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Abortion Protest: Lawless Conspiracy or Protected Free Speech?

Tracy S. Craige

NOTE

ABORTION PROTEST: LAWLESS CONSPIRACY OR PROTECTED FREE SPEECH?

INTRODUCTION

In *Roe v. Wade*,[1] the United States Supreme Court established a woman's right to terminate her pregnancy within the first trimester. The Court determined that the abortion decision fell within a cumulative right of privacy implicit in the Constitution.[2] This landmark 1973 decision legalized abortion, put reproductive choice solely in the hands of individual women, and shielded that choice from government interference. Immediately following *Roe*, opponents of abortion began to organize.[3] At first, their efforts remained within the political process. Abortion opponents attempted but were unable to pass a constitutional amendment declaring a fetus to be a human person, but were successful in cutting Medicaid funds for abortion with the first Hyde Amendment in 1977.[4] Today, no federal funding exists for abortion or abortion-related services unless a woman's life is in danger or in the case or rape or incest.[5] On the state level, abortion opponents have successfully passed laws

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1. 410 U.S. 113 (1973).

2. *Roe*, 410 U.S. at 152, 153. The right of privacy is not explicit within the text of the Constitution. The Court in *Roe*, however, looked to many of its prior opinions that recognized "a right of personal privacy, or a guarantee of certain zones of privacy." *Id.* Various places within the Constitution have been found to protect an element of privacy. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (finding privacy within the First Amendment); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (finding privacy within the Fourth and Fifth Amendments); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding privacy within the penumbra of the Bill of Rights and in the Ninth Amendment); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding privacy within the concept of liberty guaranteed by the first section of the Fourteenth Amendment). Because the right of privacy had been extended to encompass matters relating to marriage in Loving v. Virginia, 388 U.S. 1, 12 (1967); to procreation in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); to family relationships in Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and to child rearing and education in Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) and *Meyer v. Nebraska*, the Court in *Roe* extended the zone of privacy to include a woman's decision to terminate a pregnancy. *Roe*, 410 U.S. at 153.

3. For an in-depth political and historical commentary, see ROSALIND P. PETECHESKY, ABORTION AND WOMAN'S CHOICE (1990). The Catholic Church organized "right-to-life" committees to oppose legalization of abortion as early as 1970. After *Roe*, it launched a full-scale legal and educational campaign against abortion. *Id.* at 241-51; *see also* STEPHEN M. KRASON, ABORTION POLITICS, MORALITY AND THE CONSTITUTION 62-75 (1984) (discussing the emergence of the antiabortion movement).

4. *See* PETECHESKY, *supra* note 3, at 242. When their efforts to pass a constitutional amendment failed, antiabortion activists shifted their attention to federal funding of abortions. What became known as the "Hyde Amendment," was a 1976 amendment to the annual appropriations bill for the Department of Health, Education, and Welfare which prohibited the use of federal funds for abortions "except where the life of the mother would be endangered if the fetus were carried to term." Pub. L. No. 94-439, § 209, 90 Stat. 1418 (1976). The Supreme Court subsequently upheld the Hyde Amendment based on its conclusion that a constitutional right does not necessarily translate into an entitlement. Thus, neither the states nor the federal government is obligated to fund non-therapeutic abortions. *See* Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977).

5. The most recently enacted Hyde Amendment, adopted as part of the federal Medicaid budget, allows funding for abortion in cases of rape and incest in addition to life endan-

creating barriers to abortion such as waiting periods and parental notification.[6]

These political victories, however, were not enough. Abortion remained legal. To those opposing it, the only solution was to stop abortion. Such ideology has led to protest activities outside abortion facilities in the form of picketing, leafletting, and "counseling."[7] Violent tactics have been used as well. As early as 1977, protestors began bombing clinics, threatening clinic personnel, and assaulting patients in their effort to stop abortions.[8] Since 1977, there have been 1,712 reported incidents of violence against abortion providers.[9] Following *Roe*, the abortion debate became a source of political and social division within the United States, creating an immutable boundary between those who sought to overturn *Roe* and those who fought to uphold it.[10]

In 1992, the Supreme Court was given the opportunity to overturn *Roe*. In *Planned Parenthood v. Casey*,[11] the Court preserved the central holding of *Roe* that a woman has the right to end her pregnancy within the first trimester.[12] The decision did, however, open the door to restrictions that do not place an "undue burden" on a woman's right to undergo an abortion.[13] When the decision was announced, Justice David Souter characterized the case as one in which "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[14]

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germent. *See Portrait of Injustice*, REPROD. FREEDOM IN THE STATES (Center for Reprod. L. and Pol'y, New York, N.Y.), Oct. 25, 1994. Some states voluntarily provide coverage beyond life endangerment, rape, and incest, while other states restrict coverage to life endangerment and are in conflict with federal law. Challenges to restrictive Medicaid funding measures are pending in Colorado, Louisianna, Michigan, Missouri, Nebraska, North Dakota, Oklahoma, and Pennsylvania. *Id.*

6. Sixteen states require a woman to delay her procedure by a number of hours or days after receiving state-mandated literature designed to discourage abortion. *Mandatory Delays and Biased Information Provisions*, REPROD. FREEDOM IN THE STATES (Center for Reprod. L. and Pol'y, New York, N.Y.), Jan. 9, 1995. Laws in thirty-six states require young women to obtain the consent or to notify one or both parents prior to obtaining an abortion. *Restrictions on Young Women*, REPROD. FREEDOM IN THE STATES (Center for Reprod. L. and Pol'y, New York, N.Y.), Sept. 8, 1994.

7. *See* EVA R. RUBIN, ABORTION, POLITICS, AND THE COURTS 138 n.72 (1982).

8. *Id.*

9. *Incidents of Violence & Disruption Against Abortion Providers, 1994*, NEWS RELEASE (National Abortion Fed'n, Washington, D.C.), Dec. 1994 (on file with author). In 1994 alone, protestors committed 159 acts of violence. The figure includes: 5 murders, 8 attempted murders, 3 bombings, 5 arsons, 4 attempted bombing/arsons, 2 clinic invasions, 42 acts of vandalism, 7 assaults, 59 death threats, 3 burglaries, and 22 stalking incidents. In 1993, there were 434 acts of violence perpetrated against abortion providers, most notably the murder of Dr. David Gunn in Pensacola, Florida and the attempted murder of Dr. George Tiller in Wichita, Kansas. *Id.*

10. *See generally* EVA R. RUBIN, THE ABORTION CONTROVERSY (1994); *see also* PETCHESKY, *supra* note 3, at 252.

11. 112 S. Ct. 2791 (1992).

12. *Id.* at 2816-17.

13. *Id.* at 2819. For examples of the kinds of restrictions that became permissible after *Casey*, see *supra* note 6.

14. *Id.* at 2815; *see also* David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept.

Unfortunately, battle lines in the abortion controversy remain unmoved. Antiabortion organizations such as Operation Rescue and the Pro-life Action League continue to organize protests across the country in their crusade to stop abortion.[15] Frustrated by their lack of success in the courts, in the legislature, and in public opinion,[16] many abortion opponents continue to go beyond peaceful protest.[17] Of recent note is the murder of two clinic personnel and the wounding of five others in Brookline, Massachusetts on December 31, 1994. These murders, along with the 1994 murders of Dr. John Britton and his volunteer escort and the 1993 murder of Dr. David Gunn, increased the death toll to five.[18] Other terrorist tactics employed by antiabortion activists include verbally assaulting clinic patients, stalking clinic personnel, harassing family members and neighbors of abortion doctors and clinic personnel, and issuing death threats.[19] Protestors physically prevent access to abortion facilities by

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25, 1994, § 6 (Magazine), at 36, 39 (discussing Justice Souter's role in *Casey* and his commitment to stare decisis).

15. *See* H.R. REP. NO. 306, 103d Cong., 2d Sess. 9 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 706 (Attorney General Janet Reno testified that "much of the activity has been orchestrated by groups functioning on a nationwide scale, including, but not limited to, Operation Rescue whose members and leadership have been involved in litigation in numerous areas of the country."); *see also* John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991).

16. A Democratic Leadership poll found 57% of registered voters believe abortion generally should be available. AMERICAN POLITICAL NETWORK, *Poll Update DLC Poll: 57% Say Abortion Should Be Generally Available*, 6 ABORTION REPORT NO. 86, Nov. 18, 1994, *available in* WL, APN-AB Database, List & Date Query. A National Gallup poll found that 83% of Americans believe it is inappropriate for individuals to block women's access to abortion clinics. *Freedom of Access to Clinic Entrances Act*, FACT SHEET (The Fund for the Feminist Majority, Arlington, Va.), Nov. 1993. In a 1992 poll testing identification of the public with the pro-life and pro-choice positions, 58% of the adults polled were in favor of choice. RUBIN, *supra* note 10, at 282. However, a Wirthlin poll conducted for the National Right to Life Committee following the November 1994 elections indicated that only 41% of Americans say they are pro-choice. AMERICAN POLITICAL NETWORK, *Results Pro-Life Poll: Finds 53% of Americans Say They're Pro-Life*, 6 ABORTION REPORT NO. 80, Nov. 10, 1994, *available in* WL, APN-AB Database, List & Date Query.

17. *E.g.*, Laurie Goodstein & Pierre Thomas, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1; Robert O'Harrow, Jr., *Booklet Preaches, Teaches Violence—Abortion Rights Forces Condemn Radical Publication as Proof of a Terrorist Conspiracy*, WASH. POST, Jan. 17, 1995, at A8.

18. Alarmingly, some anti-abortion activists believe the murder of abortion doctors is "justifiable homicide." *See, e.g.*, Laurie Goodstein, *Life and Death Choices, Antiabortion Faction Tries to Justify Homicide*, WASH. POST, Aug. 13, 1994, at A1; David Van Biema, *Apologists for Murder: The FBI Launches a Probe of Abortion-Clinic Violence, Shining a Spotlight on Extremists Who Defend Homicide*, TIME, Aug. 15, 1994, at 39; *see also Inside the Anti-Abortion Underground*, NEWSWEEK, Aug. 29, 1994, at 28. Edward Walsh, a pro-life Pennsylvania businessman, explained, "[l]ethal force was a necessary next step because nothing else was stopping abortion." Fawn Vrazo, *A Small Chorus for Vigilantes*, DET. FREE PRESS, Jan. 15, 1995, at 1F. Other abortion opponents, however, have publicly denounced the violence. *See, e.g.*, Tamar Lewin, *Death of a Doctor: The Moral Debate—Abortion Doctor and Bodyguard Slain in Florida; A Cause Worth Killing For? Debate Splits Abortion Foes*, N.Y. TIMES, July 30, 1994, at 1; Tim Nickens, *Anti-Abortion Organizations Join to Call for Peaceful Protests*, MIAMI HERALD, Jan. 19, 1995, at 1B.

