Jan. 15, 1999, at A3). The plaintiffs, putting this speech in the "context of violence" reaching back to the

March 1993 shooting of Dr. David Gunn, testified that they felt "threatened"—although they conceded, and the court instructed, that the materials did not constitute an "incitement to violence." *Id.* at 1186. Instead, the judge decided that "the viability of . . . plaintiffs' claims depends on whether the defendants' statements constitute [First Amendment] protected speech or unprotected 'true threats' . . . [as] 'true threats' are not protected under the First Amendment." *American Coalition*, 23 F. Supp. 2d at 1188–89 (citing Watts v. United States, 394 U.S. 705, 708 (1969)). The court adopted the Ninth Circuit's objective, speaker-based test for the existence of a "true threat," namely, "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *Id.* at 1189 (citing United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)); *see also id.* (holding that "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and [the] reaction of the listeners") (alterations in original). The court then examined the "context of violence" asserted by the plaintiffs and found all three instances of speech could be found to constitute "true threats" unprotected by the First Amendment in a trial on the merits. *Id.* at 1194.

Clearly, a finding that this speech might not be protected by the First Amendment rests uneasily in the context of the Supreme Court's jurisprudence. First, the plaintiffs could have avoided this speech by simply not looking at it. *Cf. Madsen*, 512 U.S at 773 (noting that visual speech is different from verbal speech, in that "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic"). Moreover speech, absent conduct, traditionally cannot be circumscribed except where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reversing the conviction of a Ku Klux Klan member); *see also Madsen*, 512 U.S. at 772 ("[T]hreats . . . are proscribable[, and so are] 'fighting words'[—speech] so infused with violence as to be indistinguishable from a threat of physical harm . . . . [C]itizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to [First Amendment] freedoms." (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)); *Watts*, 394 U.S. at 706, 708 (finding an anti-Vietnam war demonstrator's statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." to constitute not a "threat," but only "political hyperbole"); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); *cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982) (rejecting the claims that any unlawful threats were made against those who were intimidated by speeches of an NAACP leader in support of a boycott which did not incite violence or specifically authorize it and stating that "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action").

Nevertheless, at trial the defendants were found liable under RICO with Hobbs Act predicates—probably at least in part because the instructions of the court were drafted without proper regard to the teachings of *Claiborne Hardware* and *Brandenburg*. *See generally* Jury Instructions, *American Coalition* (No. 95-1671-JO); *see also* Verdict, *American Coalition* (No. 95-1671-JO) (assessing liability without the "precision of regulation" demanded by *Claiborne Hardware*). The jury awarded the plaintiffs $107 million. *See* Sam Howe Verhovek, *Creators of Anti-Abortion Web Site Told to Pay Millions*, N.Y. TIMES, Feb. 3, 1999, at A9. The court also issued a permanent injunction that prohibits the defendants from, *inter alia*,

VII. PROTECTING FIRST AMENDMENT FREEDOMS FROM THE RICO/HOBBS ACT WEAPON

Congress designed RICO as a powerful tool for fighting enterprise criminality. It intended that RICO not apply to social or political protest. Congress carefully and narrowly chose RICO's predicate offenses so that RICO could not reach protest activity, even when that activity strays just outside the lines of First Amendment protection. Sadly, judicial intervention thwarted Congress's intent by expanding the definition of Hobbs Act extortion from its common law roots, equating "extortion" with "coercion." While only one Circuit has squarely addressed the "obtaining" requirement of extortion in the context of political protest, the fact that others have glossed over the issue has proved just as damaging for protesters facing the threat of RICO litigation. This makes RICO a dangerous weapon—in fact, a bludgeon of First Amendment freedoms. The chilling effect on protest caused by amenability to suit under RICO, with the litigation costs involved in mounting a RICO defense (not to mention the prospect of being found liable for treble damages and opponents' attorney fees), cannot be denied. Moreover, courts are largely ignoring the mandates of First Amendment jurisprudence in their application of RICO and expanded Hobbs Act extortion to reach social or political protest activities. By so doing, they effectively eviscerate the First Amendment and chill political protest.