19. For example, Warren M. Hern, M.D., Director of the Boulder Abortion Clinic in

pouring glue into keyholes, locking their heads to clinic doors, and chaining themselves to immobile vehicles in front of clinic entrances.[20] In addition, bombings, arson, and butyric acid attacks have seriously harmed clinic employees and caused millions of dollars worth of property damage.[21]

State remedies proved to be an inadequate avenue of redress.[22] State statutes often do not encompass the totality of such activity and local law enforcement is often unwilling or unable to combat the problem.[23] Because protestors persisted unabashed in their efforts and it became evident that their activities were organized on a nationwide scale, abortion providers and prochoice organizations sought protection in federal court. Plaintiffs across the

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Boulder, Colorado, has been the target of personal harassment since 1973 when he first received telephone death threats. In 1979, one of the protestors at the Boulder clinic attempted to run Dr. Hern down with his car in the clinic parking lot. In 1980 and 1982, antiabortion activists threatened Dr. Hern's life to his face at various speaking engagements. In 1984, Joseph Scheidler, founder of the Pro-Life Action League, told Dr. Hern that he planned to put him "out of business." In 1988, five shots were fired through the front windows of Dr. Hern's waiting room. On August 16, 1994, Dr. Hern received a letter that spoke of an "underground network" that was preparing to "take out a number of you abortionist [sic] at the same time no matter where you are." The letter also warned that "bullet proof vests are not enough to protect guilty murderers. There are other areas on the body that invite fatal wounds." On December 30, 1994, the night John Salvi murdered two abortion personnel in Brookline, Massachusetts, radio-TV talk show host Bob Enyart invited viewers to take action against Dr. Hern. Enyart displayed Dr. Hern's yellow pages ad on the screen, including his name, address, and telephone number. Viewers calling into the show all advocated violence against abortion providers. The two most commonly uttered words on the program were "Hern" and "kill." Special Report prepared by Warren M. Hern, M.D., M.P.H., Ph.D., Director, Boulder Abortion Clinic for Jo Ann Harris, Director Criminal Division, U.S. Department of Justice, Wash., D.C. (Jan. 6, 1995) (copy on file with the author); *see also* Rene Sanchez, *From Year of Promise to Year of Violence Abortion Rights Advocates Decry Trend Towards Militant Opposition*, WASH. POST, Dec. 31, 1994, at A14.

20. *E.g.*, Brief for Petitioners at 8-9, National Org. for Women v. Scheidler, 114 S. Ct. 798 (1994) (No. 92-780).

21. In 1994, abortion providers across the country reported $670,335 worth of damage resulting from arson, bombings, and other vandalism. *Reported Arson and Bombing Incidents* (National Abortion Fed'n, Washington, D.C.), Dec., 1994 (on file with author). In 1993, abortion providers reported $3.7 million worth of damage caused by arson and bombings, *Reported Arson and Bombing Incidents* (National Abortion Fed'n, Washington, D.C.), Dec., 1994 (on file with author) and $853,050 caused by chemical vandalism, *Noxious Chemical Vandalism Incidents at Abortion Clinics* (National Abortion Fed'n, Washington, D.C.), May, 1994 (on file with author). In addition, The Feminist Majority Foundation reported that "[i]n at least two facilities, staff have suffered long-term disability due to respiratory problems from the caustic butyric acid used." *1993 Clinic Violence Survey Report* 3 (The Feminist Majority Foundation, Arlington, Va.).

22. Elizabeth L. Crane, *Abortion Clinics and Their Antagonists: Protection From Protestors Under 42 U.S.C. § 1985(3)*, 64 U. COLO. L. REV. 181, 183-84 (1993) (explaining that state laws may not be enforced against protestors, and that stiff federal penalties deter protestors more effectively than the minor fines and jail terms imposed by a state); *see also* Eleanor H. Norton, *Federalizing Feminism: Protection of the Civil Rights of Women Against Criminal Attacks Needs the Force of Federal Law*, THE RECORDER, Aug. 11, 1994, at 8; *cf.* Dana S. Gershon, *Stalking Statutes: A New Vehicle to Curb the New Violence of the Radical Anti-Abortion Movement*, 26 COLUM. HUM. RTS. L. REV. 215 (1994) (arguing that "the time may have come to reconsider state remedies").

23. Crane, *supra* note 22, at 183.

country invoked § 1985(3) of the Reconstruction Era Ku Klux Klan Act[24] and § 1962(c) of Title IX of the Organized Crime Control Act of 1970, entitled "Racketeer Influenced and Corrupt Organizations" (RICO),[25] in an effort to bring a halt to the violence. Along with defenses based on statutory interpretation, protestors claimed their actions constituted First Amendment protected free speech. Freedom of speech, however, has never been without limitation and has never been a shield for lawless violence.

When called upon to interpret the role of federal law in curtailing violent abortion protest, the Supreme Court has carved out only a handful of remedies and left further measures up to legislators. The Court has applied strict statutory construction, staunchly upheld prior precedent, and claimed to keep underlying politics out of the process.[26] In 1993, the Supreme Court refused to apply § 1985(3) to clinic blockaders in *Bray v. Alexandria Women's Health Clinic*,[27] but a year later approved application of RICO in *National Organization for Women v. Scheidler*.[28] Also in 1994, the Court decided that some provisions of a judicially created "buffer-zone" were constitutional in *Madsen v. Women's Health Center, Inc.*[29] Unfortunately, protection for clinics, patients, and staff has been slow in coming and is still, in many ways, ineffective. Women won the right to choose in *Roe*, but that victory is rendered nominal when the government fails to provide adequate protection and women are forced to defend themselves against militant protestors in order to exercise that right.

Part I of this Note examines the Court's narrow interpretation of the Ku Klux Klan Act in *Bray*, compares it with the Court's expansive reading of RICO in *Scheidler*, and offers a possible explanation for the disparate results. Part II discusses the First Amendment concerns in *Madsen* and considers the

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24. 42 U.S.C. § 1985(3) provides in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons . . . the equal protection of the laws; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1988).

25. 18 U.S.C. §§ 1961-68 (1988).

26. Justice Scalia defended this judicial approach in *Bray v. Alexandria Women's Health Clinic*, saying, "[w]e construe the statute, not the views of most members of the citizenry." 113 S. Ct. 753, 768 (1993). Proponents of an original historical interpretation of the Constitution believe the Court should play a neutral role and apply the law mechanically. Nevertheless, they agree that the Court's decisions are not free from outside influence. For a discussion of current interpretative theories and the role of the Supreme Court in deciding social issues, see ROBERT J. MCKEEVER, RAW JUDICIAL POWER? THE SUPREME COURT AND AMERICAN SOCIETY (1993). *See also* LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992).

27. 113 S. Ct. 753 (1993).

28. 114 S. Ct. 798 (1994).

29. 114 S. Ct. 2516 (1994).

impact of that decision on future injunctions. Part III addresses the Freedom of Access to Clinic Entrances Act, its resistance to constitutional challenge, and the possibility of review by the Supreme Court. Part IV outlines the current framework available to combat clinic violence and maintain access to abortion services. Finally, this Note argues that because the abortion debate is certain to continue, courts should focus on defining the limits participants must respect in expressing their viewpoints.

I. STRICT STATUTORY CONSTRUCTION CREATES AN ANOMALY

A. *The Ku Klux Klan Act*

42 U.S.C. § 1985(3), known as the Ku Klux Klan Act, prohibits conspiracies that either deprive a person of equal protection of the laws or hinder law enforcement's efforts to maintain equal protection.[30] The legislation, passed in 1871, was initiated in response to the violence and intimidation perpetrated by the Ku Klux Klan against blacks and Republicans in the post-Civil War South.[31] The language of the original act was subsequently amended, limiting the civil remedy to private conspiracies aimed at particular classes of citizens.[32] Fearful that the statute would become a general federal tort remedy, the Supreme Court also narrowed its application in numerous decisions.

Beginning with *Collins v. Hardyman*[33] in 1951, the Court systematically denied the broad application § 1985(3) that was intended by the Forty-Second Congress. In *Collins*, the defendants were accused of forcibly disrupting the meetings of a California political association.[34] The association sought relief under § 1985(3), claiming defendants' actions demonstrated a private conspiracy to deprive them of their right to peaceably assemble.[35] The Court, however, decided that congressional authority to enact § 1985(3) came from the Fourteenth Amendment, which only proscribed a denial of equal protection by

30. 42 U.S.C. § 1985(3) (1988); *see supra* note 24.

31. Debate on the floor of the Senate at the time the Ku Klux Klan Act was passed, however, indicates the legislators had in mind a remedy for the protection of all classes of persons. Dissenting in *Bray*, Justice O'Connor cited several legislators from the 42nd Congress. Included in her dissent were the statements of Rep. Garfield that the legislation protects "particular classes of citizens" and "certain classes of individuals"; statements of Rep. Barry that "white or black, native or adopted citizens" would be protected under the statute; statements of Rep. Lowe that "all classes in all States, to persons of every complexion and of whatever politics" would be protected; and the statement of Rep. Buckley that "yes, even women" were protected. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 800-01 (1993) (O'Connor, J., dissenting) (citing CONG. GLOBE, 42d Cong., 1st Sess. app. 153-54 (1871)).

32. For a thorough analysis of the legislative history and background of the Ku Klux Klan Act, see Randolph M. Scott-McLaughlin, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1362-80 (1992).

33. 341 U.S. 651 (1951).

34. *Id.* at 653-54.

35. *Id.* at 655.

the state.[36] Section 1985(3), therefore, could only protect victims of conspiracies in which the state was an actor.[37] In one swift blow, the Court completely eliminated protection for individual civil rights against violations by private actors. This was a questionable decision considering that the statute was enacted in response to the actions of the Ku Klux Klan which was, despite membership by state officials, a purely private entity.

Twenty years later, the Court changed its mind in *Griffin v. Breckenridge*,[38] a case in which several black motorists were stopped along a Mississippi highway and subsequently beaten by a group of white men.[39] In *Griffin*, the Court declared that congressional power under § 1985(3) was not solely derived from the Fourteenth Amendment and that the statute should be given a sweep as broad as its language.[40] The Plaintiffs were allowed to proceed under a private conspiracy theory, claiming a deprivation under the Thirteenth Amendment. The Court, still wary that § 1985(3) would become all-encompassing, limited the statute in other ways. It developed two new requirements: first, a plaintiff had to prove the conspirators acted with a "racial, or perhaps otherwise class-based, invidiously discriminatory animus;"[41] second, a plaintiff had to identify the source of Congress' power to remedy the particular deprivation alleged.[42] The Court did not, however, address what "classes" might qualify for protection under the statute nor what constitutional sources would support federal protection from a private conspiracy.

The Court later attempted to fill in some of the gaps left open by the *Griffin* decision. *United Brotherhood of Carpenters, Local 610 v. Scott*[43] involved a group of construction workers who refused to join a union and consequently became the victims of harassment and intimidation by local residents and union members.[44] The workers invoked § 1985(3) alleging a violation of their First Amendment right of association. The Court first addressed whether a § 1985(3) action would lie if the defendants' discriminatory intent involved something other than racial bias. While the Court did not explicitly state that only racial groups were protected by the statute, it did preclude extension of the statute to conspiracies based only on "economic" animus.[45] The Court then addressed the state action requirement. It ruled that a § 1985(3) action based on deprivation of Fourteenth Amendment rights necessarily required proof of state involvement.[46] Deprivation of Thirteenth Amendment rights,

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36. *Id.* at 658.

37. *Id.* at 658. This decision is troubling in view of legislative debate indicating that Congress intended § 1985(3) to cover violations of the Thirteenth, Fourteenth, and Fifteenth Amendments. *See* Scott-McLaughlin, *supra* note 32, at 1361.

38. 403 U.S. 88 (1971).

39. *Id.* at 90-91.

40. *Id.* at 97, 105.

41. *Id.* at 102.

42. *Id.* at 104, 106.

43. 463 U.S. 825 (1983).

44. *Id.* at 827-28.

45. *Id.* at 837.

46. *Id.* at 830-31.

however, by a private actor, as was the case in *Griffin*, could be maintained as the Thirteenth Amendment arguably protects only blacks. Implicit in the holding of *Scott*, therefore, is a racial animus requirement. These decisions ignore the fact that § 1985(3) was designed to protect white as well as black victims of violence and intimidation at the hands of the Ku Klux Klan. The Klan's targets included their political opposition, the Republican Party, and other supporters of Reconstruction policies who were undoubtedly white.[47]

By issuing inconsistent opinions regarding a state action requirement and by failing to specify the classes of persons protected by § 1985(3), the Supreme Court left a great deal of interpretation to lower courts. In addition, the Court never sufficiently explained its hesitancy to apply the Act as broadly as that intended by the legislators. Thus, several district courts and circuit courts of appeal extended application of the statute to a wide variety of discriminatory contexts.[48] When the Supreme Court revisited § 1985(3) in *Bray v. Alexandria Women's Health Clinic*, there were well-reasoned rationales to justify applying the statute to the terrorist activities of antiabortion protesters. The Court in *Bray*, however, found those rationales unpersuasive.

B. Bray v. Alexandria Women's Health Clinic

1. Facts and Procedural History

In January of 1993, the United States Supreme Court denied application of § 1985(3) to clinic blockaders in *Bray v. Alexandria Women's Health Clinic*.[49] The plaintiffs in *Bray* included nine clinics in the Washington D.C. metropolitan area and five pro-choice organizations, including the National Organization for Women (NOW). As state law enforcement had repeatedly been overwhelmed by Operation Rescue's protest efforts,[50] and state law remedies had proven ineffective, plaintiffs sought relief in federal court. The complaint alleged that Operation Rescue had violated § 1985(3) by disrupting and blockading clinics, thereby denying women equal protection of the laws. The plaintiffs argued that Operation Rescue's activity created a class-based conspiracy designed to prevent women from exercising their constitutional right to interstate travel and their right to privacy in seeking abortion services.

The Federal District court for the Eastern District of Virginia granted the plaintiffs' request under § 1985(3) for a permanent injunction in *National Organization for Women v. Operation Rescue*.[51] Because many women traveled interstate to obtain abortion services in the Washington metropolitan area,

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47. Scott-McLaughlin, *supra* note 32, at 1366-67.

48. *See, e.g.*, Lisa J. Banks, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449, 457 n.74 (1994).

49. 113 S. Ct. 753 (1993).

50. *Bray*, 113 S. Ct. at 781 (Stevens, J., dissenting) ("Because of the large-scale, highly organized nature of petitioners' activities, the local authorities are unable to protect the victims of petitioners' conspiracy."); *see also* Crane, *supra* note 22, at 181.

51. 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

the court upheld NOW's claim that Operation Rescue had engaged in a conspiracy for the purpose of depriving women seeking abortions the right to travel interstate.[52] Such gender-based discrimination, according to the court, was sufficient to satisfy the class-based discriminatory element of § 1985(3).[53] The district court declined, however, to address NOW's claim that defendants, by conspiring to prevent access to abortion facilities, had also deprived women of their Fourteenth Amendment right to privacy. The Fourth Circuit Court of Appeals, finding no abuse of discretion, affirmed the opinion and the permanent injunction issued by the district court.[54] It also refused to consider whether the right to abortion as a fundamental right of privacy was within the scope of § 1985(3).[55]

2. The Supreme Court's Plurality Opinion

On February 25, 1991, the Supreme Court granted certiorari in *Bray v. Alexandria Women's Health Clinic*.[56] The Court addressed several questions on review. The first involved whether the protestors' actions resulted from a "class-based invidiously discriminatory animus." This involved deciding whether women seeking abortions constituted a "class" and then whether such a gender-based class qualified for protection under § 1985(3). The second question analyzed whether respondents had been deprived of constitutional rights enforceable by Congress. This entailed deciding whether the right of interstate travel and the right to abortion were entitled to protection under § 1985(3).

Writing for the plurality, Justice Scalia first rejected the contention that women seeking abortions were a "class" entitled to protection under § 1985(3). Such a finding, he explained, would create a potential cause of action for every tort victim.[57] Justice Scalia also did not believe that defendants' actions were targeted towards women in general.[58] He argued that opposition to abortion does not translate into an "invidiously discriminatory animus" against women.[59] Because the plurality concluded that women as a class were not the target of civil rights violations in *Bray*, it declined to address whether a gender-based conspiracy would be upheld under § 1985(3).[60]

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52. National Org. for Women v. Operation Rescue, 726 F. Supp. at 1489.

53. *Id.* at 1492.

54. National Org. for Women v. Operation Rescue, 914 F.2d 582, 585 (1990), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

55. National Org. for Women v. Operation Rescue, 914 F.2d at 586.

56. 498 U.S. 1119 (1991).

57. *Bray*, 113 S. Ct. at 759.

58. *Id.* at 759-60.

59. Justice Scalia, after citing the definition of "invidious" from Webster's Dictionary: "[t]ending to excite odium, ill will, or envy; likely to give offense; esp. unjustly and irritatingly discriminating," asserted "[w]hether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for such harsh description, and for such derogatory association with racism." *Id.* at 761-62.

60. *Id.* at 759.

The Court next evaluated whether respondents had alleged a right guaranteed by the Constitution against private encroachment as required by *Carpenters*.[61] While recognizing that the right to interstate travel had been protected by the Court from private interference in *Griffin*, Justice Scalia nevertheless denied such protection in *Bray* because he believed that interstate travel was not sufficiently implicated.[62] The fact that some women had traveled interstate to obtain abortion services in the Washington metropolitan area, Justice Scalia argued, was not enough to show that protestors intended to impede interstate travel.[63] He went on to explain that antiabortion demonstrations only physically obstructed access to a particular clinic and therefore did not in any way affect interstate travel.[64] Justice Scalia equally denied that the right to abortion was protected from private interference.[65] He explained that the Court in *Roe* had characterized abortion in terms of a "more general right of privacy"[66] under the Constitution and, therefore, was barely afforded protected from state action. Maintaining the extremely narrow reach of § 1985(3), Justice Scalia pointed out that only the Thirteenth Amendment had thus far been accorded protection from both state and private conspiracies.[67] The plurality, therefore, was extremely disinclined to protect abortion.[68]

3. The Hindrance Clause

After concluding that the respondents failed to make out a claim under the deprivation clause of § 1985(3), Justice Scalia took aim at the existence of a claim under the latter part of § 1985(3). The so-called "hindrance" clause prohibits conspiracies "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws."[69] Because a claim under the hindrance clause was neither expressly pled nor raised on certiorari, Justice Scalia vehemently claimed it was not an issue the Court should address. Justices Souter, Stevens, Blackmun, and O'Connor, however, agreed in their respective dissenting opinions that a claim under the hindrance clause should be considered by the Court.

Justice Souter, concurring in part and dissenting in part, acknowledged that the deprivation clause was restrained by *Griffin*, which required a racial or class-based animus, and by *Carpenters*, which required proof of a right se-

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61. *Id.* at 762 (citing United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 833 (1983)).

62. *Id.*

63. *Id.*

64. *Id.* at 763.

65. *Id.* at 764.

66. *Id.*

67. *Id.*

68. *Id.*

69. 42 U.S.C. § 1985(3) (1988). The hindrance clause prohibits acts that interfere with law enforcement efforts to protect the rights of the plaintiff, whereas the deprivation clause prohibits acts that directly deprive the plaintiff's rights.

cured against private action.[70] Justice Souter disagreed, however, that the hindrance clause was similarly restrained. He undertook a lengthy re-examination of both *Griffin* and *Carpenters*, noting that in both cases the Court construed only the deprivation clause.[71] In his opinion, the two conditions that arose out of the two cases were in direct conflict with the intentions of the Forty-second Congress.[72] While the principle of stare decisis required that the conditions be applied to the deprivation clause,[73] Justice Souter opined that the current Court should be free to construe the meaning of the hindrance clause separately, since its meaning had not been considered by the Courts in either *Griffin* or *Carpenters*.[74] Because he believed both restrictions were inconsistent with the intended scope of § 1985(3),[75] Souter concluded that the hindrance clause should be interpreted without them.[76] In his view, the hindrance clause would apply even if the conspirators did not act with a racial or otherwise class-based animus[77] and even when the object of their conspiracy was interference with a constitutional guarantee only against state action.[78] Ultimately, however, Justice Souter found that while the findings of the District Court could support a hindrance clause violation, it should be remanded for a more express determination.[79]

The dissenting opinions, penned by Justice Stevens and Justice O'Connor, and joined by Justice Blackmun, focused primarily on their opposition to the plurality's holding under the deprivation clause. Both opinions, however, agreed with Justice Souter that the conditions imposed by *Griffin* and *Carpenters* limited only the deprivation clause and were inapplicable to the hindrance clause.[80] Justice Stevens pointed to *Kush v. Rutledge*[81], an earlier case, in which the Court refused to apply the class-based animus requirement to another section of the Ku Klux Klan Act now codified at § 1985(2).[82] In addition, he determined that a conspiracy to interfere with the duties of law enforcement implicated sufficient involvement by the State to trigger the federally protected right to choose an abortion.[83] As such, it was unnecessary to demonstrate a right protected from private interference, as required by *Carpenters*, to make out a claim under the second clause of § 1985(3).[84] Justices Stevens and O'Connor went one step further, finding that a claim under the hindrance clause was clearly established by the facts. They relied on evidence within the

70. *Bray*, 113 S. Ct. at 770.
71. *Id.* at 772-76.
72. *Id.* at 772.
73. *Id.* at 770.
74. *Id.* at 769-70, 775.
75. *Id.* at 771.
76. *Id.* at 775.
77. *Id.* at 775-76.
78. *Id.* at 776-77.
79. *Id.* at 779.
80. *Bray*, 113 S. Ct. at 796 (Stevens, J., dissenting), 800 (O'Connor, J., dissenting).
81. 460 U.S. 719 (1983).
82. *Bray*, 113 S. Ct. at 796 (Stevens, J., dissenting).
83. *Id.*
84. *Id.*

record that protestors had often overwhelmed local law enforcement and prevented their efforts to maintain clinic access.[85] Such evidence, in the opinions of both Justices, demonstrated a conspiracy that mirrored the activities of the Ku Klux Klan and merited redress under § 1983(5).

Justice Scalia, in the plurality opinion, steadfastly responded that his colleagues were mistaken in their views regarding the hindrance clause. He explained that the restrictions formulated in *Griffin* and *Carpenters* applied to the "equal protection of the laws" language found in both clauses under §1985(3).[86] The restrictions, therefore, applied unquestionably to the hindrance clause, preventing it from being stretched more broadly than the deprivation clause.[87] A different interpretation, in his view, would create an impermissible inconsistency.[88] Justice Scalia emphasized, however, that the meaning of the hindrance clause was not an issue properly before the Court.[89] His analysis of the issue, therefore, was not dispositive.

Importantly, four of the Justices believed the hindrance clause was properly implicated in this case. The extent to which they addressed the issue may be of some precedential value in future cases. The issue has been left open for future discussion, as the meaning of the hindrance clause remains undecided. In contrast, the plurality slammed the door on the deprivation clause under § 1985(3). By refusing to extend its application to abortion protestors, the Court narrowed the scope of § 1985(3) further than ever intended by the drafters. This inexplicable restriction becomes even more mystifying considering that the Court later extended an organized crime statute to the very same fact pattern.

C. *Racketeer Influenced and Corrupt Organizations*

The Organized Crime Control Act of 1970, signed by President Nixon on October 15, 1970, was heralded as a powerful weapon in the "war against organized crime."[90] Title IX of the Act, entitled "Racketeer Influenced and Corrupt Organizations" (RICO),[91] requires proof that a defendant, through a pattern of racketeering, directly or indirectly invested in, maintained an interest in, or participated in an enterprise, the activities of which affected interstate commerce.[92] Plaintiffs invoking civil RICO must also allege and prove that an injury to their business or property occurred as a result of such activity.[93] An "enterprise" includes any "association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[94]

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85. *Id.* at 781 (Stevens, J., dissenting), 800 (O'Connor, J., dissenting).
86. *Bray*, 113 S. Ct. at 765.
87. *Id.*
88. *Id.* at 766.
89. *Id.* at 767.
90. DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO 1-2 (1991).
91. 18 U.S.C. §§ 1961-68 (1988).
92. 18 U.S.C. § 1962 (1988).
93. 18 U.S.C. § 1964(c) (1988).
94. 19 U.S.C. § 1961(4) (1988).