> (b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster . . . or its equivalent, with specific intent to threaten [the plaintiffs] or any of their family members, officers, agents, servants, employees, patients, or attorneys; (c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist . . . or its equivalent, with specific intent to threaten [the plaintiffs] or any of their family members, officers, agents, servants, employees, patients or attorneys; [and], (d) Providing additional material concerning [the plaintiffs] or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in [the Nuremberg Files] with a specific intent to threaten.

Planned Parenthood v. American Coalition of Life Activists, 41 F. Supp. 2d 1130, 1155–56 (D. Or. 1999) (footnote omitted).

That this kind of speech—passive entities such as posters and computer websites—so far removed from an actual incitement to imminent violence, can constitute a "true threat," and thus be actionable while the First Amendment nominally lives is, to put it mildly, unsettling.

To make matters worse, the federal courts—including the Supreme Court—seem to have lost sight of the importance of this issue, viewing it as an abortion matter rather than an issue involving constitutionally protected freedom of political protest. The recent attempt to apply the RICO/Hobbs Act weapon to other kinds of social and political protesters, however, underscores the ubiquitous nature of this problem.

Despite the swirling miasma of RICO and First Amendment problems generated by the current expanded definition of extortion, the Supreme Court has not, in recent times, been of a mind to clarify the scope of extortion[293] or to clarify how the First Amendment applies to RICO and Hobbs Act use in the social or political protest context.[294] However, if Americans are to continue to enjoy the constitutional freedom to protest that was so dear to this nation's founders, action must be taken swiftly to vindicate those freedoms. Guidance from more focused panel clarifications or en banc rehearings by the circuit courts, or a Supreme Court decision, is urgently needed. Alternatively, resort to Congressional action is possible.[295] In any event, judicial or legislative action is required to

(1) retrench the judicially expanded definition of "extortion," clarifying that extortionate "obtaining" requires both a "getting" and a "deprivation" of tangible or intangible property;

(2) ensure that "precision of regulation" is used in litigation involving First Amendment freedoms to distinguish protected from unprotected activity and in assessing individual and group liability; and

(3) clarify the concept of "threat."

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293 NOW v. Scheidler, 510 U.S. 249, 253 n.2 (1994).

294 *See id.* at 262 n.6.

295 Congress is, of course, free—consistent with Due Process—to modify statutorily created rights imposing liability, even after conduct in violation of that standard has occurred. This is particularly the case where the legislation is curative of judicial interpretation of congressional intent. *See* Battaglia v. General Motors Corp., 169 F.2d 254, 259 (2d Cir. 1948) (upholding the Portal-to-Portal Act of 1947, which curtailed the scope of liability unexpectedly imposed under the Fair Labor Standards Act in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), and collecting Supreme Court decisions); *accord* Hammond v. United States, 786 F.2d 8, 10–12 (1st Cir. 1986) (collecting Supreme Court decisions). Numerous cases uphold such legislation.

Last year, Republican Senator Dan Coats (Ind.) introduced a bill designed to address points (1) and (2) below. *See* 144 CONG. REC. 12,179 (daily ed., Oct. 9, 1998). While that bill was not enacted, its introduction indicates that at least Congress is becoming aware of the problem. In the absence of (or in addition to) swift circuit or Supreme Court action in this area, point (3) should be added to the bill, and it should be re-introduced and processed without delay.

VIII. CONCLUSION

The illegitimate expansion of Hobbs Act extortion and the forgetting of First Amendment jurisprudence are allowing RICO to be used against social and political protesters—into the teeth of specific Congressional intent. The missteps of the past must be corrected, and the time for action is now. At the very least *Claiborne Hardware* must be rediscovered. More properly, Hobbs Act "extortion" must be disgorged from "coercion," and the concept of "threat" must be clarified. RICO must not be allowed to chill the First Amendment.