"Racketeering activity" covers a wide range of crimes including "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery [and] extortion."[95] To establish a "pattern," a plaintiff must prove at least two predicate acts.[96]

At its inception, RICO was directed at the "infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[97] Its civil remedy,[98] however, has been applied in a variety of situations against a wide range of defendants, moving far beyond the originally targeted mobster activity.[99] The inclusion of a liberal construction clause[100] lends support to RICO's wide application and broad interpretation.

With RICO's increased extension outside the context of organized crime, courts and defendants sought ways to limit its use. The Supreme Court, however, has consistently discouraged such attempts. In its first civil RICO case, *Sedima, S.P.R.L. v. Imrex Co.*,[101] the Court refused to require a prior criminal conviction or an allegation of a special racketeering type injury.[102] The Court recognized that "RICO is evolving into something quite different from the original conception of its enactors,"[103] and approved the statute's broad reach.[104]

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95. 18 U.S.C. § 1961(1) (1988).

96. 18 U.S.C. § 1961(5) (1988). Predicate acts are defined as individual criminal acts that, when viewed together with evidence of other singular criminal acts, may constitute a "pattern."

97. S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969); *see also* the Congressional Statement of Findings and Purpose prefacing RICO, Organized Crime Control Act of 1970 tit. 9, Pub. L. No. 91-452, 84 Stat. 922-23 (1970), *quoted in* United States v. Turkette, 452 U.S. 576, 588-89 (1981) (holding that the purpose of the Act is "to seek the eradication of organized crime in the United States").

98. 18 U.S.C. § 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1988).

99. Defendants have included "individuals, American and foreign corporations, partnerships, labor unions, receivers, churches, colleges and universities, municipal officials, municipal corporations, estates, and political party organizations." ABRAMS, *supra* note 90, at 177-79 (citations omitted); *see also* Arthur P. Breshnahan et al., *Racketeer Influenced and Corrupt Organizations*, 30 AM. CRIM. L. REV. 847 (1993) (citations omitted) (stating that RICO claims have included "corporate takeovers, securities regulations, banking, and insurance"); Geri J. Yonover, *Fighting Fire With Fire: Civil RICO and Anti-Abortion Activists*, 12 WOMEN'S RTS. L. REP. 153 (1990) (citations omitted) (stating that RICO has been applied to "copyright and licensing agreements, closely-held corporations, tax shelters, churning (securities fraud), tortious interference with a business, breach of contract, sexual harassment, family disputes, and religious disputes").

100. Section 904 of title 9 of Pub. L. No. 91-452 provides in relevant part: "The provisions of this title . . . shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970 (OCCA), tit. 9, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. § 1961 (1988)).

101. 473 U.S. 479 (1985).

102. *Sedima*, 433 U.S. at 500; *see also* United States v. Turkette, 452 U.S. 576, 593 (1981) (holding that RICO applies both to legitimate and illegitimate enterprises).

103. *Sedima*, 473 U.S. at 500.

104. *Id.* at 499; *see also* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248

The notion that a RICO claim must include proof that a defendant's actions were motivated by financial gain first emerged in the Eighth Circuit in *United States v. Anderson*.[105] The court's primary goal was to keep separate the "pattern" and "enterprise" elements.[106] In order to prevent two or more predicate acts from automatically establishing evidence of an enterprise, the court required that an enterprise be "directed towards an economic goal."[107] *Anderson* was decided before the Supreme Court declaration of RICO's breadth in *Sedima*. Even after *Sedima*, however, the Eighth Circuit adhered to a restrictive reading of RICO in *United States v. Flynn*,[108] denying a conviction absent an economic motive. In *United States v. Ivic*,[109] the plaintiffs invoked RICO to address the terrorist activities of Croatian nationalists. In their complaint, plaintiffs alleged that the defendants had committed two attempted bombings and one attempted murder against advocates of Croatian independence.[110] The Second Circuit panel itself raised the question of economic motivation at oral argument. The court was concerned about whether RICO extended to such politically motivated acts in light of the statute's intended purpose.[111] After the parties submitted additional briefs on the issue, the panel concluded that the RICO enterprise or the predicate acts must have a financial purpose.[112] Relying primarily on RICO's legislative history and Justice Department Guidelines that narrowly targeted the "ill-gotten gains" of organized crime, the court found the defendants' acts were necessarily beyond the scope of RICO.[113]

Ivic's narrow holding was undermined but not extinguished two and a half months later by a different panel of the Second Circuit in *United States v. Bagaric*.[114] Faced once again with the application of RICO to Croatian terrorists, the panel rejected the contention that the prosecution must prove an "ultimate and overriding economic motive."[115] While it was clear that the defendants were motivated solely by their political beliefs, the court found predicate acts involving the financial crime of extortion enough to show an "economic dimension."[116]

Five years later, the Third Circuit Court of Appeals in *Northeast Women's*

(1989) (commenting that "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime").

105. 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).
106. *Anderson*, 626 F.2d at 1365-1369, 1372.
107. *Id.* at 1362.
108. 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).
109. 700 F.2d 51 (2d Cir. 1983).
110. *Ivic*, 700 F.2d at 53-55.
111. *Id.* at 59-61.
112. *Id.* at 65.
113. *Id.* at 64.
114. 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).
115. *Bagaric*, 706 F.2d at 53.
116. *Id.* at 57.

Center v. McMonagle,[117] affirmed the district court's finding that twenty-seven antiabortion protestors were liable for monetary damages under RICO. The evidence at trial revealed that protestors had unlawfully entered the clinic on four occasions, knocked down and injured several employees, and destroyed medical equipment. This caused some employees to resign and the Center to lose its lease.[118] In its complaint, the Center alleged extortion in violation of the Hobbs Act[119] involving threats of force, fear, and violence designed to drive the Center out of business.[120] Proof of Hobbs Act violations serve as predicate acts required under RICO.[121] Predicate acts, evidence that the defendant has committed some crime, may ultimately be used in combination with other evidence to show a large-scale operation. Because the absence of economic motive is not a defense to Hobbs Act crimes, the court reasoned by analogy that it was not necessary to prove an economic motive to maintain a valid RICO claim.[122] Two months later, the District Court for the Western District of Washington, in *Feminist Women's Health Center v. Roberts*,[123] followed *McMonagle* and expressly rejected the defendants' contention that RICO was inapplicable to the political acts of abortion protestors.[124]

By injecting an economic motive requirement into RICO, the Eighth and Second Circuit courts prescribed a narrow construction of RICO that was not supported by any Supreme Court decision. The inconsistent justifications by the two circuit courts for such a restricted reading and their inability to clarify the scope of the requirement warranted further review. Establishing reliable precedent with regard to the issue was crucial when it appeared that success or failure of a civil RICO claim rested upon the question of economic motivation.

D. National Organization for Women v. Scheidler

1. Facts and Procedural History

In 1989, the National Organization for Women ("NOW")[125] along with two women's health organizations,[126] sought stiff penalties under civil RICO

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117. 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

118. *McMonagle*, 868 F.2d at 1345-46.

119. The Hobbs Act defines extortion as "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." 18 U.S.C. § 1951(b)(2) (1988).

120. *McMonagle*, 868 F.2d at 1345-47.

121. 18 U.S.C. § 1961(1)(B) (1988).

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

123. Feminist Women's Health Ctr. v. Roberts, No. C86-161Z, 1989 WL 56017 (W.D. Wash. May 5, 1989).

124. *Id.* at *11.

125. NOW is an organization "which has a vital interest in women's rights to privacy and reproductive freedom." It brought the action on behalf of itself, its members, and other people who use or may use the services of women's health centers that provide abortions. Brief for Petitioners at 5, National Org. for Women v. Scheidler, 114 S. Ct. 798 (1994) (No. 92-780).

126. The Delaware Women's Health Organization and the Summit Women's Health Organization. *Id.*

to strike at the heart of nationally organized and violent abortion protests. Defendants included Joseph Scheidler, founder of the Pro-Life Action League ("PLAL"), and Randall A. Terry, founder of Operation Rescue who, along with other abortion opposers, comprised the Pro-Life Action Network ("PLAN").[127] NOW claimed the defendants had violated § 1962 of RICO by participating in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity, specifically extortion under the Hobbs Act.[128] The extortionate acts alleged included direct threats of personal harm to clinic personnel and patients, arson and fire, burglary, criminal damage to clinic property and equipment, and threats against the clinics' lessors, medical laboratories, and suppliers.[129]

The district court dismissed NOW's claims under § 1962 in part because it concluded that donations from supporters could not be considered "income" obtained by the defendants through a pattern of racketeering activity and in part because it required proof of an economic motive.[130] The court acknowledged that the circuit courts were divided on the issue but followed the Seventh Circuit's opinion in *United States v. Neapolitan*[131] which had adopted the Eighth Circuit's definition in *Anderson* of an "enterprise" directed at an economic goal.[132]

The Court of Appeals for the Seventh Circuit affirmed the district court's ruling.[133] It agreed that the contributions defendants received from pro-life supporters were not derived from a pattern of extortionate activity, despite NOW's insistence that defendants' income increased in direct relation to the frequency and notoriety of their efforts.[134] The court conceded that its decision in *Neapolitan* only indirectly imposed an economic motive requirement.[135] It also agreed with the finding in *McMonagle* that Hobbs Act defendants need not profit economically from their extortionate acts.[136] Nevertheless, the court examined *Ivic*, which it considered to be the leading case on the issue, and adopted *Ivic*'s narrow interpretation of the statute. It agreed that according to its legislative history, RICO was intended to apply only in the case of a financially motivated enterprise or series of predicate acts.[137] RICO could not extend, therefore, to politically motivated entities or acts.

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127. PLAN has organized an overall national strategy of "direct action" against clinics, clinic staff, and patients. PLAN's activities include multi-city "blitzes." PLAN designated 1985-1986 as "the year of pain and fear" for anyone giving or receiving an abortion. *Id.* at 7.

128. 18 U.S.C. § 1951(b)(2) (1988).

129. Petitioners' Brief at 4, *Scheidler* (No. 92-780).

130. National Org. for Women v. Scheidler, 765 F. Supp. 937, 941-43 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

131. 791 F.2d 489 (7th Cir. 1986).

132. *Id.* at 500.

133. National Org. for Women v. Scheidler, 968 F.2d 612, 630-31 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

134. *Id.* at 623.

135. *Id.* at 627.

136. *Id.* at 629-30.

137. *Id.* at 627.

2. The Supreme Court's Unanimous Opinion

The Supreme Court granted certiorari in *Scheidler* to resolve the disparity among the circuit courts on the issue of economic motive.[138] It unanimously concluded that neither the enterprise nor the predicate acts of RICO require proof that the defendants were driven by financial gain.[139] In reversing the Seventh Circuit Court's ruling, the Court first examined the statutory language. It pointed out that an economic motive requirement is neither explicitly contained in the language of § 1962 outlining prohibited conduct nor is it mentioned in any of the definitions in § 1961.[140] While § 1962(c) imposes liability when an enterprise engages in or affects interstate commerce, the Court acknowledged that an enterprise could "affect" interstate commerce "without having its own profit-seeking motives."[141]

Dissecting the language of the statute even further, the Court demonstrated that the Seventh Circuit was wrong to graft an economic motive requirement onto § 1962(c) based on use of the term "enterprise" in §§ 1962 (a) and (b) because the term plays a different role in each subsection.[142] Chief Justice Rehnquist, writing for the Court, explained that "enterprise" in subsections (a) and (b) correspond respectively to income derived from illegal activity or money invested in illegal activity.[143] Subsection (c), however, is merely a "vehicle" through which illegal activity is conducted.[144] An enterprise, therefore, need only be an association which does in fact affect interstate commerce through a pattern of racketeering.[145] Justice Rehnquist emphasized that requiring predicate acts to have an economic motive ignores the possibility that an enterprise, through its illegal conduct, may cause financial harm to a business without creating any financial gain for itself.[146]

The Court reaffirmed its decisions in both *Sedima* and *H.J. Inc. v. Northwestern Bell Telephone Co.*,[147] advocating a broad reading of RICO in light of the language chosen by Congress. Specifically, the Court reiterated a point from *United States v. Turkette*[148] that if Congress had intended RICO to be more limited in scope, it could have done so by inserting a single word. In response to the argument that the statement of congressional findings in the note following § 1961 justified a restricted reading of RICO, the Court stated that it is "a rather thin reed upon which to base a requirement . . . neither expressed nor, we think, fairly implied in the operative sections of the

138. National Org. for Women v. Scheidler, 114 S. Ct. 798, 800 (1994).
139. *Id.* at 806.
140. *Id.* at 804.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 805.
147. 492 U.S. 229 (1989).
148. *Scheidler*, 114 S. Ct. at 805 (construing United States v. Turkette, 452 U.S. 576, 581 (1981)).

Act."[149] While it did not specifically address the weight given to administrative law principles, the Court mentioned that the Department of Justice guidelines stating that a RICO enterprise must have an economic purpose had since been amended to include "other identifiable goal[s]."[150]

The Court restated its holding in *Sedima* that the language of RICO, which invites application beyond the context of organized crime, illustrates its broad nature and does not call for clarification.[151] The Court consequently found no need to analyze the bits of legislative history that the lower courts found so persuasive in support of an economic element.[152] For the same reason, the Court declined to apply the rule of lenity, that is invoked only when the language of a statute is ambiguous.[153]

The Court expressed no view, however, as to whether all the required elements of RICO were met in the instant case.[154] It concluded only that an economic motive was not necessary to maintain a valid claim. On remand to the district court, NOW must still prove that the defendants participated in an enterprise that affected interstate commerce through a pattern of racketeering.

3. The Concurring Opinion

Justice Souter, who wrote a concurring opinion in which Justice Kennedy joined, emphasized that the majority opinion addressed a narrow legal question and should not be interpreted to bar a First Amendment challenge to the application of RICO in the context of political protest.[155] He indicated that imposing an economic motive requirement might over-protect or under-protect free-speech and was, therefore, not the proper avenue through which such concerns should be pursued.[156] A better tactic, he suggested, would be to raise a First Amendment challenge in defense of an individual RICO claim.[157] Finally, Justice Souter delivered a warning to the courts to be cautious in applying RICO where free speech may be an issue.[158]

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149. *Id.* at 805.

150. *Id.* (quoting U.S. DEP'T OF JUSTICE, 9 U.S. ATTORNEY'S MANUAL 110.360 (1984)).

151. *Id.* at 806 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (quoting Harco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (2d Cir. Ill.))).

152. *Id.*

153. *Id.* The lenity rule provides that where there is ambiguity in the language of a statute concerning multiple punishment, it should be resolved in favor of lenity in sentencing. BLACKS LAW DICTIONARY 902 (6th ed. 1990).

154. *Id.*

155. *Id.* at 806 (Souter, J., concurring).

156. *Id.* at 807. Justice Souter explained that an economic motive requirement might "keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling . . . but fully protected expression might fail the proposed economic-motive test (for even protest movements need money)." *Id.*

157. *Id.* at 807. For a discussion of the potential conflict between RICO liability and the First Amendment rights of abortion protestors, see Steven E. Soule & Karen R. Weinstein, *Racketeering, Anti-Abortion Protestors, and the First Amendment*, 4 UCLA WOMEN'S L.J. 365 (1994).

158. *Scheidler*, 114 S. Ct. at 807.

E. *Reconciling* Bray *and* Scheidler

On one level, the decision in *Scheidler* is not particularly remarkable. The Supreme Court has consistently given RICO a wide reign. *Scheidler* is in line with numerous cases that reject attempts to narrow application of the statute. However, the Court's tacit approval of the extension of RICO to abortion protestors, in light of its refusal to extend § 1985(3) of the Ku Klux Klan Act, is somewhat anomalous.

1. The Harm Remedied

It is clear that the Supreme Court in *Bray* did not believe the KKK Act was the proper federal remedy to address the violent efforts of antiabortion protestors.[159] Protecting a woman's constitutional right to an abortion, however, is a logical application of a statute whose goal is to uphold equal protection of the laws. In contrast, the goal of RICO is to prevent organized entities from using illegal means to harm a business.[160] The element in *Scheidler* that allows RICO to encompass the acts of abortion protestors is the allegation of an injury to plaintiff's business or property. This injury, however, was merely incidental to the real harm caused by the protestors—preventing women's access to abortion services. While the decision in *Scheidler* is certainly not an unwelcome one for abortion rights proponents, questions remain on both sides as to why the Court was so willing to extend liability under RICO in *Scheidler* but not under the Ku Klux Klan Act in *Bray*.

2. The Group Targeted

The respective statutes were originally aimed at two very different types of organized conspiracies. Section 1985(3) targeted the Ku Klux Klan, a group motivated by race and politics. After suffering defeat in the war between the states, the South gave birth to the KKK, a group comprised of former Confederate soldiers and former slave owners.[161] By whatever means necessary, members of the Klan sought to reclaim their accustomed way of life. Their efforts were aimed not only at blacks but at northern profit seekers and southern sympathizers.[162] This fact alone repudiates the idea that § 1985(3) was

159. *Bray* was a 5-4 decision. Justice Scalia revealed the sharp division of the Court in his venomous opinion, which took issue with every point made by the dissenting Justices Stevens, Blackmun, and O'Connor. Had it not been for Justice Scalia's belief that abortion is not a constitutionally protected right, the Court might have reached a different conclusion in *Bray*. *See* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). Justice Scalia explicitly stated his belief that *Roe v. Wade* should be overturned in Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989). In Planned Parenthood v. Casey, 112 S. Ct. 2791, 2873 (1992), he also expressed his view that the Constitution does not require states to permit abortion.

160. *See supra* note 75 and accompanying text.

161. Scott-McLaughlin, *supra* note 22 at 1364.

162. The term "carpetbaggers" was used to describe those people who descended from the North seeking to rebuild the war-torn South. "Scalawags" were native southerners who sympathized with the new federal policies. Both were targeted by the Klan's campaign against change in the South. *Id.*

intended solely to remedy racial bias.[163] It also demonstrates that the Forty-Second Congress intended to fashion a more general remedy that would protect the rights of all citizens against their political opposers.[164]

RICO, by contrast, was originally aimed at mobsters, a group motivated solely by economic gain. In 1967, the Task Force on Organized Crime established by the President's Commission on Law Enforcement and Administration of Justice, reported that twenty-four crime families operated across the nation.[165] These intricate associations maneuvered outside the law to achieve financial and political dominance. They gained profits through illegal gambling, loan sharking, and the sale of narcotics.[166] They obtained power through monopolization and extortion of legitimate businesses and bribery of government officials.[167] These criminals sought to put competitors out of business solely to put more money in their own pockets, not because they opposed a particular kind of business, its members, or its politics.[168]

In terms of intense political, moral, and social opposition, abortion protest organizations align most closely with the Ku Klux Klan. Groups like Operation Rescue, the Pro-Life Action League, and Rescue America are motivated primarily by their moral and political views. They oppose any constitutional protection for a woman's right to terminate her pregnancy, just as the Klan opposed constitutional protection for a slave's right to be free. Like the Klan, opposers of choice seek, through whatever means necessary,[169] to undo what the Court did in *Roe v. Wade*.

When organized crime pressures a particular business owner in an attempt to shut down his or her business, it is a purely profit motivated activity. Not so for protestors whose ultimate goal is to shut down abortion clinics and deprive women of their constitutional rights. Anti-choice activists seek to put abortion providers out of business, but not for financial gain. Thus, it does not make sense to stretch the provisions of RICO to cover acts based on political

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163. While the Supreme Court has not directly limited § 1985(3) to racially motivated conspiracies, it has implied such a limitation. *Griffin*, a case involving racial discrimination, is the only instance where the Court has allowed application of the statute. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971). In addition, the Court in *Carpenters* placed the statute in an historical context, making it less applicable to modern-day conspiracies when it characterized the purpose of § 1985(3) narrowly "to combat the prevalent animus against Negroes and their supporters." United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 836 (1983).

164. *See supra* note 31.

165. TASK FORCE ON ORGANIZED CRIME, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 7 (1967).

166. *Id.* at 1.

167. *Id.* at 2.

168. "What organized crime wants is money and power." *Id.* at 1.

169. Randall Terry, founder of Operation Rescue, is stepping up efforts to bring about his brand of change. He is building his own training center to raise up "a cadre of people who are militant, who are fierce, who are unmerciful." In addition, he plans to run for New York State office in 1996, his goal being to "recaptur[e] the power bases from their current tyrannical captors." Kio Stark, *Call it Pro-Death: Operation Rescue*, THE NATION, Aug. 22, 1994, at 183.

and social beliefs. Section 1985(3), however, was specifically designed to remedy civil rights infringements of the very kind found in the antiabortion context.

3. The Plain Meaning Approach and Stare Decisis

Justice Scalia emphasized a plain meaning approach when writing the plurality opinion in *Bray*. This meant looking only to the "ordinary understanding of the words and structure of statutory text."[170] Justice Scalia consulted Webster's Dictionary for the plain meaning of "invidious," and concluded that such a word does not describe the mental state of abortion protestors towards women in general.[171] In reaching his conclusion, Justice Scalia effectively precluded application of § 1985(3). The actual words of the statute, however, do not contain any such language. The statute plainly states that it prohibits a conspiracy "for the purpose of depriving" any person or class of persons the equal protection of the laws.[172] In *Bray*, Justice Scalia was interpreting the language drafted by the Court in *Griffin*.[173] The *Griffin* Court, however, added this limiting language in blatant disregard of the words already in place.

Additionally, § 1985(3) states quite clearly that the intended beneficiaries of the statute include "any person or class of persons."[174] The word "any" indicates that the statute should protect women seeking abortions as well as blacks seeking employment. The Court in *Griffin*, however, limited protection to those deprived of their rights based on race or "class."[175] The Supreme Court has yet to determine what classes qualify for class-based discrimination under this statute.

In *Bray*, Justice Scalia skirted this issue by finding that protestors' opposition to abortion did not translate into opposition to women in general. He concluded that the protestors could not be liable under § 1985(3) since their conspiracy was not aimed at any particular class. Such reasoning, however, neglects that the conduct complained of interferes with every woman's right to obtain abortion services.

Further, the people whose rights were being infringed upon in *Bray* included not only women seeking abortions, but also the men and women who provide the medical service. A plain meaning interpretation of the statute would seem to protect anyone who was denied equal protection of the laws based on political opposition. The Supreme Court, however, preferred to rely

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170. Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 401 (1994).

171. He quoted the definition from Webster's as "[t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating," Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 762 (1993) (quoting WEBSTER'S INTERNATIONAL DICTIONARY 1306 (2d ed. 1954)).

172. 42 U.S.C. § 1985(3) (1988).

173. A plaintiff must prove the conspirators acted with a "racial, or perhaps otherwise class-based invidiously discriminatory animus." *Griffin*, 403 U.S. at 102.

174. 42 U.S.C. § 1985(3) (1988).

175. *Griffin*, 403 U.S. at 103.

upon its precedents and their distortion of the Act. Thus, in order to apply § 1985(3) in *Bray*, the Court was compelled to find a discriminatory animus because of *Griffin*. It also had to find that the rights violated were protected from private interference pursuant to *Carpenters*.

But was the Court truly bound by *Griffin* and *Carpenters*? The Court claims to be committed to the doctrine of stare decisis.[176] But that commitment is not absolute. The majority in *Planned Parenthood v. Casey*[177] fashioned a test that allows the Court to overrule a prior decision if: 1) it proves unworkable in practice; 2) causes inequities in effect; 3) damages social stability; 4) is abandoned by society; and 5) relies on key fact assumptions which have changed. *Griffin* itself did not adhere to the principle of stare decisis when it eliminated the state action requirement, overruling *Collins v. Hardyman*.[178] Similarly, *Carpenters* mutated the statute and prior precedent even further. If the purpose of stare decisis is to give the Court institutional legitimacy through consistency, that purpose was not accomplished in this line of cases.

The Court could have applied the test in *Casey* and concluded easily that the requirements from *Griffin* and *Carpenters* rendered § 1985(3) unworkable or inequitable in effect. The Court's narrow interpretation of § 1985(3) in *Bray* may have complied with the elements laid out in *Griffin* and *Carpenters*, but it is a far cry from the plain meaning of the statute or the intent of its drafters. Thus, it seems fair to conclude that the majority in *Bray* acted with its own, or other, concerns in mind and failed to see the inequities created by denying application of § 1985(3).

The Court also employed the plain meaning approach when it interpreted the RICO statute in *NOW v. Scheidler*.[179] Justice Rehnquist, writing for a unanimous court, quickly came to the conclusion that an economic motive requirement was neither contained in the words nor could it be implied in the structure of the statute.[180] Aiding the Court in its decision were multudinous prior decisions which had already broadened the reach of RICO. Perhaps that is why it was so much easier for the Court to extend a remedy to the victims of violent protest in *Scheidler*, whereas in *Bray* prior case law severely narrowed the statute in question.

The Court may also have found the issue in *Scheidler* simpler to resolve because it was not dispositive. The plaintiffs must still prove all elements of a RICO conspiracy at the trial level. The initial decision on the merits and the accompanying criticism would be shouldered by the trial court. Further, perhaps, the Supreme Court saw *Scheidler* as a concession for its poor judgment

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176. Stare decisis was the primary justification for the Court's holding in *Casey*. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808 (1992); *see also* Ronald Kahn, *The Supreme Court As a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and Rehnquist Courts*, 1994 DET. C.L. REV. 1.

177. 112 S. Ct. 2791 (1992).

178. 341 U.S. 651 (1951), *overruled by* Griffin v. Breckenridge, 403 U.S. 88 (1971).

179. 114 S. Ct. 798 (1994).

180. *Id.* at 803-05.

in *Bray*. After its decision in *Bray*, the Court was severely criticized,[181] clinic violence continued to escalate, and there was a heightened demand for practical solutions. *Scheidler*, therefore, may be viewed as not merely the reaction of a conservative court, but as a compromising gesture and an attempt to quell the suspicion that Justices allow their individual opinions on the abortion issue to enter into the decision-making process.

II. BALANCING CLINIC PROTECTION AND FIRST AMENDMENT FREE SPEECH

A. *The Standard Applied in* Madsen v. Women's Health Center, Inc.

In *Madsen v. Women's Health Center, Inc.*,[182] the Supreme Court considered the constitutionality of a permanent injunction issued by a Florida state court to restrain antiabortion demonstrations. In 1991, a Florida clinic sought protection for its patients, personnel, and property when demonstrations aimed at shutting down the clinic became too disruptive.[183] The Florida state court issued a permanent injunction in September of 1992 which prohibited the protestors from "blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic."[184] This general restriction served only to escalate protest activity.[185] In response, the clinic sought another injunction to address specific protest activities. The Florida district court issued a broader and more explicit injunction on April 8, 1993.

Antiabortion activists Judy Madsen and Shirley Hobbs challenged five provisions of the amended injunction which restricted their protest activities. The challenged provisions included: 1) *36-foot clinic buffer zone* - prohibiting protestors from demonstrating within 36 feet of clinic property; 2) *noise* - prohibiting, during hours of operation, "singing, chanting, whistling, shouting, yelling, us[ing] bullhorns, auto horns, sound amplification equipment or other

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181. *See* Randolph M. Scott-McLaughlin, *Operation Rescue Versus A Woman's Right to Choose: A Conflict Without A Federal Remedy?*, 32 DUQ. L. REV. 709 (1994); Banks *supra*, note 48; Todd C. Coleman, Casenote, *Hindering The Applicability of 42 U.S.C. § 1985(3) to Abortion Protests:* Bray v. Alexandria Women'a Health Clinic, 27 CREIGHTON L. REV. 525 (1994); Toni Driver, Casenote, *Federal Law—Civil Rights—Individuals Obstructing Ingress and Egress to Abortion Facilities Do Not Violate A Woman's Federal Rights Within 42 U.S.C. § 1985(3)*, 25 ST. MARY'S L.J. 753 (1994); J. Paige Lambdin, Note, *Civil Rights—Abortion Protests—42 U.S.C. § 1985(3) Does Not Provide A Federal Cause of Action Against Protestors Who Obstruct Access to Abortion Clinics*—Bray v. Alexandria Women's Health Clinic, 24 SETON HALL L. REV. 2096 (1993).

182. 114 S. Ct. 2516 (1994).

183. *See* Respondent's Brief at 1, Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994) (No. 93-880).

184. *Madsen*, 114 S. Ct. at 2521.

185. "In the months following the September 1992 injunction, the Clinic suffered a December 1992 butyric acid attack; the Clinic doors were disabled with super glue; the doctor serving the Clinic received threats including a mock shooting . . . and focused residential picketing against the Clinic staff continued." Respondent's Brief at 3, *Madsen* (No. 93-880). In addition, the Melbourne police testified to the increase in protest activity, its overflow into the street, and protestors' disregard for police warnings. *Id.* at 7.

sounds . . . within earshot of the patients inside the Clinic.";[186] 3) *observable images* - prohibiting the use of signs which could be seen inside the clinic;[187] 4) *no approach zone* - prohibiting protestors from "physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate.";[188] and 5) *300-foot residential buffer zone* - prohibiting protestors from demonstrating within 300 feet of the residences of "employees, staff, owners or agents."[189] The Florida Supreme Court upheld the injunction[190] while the Eleventh Circuit, in a concurrent challenge, struck it down as an unconstitutional infringement on protestors' First Amendment right of free speech.[191] The U.S. Supreme Court granted certiorari to resolve the dispute.[192]

In its opinion, the Court first explained why the injunction was not content or viewpoint based and therefore did not warrant a strict scrutiny analysis as urged by the petitioners.[193] The Court stated that an injunction, by its very nature, targets a specific group of people based on that group's past behavior.[194] Whether an injunction is content or viewpoint based, however, depends upon the purpose of the court in issuing the order. The Florida state court adopted the restriction in response to the protestors' violation of the original order, not because of their antiabortion message.[195] The injunction was, therefore, content-neutral.

The Court next distinguished a content-neutral injunction from a content-neutral statute, the former being a remedy "imposed for violations (or threatened violations) of a legislative or judicial decree,"[196] and the latter a "legislative choice regarding the promotion of particular societal interests."[197] The constitutionality of a content-neutral statute, which restricts free speech in a public forum, normally requires a court to apply the intermediate scrutiny standard from *Ward v. Rock Against Racism*.[198] Under this standard, a court evaluates whether the restriction on speech is "justified without reference to the content of the regulated speech, [is] narrowly tailored to serve a significant

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186. *Madsen*, 114 S. Ct. at 2522.

187. The protestors were known to prop ladders against the Clinic's 8-foot privacy fence and hold up signs within view of patients inside the clinic. Respondent's Brief at 4, *Madsen* (No. 93-880).

188. *Madsen*, 114 S. Ct. at 2522.

189. *Id.*

190. *Id.*

191. *Id.* at 2523.

192. *Id.*

193. *Id.* at 2523 (referring to Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

194. *Id.*

195. *Id.* at 2523-24. "Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Id.* at 2523 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

196. *Id.* at 2524.

197. *Id.*

198. 491 U.S. 781 (1989).

government interest, and . . . leave[s] open ample alternative channels for communication of the information."[199]

The Court in *Madsen*, however, was concerned that a content-neutral injunction has a greater potential to discriminate. Therefore, the Court sought to apply First Amendment principles more strictly than those embodied in the intermediate scrutiny standard. It announced a new standard whereby the constitutionality of a content-neutral injunction requires a finding that its restrictions "burden[ed] no more speech than necessary to serve a significant governmental interest."[200] The Court agreed with the Florida Supreme Court that the injunction in *Madsen* was intended to serve three significant governmental interests: 1) to protect "a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy;"[201] 2) to ensure "public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens;"[202] and 3) to protect residential privacy.[203] These interests were then weighed against that of the protestors in exercising their right to freedom of expression guaranteed by the First Amendment.

The Court applied this balancing test to each challenged provision of the injunction. First, it upheld the 36-foot buffer zone around clinic entrances. The Court found the denial of potentially peaceful protest in that area was outweighed by the need to protect ingress to and egress from the clinic and protect the free flow of traffic on the street in front of the clinic.[204] The Court relied on facts in the record indicating that large numbers of protestors could significantly block the entrances to the clinic even though their actions were peaceful.[205] In addition, the Court reasoned that the first, less restrictive injunction, failed to maintain adequate access to the facility. According to the Court, however, the buffer zone could not permissibly include private property on the back and side of the clinic.[206] The record indicated that protest activities in those areas neither interfered with access to the clinic nor interrupted traffic on the adjoining street.[207] Thus, a restriction including those areas burdened more speech than necessary to serve the interest of maintaining access to the facility.[208]

The Court also upheld the noise restriction, finding that the health center, like any medical facility, requires a comfortable and quiet atmosphere for its patients. Similar noise restrictions had previously been upheld as reasonable by the Court, based on the nature of the area in question.[209] In *Madsen*, the

199. *Ward*, 491 U.S. at 791 (citations omitted).
200. *Madsen*, 114 S. Ct. at 2525.
201. *Id.* at 2526.
202. *Id.*
203. *Id.*
204. *Id.* at 2527.
205. *Id.*
206. *Id.* at 2528.
207. *Id.*
208. *Id.*
209. *Id.* "[T]he nature of a place, 'the pattern of its normal activities, dictate the kinds

Court reasoned that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[210] The noise restriction, therefore, was a necessary burden on protestors' speech. With regard to observable images, however, the Court found "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears."[211] As such, a restriction on images observable from clinic windows was an unnecessary burden on the protestors' speech.

Next, the Court invalidated both the provision prohibiting protestors from engaging in uninvited communication with persons entering the clinic and the provision prohibiting demonstrations within 300 feet of the personal residences of clinic staff. Both restrictions were found to restrict peaceful protest beyond that necessary to maintain clinic access and residential privacy. The Court explained that when a topic is a subject of heated public debate, people "must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[212] While the Court indicated it might have upheld a smaller buffer zone around staff residences, a 300 foot zone was too broad and not justified by the facts in the record.[213]

Madsen is important because it recognizes injunctions as a means of addressing violence at abortion clinics. It demonstrates that even those on the Court who oppose abortion are unwilling to permit unlawful protest. Despite the Court's ruling in *NOW v. Scheidler*,[214] RICO has proved to be an illusory solution to the problem of day-to-day protest activities. *Madsen*, however, offers definitive and immediate protection for abortion clinics, patients, and personnel. In addition, the majority demonstrated a respect for the rights of both parties. The decision indicated that neither a woman seeking an abortion nor protestors seeking to express their viewpoint may exercise their right to the exclusion of the other. Many saw *Madsen* as a sound compromise.[215] Others, however, believed the Supreme Court had gone too far in restricting the free speech of protestors.[216]

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of regulations . . . that are reasonable.'" Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). For an analysis of Supreme Court opinions addressing noise restrictions, see Richard E. Guida, Note, *Constitutional Law—First Amendment Freedom of Speech—Statute Prohibiting "Loud and Unseemly" Noises is a Content-Neutral Regulation of Protected Speech*, 20 U. BALT. L. REV. 507 (1991) (pointing out that the Supreme Court generally upholds regulation of amplified speech if necessary to protect the public from noise).

210. *Madsen*, 114 S. Ct. at 2528.

211. *Id.* at 2529.

212. *Id.* at 2529 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

213. *Id.* at 2530.

214. 114 S. Ct. 798 (1994).

215. *See, e.g.*, Joan Biskupic, *Court Allows Abortion Clinic Buffer Zones; Scalia Sees Threat to Free Speech Rights*, WASH. POST, Jul. 1, 1994, at A1; Aaron Epstein, *Court Backs Restrictions on Protestors It Upheld, 6-3, A Florida Judge's Ruling Against Anti-Abortion Demonstrators. Scalia Decried the Decision as "A Powerful Loaded Weapon"*, PHILA. INQUIRER, Jul. 1, 1994, at A3.

216. *See* Epstein, *supra* note 215.

B. *The First Amendment Implications of* Madsen

Justice Scalia, in a dissenting opinion joined by Justices Kennedy and Thomas, attacked the standard developed in *Madsen* and accused the majority of making yet another exception in the context of abortion.[217] The entire decision, in Justice Scalia's view, was "profoundly at odds with [the Court's] First Amendment precedents and traditions . . . ."[218] He advocated strict scrutiny of any injunction mainly because be believed such a restriction on speech is as likely to intentionally discriminate against a particular viewpoint as is a content-based statute. In Justice Scalia's opinion, the Court should have evaluated whether the injunction's restriction on speech was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[219] Justice Scalia primarily contended that the 36-foot buffer zone, which included a public sidewalk area, was an impermissible restriction on the protestors' right of free expression. Because he believed the record did not reflect sufficient violence or attempts to prevent patient entry into the clinic,[220] Justice Scalia did not understand the majority's willingness to curtail the protestors' activities in any way. He likened the demonstrations in *Madsen* to civil rights protests[221] and implied that the Court's decision could support future restrictions on social protest with little or no findings of fact.[222]

Justice Scalia's disagreement with the majority in *Madsen* is illustrative of a current debate among First Amendment scholars. There are those who would leave speech mostly deregulated and others who Professor Kathleen M. Sullivan terms the "new speech regulators."[223] Professor Sullivan argues that the new speech regulators blur distinctions created by modern free speech doctrine.[224] For example, where the modern free speech consensus draws a line between pure speech and speech as conduct, allowing regulation only of the latter, the new speech regulators would equate some pure speech with physical assault.[225] By upholding the noise restriction, the *Madsen* Court demonstrated some accord with the view of the new speech regulators. The Clinic argued that antiabortion speech outside the clinic caused patients to display physical symptoms of anxiety, requiring increased doses of sedation.[226] The Court rejected this equation of speech with physical harm in its refusal to restrict protestors from shouting their message or approaching patients entering the clinic. The Court did, however, find that once inside the clinic, restriction of a bull-

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217. *Madsen*, 114 S. Ct. at 2535 (J. Scalia dissenting).

218. *Id.*

219. *Id.* at 2537 (quoting Perry Education Ass'n v. Perry local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

220. *Id.*

221. *Id.* at 2542.

222. *Id.* at 2550.

223. Kathleen M. Sullivan, Lecture, *Free Speech Wars*, 48 SMU L. REV. 203, 206 (1994).

224. *Id.*

225. *Id.* at 209; *e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993) (arguing that pornography sexualizes male dominance and is a harm in itself).

226. *Madsen*, 114 S. Ct. at 2521.

horned message is necessary "to ensure the health and well-being of the patients."[227] This demonstrates a nod towards the view that pure speech may be regulated in some instances when it is thought to create physical harm.

In addition, the new speech regulators would have the courts focus more upon the "effect" of a restriction on speech than on the "purpose" of the restriction. Currently, the Supreme Court will generally uphold a content-neutral restriction on speech and strike down a content-based restriction. Professor Cass Sunstein points out, however, that some restrictions on a particular viewpoint may not be as damaging as a blanket ban on speech.[228] Professor Sunstein cites a public university prohibition on a narrow category of racial hate speech as an example of an acceptable content-based restriction.[229] In contrast, a restriction on all speech in airports, train stations, and bus terminals would be an impermissible restriction of the fora in which speech can take place.[230] Professor Sunstein argues for a less mechanical application of First Amendment principles.

The majority in *Madsen* seemed to follow this line of thinking. Whereas Justice Scalia would have the Court routinely characterize an injunction as a content-based restriction, the majority in *Madsen* undertook a more thoughtful approach. It refused to automatically classify all injunctions as content-based just because they enjoin the activities of a single group. On the other hand, the majority acknowledged that because injunctions always target a particular group, they could potentially be used to stifle a particular viewpoint. The majority, therefore, fashioned a stricter content-neutral standard and then evaluated each section of the injunction individually to assess its effect on the parties. With each provision, the Court asked, what will happen to protestors if this restriction is included and what will happen to clinic personnel and patients if it is not? Adoption of the limited 36-foot buffer zone reflects such an analysis. The Court upheld a 36-foot restriction in order to maintain access to the clinic, but struck down portions around the clinic where protest activity did not obstruct an entrance to the clinic. Such a fact-driven decision-making process has the potential to create a more just outcome. It does not, however, produce meaningful guidelines for those similarly situated.

The majority in *Madsen* may disagree with some of the opinions advanced by the new speech regulators. It is interesting, however, to see how a recent Supreme Court decision incorporates elements of their philosophy. First Amendment law, in Justice Scalia's view, has been forever marred by the decision in *Madsen*. This decision may, however, mark a necessary change in the way we view freedom of speech. The availability of a post-injury remedy for patients and clinic personnel may not be enough in the context of abortion protest where peaceful picketing has given rise to clinic invasions, personal assault, and even murder. The Court cannot choose freedom of speech over

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227. *Id.* at 2528.

228. Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 42.

229. *Id.*

230. *Id.*

freedom of choice or vice versa. Placing some restriction on protestors' speech, while refusing to shield recipients from their message, however, encourages respect for differing viewpoints. Achievement of such a compromise could end violence in the on-going debate over abortion.

C. *Post*-Madsen *Decisions*

As mentioned above, the Court in *Madsen* paid particular attention to the facts of the case. It evaluated the specific instances of conduct in relation to the restriction sought. While the Court's analysis may have produced a sound result in *Madsen*, it provides only a vague guideline for district judges in crafting permissible injunctions and for courts of appeal in evaluating them.

1. Demonstrations On and Around Clinic Property

On October 31, 1994, the U.S. Supreme Court vacated a California Supreme Court's judgment regarding an injunction aimed at abortion protestors, and remanded the case for further consideration in light of *Madsen*. In *Planned Parenthood Shasta-Diablo, Inc. v. Williams*,[231] the California Supreme Court upheld[232] a portion of an injunction restricting "all picketing, demonstrating or counseling to the public sidewalk across the street from the clinic building."[233] Only that particular provision of the injunction was reviewed by the California Court and considered by the U.S. Supreme Court.[234] The California Supreme Court determined, as had the U.S. Supreme Court in *Madsen*, that the injunction is a content-neutral restriction.[235] The California Court, however, applied the intermediate scrutiny standard established for content-neutral statutes[236] that the U.S. Supreme Court enumerated in *Ward v. Rock Against Racism*.[237] In upholding the sidewalk restriction, it identified the "health and safety of the clinic's patients" as a significant governmental interest.[238] This is in accord with the governmental interests identified in *Madsen*.

On remand, however, the *Shasta-Diablo* court is required to re-evaluate the restriction under the stricter *Madsen* standard, to determine whether the restriction burdens more speech than necessary to serve the identified signifi-

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231. 873 P.2d 1224 (Cal. 1994), *cert. granted*, 115 S. Ct. 413 (1994). In granting certiorari, the United States Supreme Court vacated and remanded the California Supreme Court opinion for further consideration in light of *Madsen*.

232. *Id.* at 1226.

233. *Id.* at 1227-28.

234. *Id.* at 1228.

235. *Id.* at 1229.

236. *Id.*

237. The standard allows "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal cites omitted).

238. *Shasta-Diablo*, 873 P.2d at 1230.

cant government interest. Because the sidewalk restriction in *Shasta-Diablo* is very similar to the 36-foot buffer zone upheld in *Madsen*, the California Court is likely to uphold the sidewalk restriction with only slight modification. *Madsen* upheld a 36-foot buffer zone, but only around the entrances and driveways where, as shown by evidence in the record, protest activity had often prevented access to the clinic. In addition, the Court in *Madsen* refused to uphold portions of the buffer zone that extended into private property where protest activity had not proven to be disruptive. Similarly, the California Court in *Shasta-Diablo* may uphold the sidewalk restriction only in areas where evidence shows that protest activity prevents access to the clinic or disrupts the free flow of traffic.

In the U.S. Courts of Appeal, both the D.C. and Second Circuits have followed *Madsen* in deciding the constitutionality of injunctions that restrict the speech of abortion protestors. In *Pro-Choice Network v. Schenck*,[239] the Second Circuit struck down a bubble-zone provision that prohibited all demonstrations within fifteen feet of clinic entrances and driveways and within fifteen feet of all persons and vehicles seeking access to the facility. The provision did allow two demonstrators at a time to enter the bubble zone for the purpose of sidewalk "counseling."[240] The court found the fifteen foot radius was well within the bounds of *Madsen*[241] and the exception for two sidewalk counselors was an acceptable way to prevent a complete ban on expression.[242] The provision would, however, prohibit standing on the sidewalk with a sign, when it did not obstruct or impede access to the clinic.[243] In addition, the record failed to reflect significant disregard of a prior court order,[244] as was the case in *Madsen*. The bubble zone in *Schenck*, therefore, was too broad a restriction on constitutionally protected expression.[245]

The court in *Schenck* also invalidated a provision that required protestors to "cease and desist" counseling people who approach the clinic, reject the counseling, and turn to walk away.[246] The court found that while this provision was less restrictive than its "no approach" counterpart in *Madsen* because it allowed a counselor to approach a potential listener, the provision nevertheless allowed the potential listener "to control the prospective counselor's opportunity to engage in protected expression."[247] It therefore violated the idea

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239. 1994 WL 480642 (2nd Cir. Sep. 6, 1994). The opinion was initially reported at 34 F.3d 130 (2nd Cir. 1994) but was withdrawn from the bound volume pending an *en banc* poll.

240. The term "sidewalk counselor" is somewhat misleading. Anti-abortion "counselors" approach women entering abortion facilities with the goal of persuading them not to have an abortion. *See, e.g.*, Alan F. Brownstein & Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073 n.1 (1991).

241. *Pro-Choice Network v. Schenck*, 1994 WL 480642 at *9.

242. *Id.*

243. *Id.*

244. *Id.* at *9-10.

245. *Id.* at *10.

246. *Id.*

247. *Id.* at *11.

established in *Hustler Magazine, Inc. v. Falwell*[248] that we must sometimes tolerate outrageous speech in order to maintain First Amendment freedom.

In *National Organization for Women v. Operation Rescue*,[249] the D.C. Circuit upheld the first portion of an injunction that prohibited protestors from "trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning, or gynecological services are performed in the District of Columbia."[250] It remanded for modification the second portion of the injunction that prohibited "inducing, encouraging, directing, aiding, or abetting others" to violate the first provision.[251] The court found the injunction to be content-neutral, identified virtually the same significant governmental interests as in *Madsen*, and then applied the "burden no more speech than necessary" standard.[252]

The court upheld the first provision because trespassing and blocking access to private property have been established by the Supreme Court as illegal conduct not protected by the First Amendment.[253] This provision is particularly noteworthy for two reasons. First, it accomplishes essentially the same goal as the thirty-six foot buffer zone in *Madsen* by maintaining access to the medical facility. The provision does not, however, restrict the expression of a protestor holding a sign outside the clinic who is not blocking access to an entrance or driveway. Presumably, though, if this injunction does not succeed in deterring clinic blockades, the district court could create a buffer zone similar to that in *Madsen*. Second, unlike the injunction in *Madsen*, which involved a particular abortion clinic, the injunction in *NOW v. Operation Rescue* covers the entire District of Columbia. Such a distinction was not discussed in *Madsen* but could be important for other cities drafting similar injunctions or ordinances. Other courts might rule that such a regional restriction on speech is not narrowly tailored and therefore unconstitutional.

In reviewing the second provision, the D.C. Circuit Court ultimately relied on *Madsen*. Operation Rescue's primary concern was that the terms "inducing" and "encouraging" are broad enough to include the ordinary fundraising and organizing activities which facilitate permissible demonstrations but might also ultimately involve prohibited activity.[254] The record of the district court, however, indicated that it meant to prohibit protestors from "inciting" unlawful acts.[255] The D.C. Circuit Court agreed that "inducing" and "encouraging" were impermissibly vague but that use of the term "inciting" would make the

248. 485 U.S. 46, 56 (1988).

249. 37 F.3d 646 (D.C. Cir. 1994).

250. *Id.* at 649.

251. *Id.*

252. *Id.* at 655.

253. *Id.*; *see* Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1971) (holding there is no First Amendment right to trespass on private property); Cox v. Louisiana, 379 U.S. 536, 555 (1965) (holding there is no right to block physically access to private property as a means of protest).

254. National Org. for Women v. Operation Rescue, 37 F.3d at 656.

255. *Id.* at 657.

prohibition clear.[256] As the injunction's vague terms created an unnecessary burden on protestors' speech, the court remanded that portion of the order to the district court with instructions to remove the vague terms and insert the word "inciting," which more clearly expressed the district court's intentions.[257]

2. Residential Picketing

The U.S. Supreme Court first addressed residential picketing by abortion protestors in *Frisby v. Schultz*.[258] After much controversy over antiabortion demonstrations outside the home of an abortion doctor, the town of Brookfield, Wisconsin adopted an ordinance that completely banned picketing "before or about" any residence.[259] The Supreme Court recognized that the government has a significant interest in protecting residential privacy, as "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."[260] The Court, however, upheld a limited interpretation of the restriction, finding that to "fall within the scope of the ordinance the picketing must be directed at a single residence."[261] This meant protestors could continue to terrorize a particular resident. They merely had to picket up and down the entire block rather than in the area directly in front of the resident's home. Their activities would then cease being "focused" and become a "more generally directed means of communication" which, according to *Frisby*, may not be completely banned in residential areas. Such a narrow holding restrained the spatial reach of the ordinance and cast doubt on the future ability of municipalities to remedy the harms associated with residential picketing.[262]

In *Madsen*, the Court addressed the constitutionality of a restriction on picketing in residential neighborhoods. The injunction at issue in *Madsen* placed a blanket ban on picketing within 300 feet of the residences of clinic staff. While recognizing the need to maintain privacy of the home, the Court found a 300 foot buffer zone to be much broader than necessary to achieve that goal.[263] In addition, the prohibited zone was much larger than the "focused picketing" ban in *Frisby*.[264] The Court advised, however, that a smaller zone and less restrictive ban on the time of picketing, the duration of pickets, and the number of picketers might be upheld if supported by sufficient evi-

256. *Id.* at 656.
257. *Id.* at 658.
258. 487 U.S. 474 (1988).
259. *Id.* at 476.
260. *Id.* at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).
261. *Frisby*, 487 U.S. at 483.
262. *See The Supreme Court 1987 Term—Residential Picketing*, 102 HARV. L. REV. 261 (1988) (concluding that the Court failed to enunciate an ascertainable test for lower courts to follow).
263. *Madsen*, 114 S. Ct. at 2530.
264. *Id.* at 2529-30.

dence.[265] Unfortunately, the Court did not specify what kind and how much evidence would be necessary to support a particular restriction.[266] The Supreme Court subsequently granted certiorari on a New Jersey Supreme Court decision that upheld a 300 foot residential picketing ban.

In *Murray v. Lawson*,[267] the Court vacated and remanded the decision of the New Jersey Supreme Court[268] for further consideration in light of *Madsen*. After Dr. Elrick Murray, an abortion doctor, became the target of antiabortion protest at his home, a court in the New Jersey Chancery Division issued a permanent injunction banning protestors from "picketing in any form including parking, parading or demonstrating in any manner, within 300 feet of the Murray residence."[269] Both the New Jersey Appellate Division and the New Jersey Supreme Court initially upheld the 300 foot restriction.[270] On remand, after reviewing *Madsen*, the New Jersey Supreme Court amended the original injunction to allow picketing up to 100 feet of the Murray's property line, in a group of no more than ten persons, for one hour every two weeks, with twenty-four hour notice to the local police department.[271]

The New Jersey Supreme Court first rejected the protestors' argument that the entire injunction was a "'prior restraint' on speech and thus presumptively unconstitutional."[272] The court explained that a prior restraint generally involved "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[273] The U.S. Supreme Court had summarily disposed of this issue in *Madsen*, by pointing out that every injunction that incidentally affects speech is not necessarily a prior restraint.[274] Because a buffer zone only partially restrained the protestors' message, as they were free to voice it in a variety of

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265. *Id.* at 2530.

266. The Court added to this confusion when it denied certiorari in Winfield v. Kaplan, 114 S. Ct. 2783 (1994), on the same day it issued its opinion in *Madsen*. *Winfield* involved an identical 300 foot ban on residential picketing. In a dissenting opinion joined by Justices Kennedy and Thomas, Justice Scalia explained that the Court deferred disposition on *Winfield* until a final decision was reached in *Madsen*. Incredulously, the majority of the Court decided not to vacate and remand the case for further consideration in light of the judgment in *Madsen*, but rather to deny certiorari. Justice Scalia surmised that because the injunction in *Winfield* was only temporary, the Court majority must have presumed the North Carolina court would follow *Madsen* in issuing the permanent order. This still left a question, Justice Scalia argued, as to why the Court did not deny certiorari initially. *Id.* at 2783.

267. 115 S. Ct. 44 (1994).

268. Murray v. Lawson, 642 A.2d 338 (N.J. 1993), *vacated*, 115 S. Ct. 44 (1994).

269. Murray v. Lawson, 649 A.2d 1253, 1257 (N.J. 1994), *cert. denied*, No. 94-1450, 1995 WL 94168 (May 30, 1995).

270. *Id.* at 1255.

271. *Id.* at 1268.

272. *Id.* at 1261. The protestors based their argument on a footnote in *Madsen*. That footnote indicated that the injunction in *Madsen* was issued because of unlawful conduct, not because of the content of the expression. *Madsen*, 114 S. Ct. at 2524 n.2.

273. *Murray*, 649 A.2d at 1261 (quoting Alexander v. United States, 113 S. Ct. 2766, 2771 (1993)).

274. *Madsen*, 114 S. Ct. at 2524 n.2.

other ways, the restriction was not an impermissible prior restraint.[275] The New Jersey Supreme Court adopted this reasoning from *Madsen* and pointed out that the protestors were not prohibited from leafletting, canvassing, and picketing outside the buffer zone in the Murrays' neighborhood.[276] In addition, the court denied that the injunction was aimed at the content of the protestors' message, as picketing in front of the Murray residence for any purpose would violate the Murrays' privacy.[277]

After making these initial findings, the New Jersey Supreme Court proceeded to apply the *Madsen* test to the 300 foot restriction. The court first looked at the evidence offered in *Madsen* to support the 300 foot zone. Reasoning that more evidence than in *Madsen* was necessary to justify such a restriction, the New Jersey Supreme Court compared its record to that of *Madsen*.[278] Here, the record reflected that the trial judge engaged in a rigorous inquiry. He viewed a videotape, looked at pictures of the protests, and heard live testimony in evaluating the request for injunctive relief.[279] In addition, he personally examined the Murrays' neighborhood and consulted the town tax map in determining how to design the injunction.[280] The court concluded that the record developed by the trial judge clearly supported some sort of buffer.[281] It chose to shorten the distance from 300 to 100 feet because at that distance, the protestors would still be visible a lot-and-a-half away, but inside their home the Murrays would no longer feel imprisoned.[282] Limiting the number of picketers to ten prevented the Murrays from feeling besieged and assured the protestors that their picketing would be taken seriously.[283] Allowing picketing once every two weeks for one hour gave protestors the opportunity to communicate their message without subjecting the Murrays to a constant barrage.[284] The New Jersey Supreme Court ultimately concluded that the modified injunction allowed the protestors to communicate their message effectively while still affording protection to the Murrays.[285]

Murray is a reasonable interpretation of the Supreme Court's decision regarding residential picketing in *Madsen*. The opinion in *Madsen*, however, gave little guidance beyond its finding that a 300 foot buffer was too broad and that sufficient evidence was necessary to justify any restriction. Nevertheless, the New Jersey Supreme Court aptly applied the enumerated standard and revised the restriction to effect a better balance of first amendment freedoms with the residential right of privacy. *Murray* may be instructive for future

275. *Id.*
276. *Murray*, 649 A.2d at 1262.
277. *Id.* at 1263.
278. *Id.* at 1264.
279. *Id.* at 1266.
280. *Id.* at 1265-66.
281. *Id.* at 1268.
282. *Id.* at 1268.
283. *Id.*
284. *Id.*
285. *Id.* at 1268.

cases, but decisions in this area will likely remain subjective as they are heavily fact-driven. The New Jersey decision is nevertheless important because it gives more definition to *Frisby*'s concept of focused picketing and maintains injunctive relief as a way to prevent social protest from invading the privacy of the home.

The United States Court of Appeals for the Sixth Circuit has subsequently reviewed a city ordinance identical to that in *Frisby*. The majority decision in *Vittitow v. City of Upper Arlington*,[286] issued January 12, 1995, calls the dictates of both *Frisby* and *Madsen* into question. Plaintiffs were abortion protestors who sought an injunction to prevent the City of Arlington from enforcing a city ordinance that prohibited picketing "before or about the residence or dwelling of any individual . . . ."[287] The district court issued an injunction enjoining the city from enforcing the ordinance as written, but provided for conditional enforcement which, in effect, imposed a counter-injunction on protestors' activities. The injunction prohibited picketers from stopping or gathering "in front of or around any residence"[288] and from giving "undue emphasis to directing their activities to one residence."[289] After further review, however, the district court modified the order sua sponte to prevent protestors from "picketing in front of: (a) the doctor's home, and (b) the two homes on either side of the doctor's home," as well as "the home of anyone [the city has] probable cause to believe is the target, focus or subject of the picketing, as well as . . . the two homes on either side of the home just described."[290]

The Sixth Circuit Court reviewed this ordinance and injunction in light of its understanding of *Frisby* and *Madsen*. The court interpreted *Madsen* to clearly make suspect if not prohibit, "any linear extension beyond the area 'solely in front of a particular residence.'"[291] While the city of Arlington used language identical to that upheld in *Frisby*, the Sixth Circuit admonished the city for doing so, as only a narrow interpretation of the *Frisby* ordinance was ultimately upheld.[292] The court pointed out that the local police would find a violation when it thought one residence was being targeted. This would be incorrect, according to the Sixth Circuit, because every picket will have a target and "only focused picketing taking place solely in front of a particular residence is prohibited."[293] The court distinguished this case and those such as *Murray*, where the victim of residential picketing seeks the injunction. In the latter case, the court conceded, "the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for."[294] Here, however, the court, feeling restrained by

286. 43 F.3d 1100 (6th Cir. 1995).
287. *Id.* at 1101.
288. *Id.* at 1102.
289. *Id.* at 1102-03.
290. *Id.*
291. *Id.* at 1105.
292. *Id.* at 1106.
293. *Id.* at 1107 (quoting Frisby v. Schultz, 487 U.S. 474, 483 (1988)).
294. *Vittitow*, 43 F.3d at 1107.

federalism concerns, refused to rewrite the city ordinance. Since the court found the ordinance's complete ban on residential picketing was in conflict with *Madsen*, it therefore reversed and remanded with instructions for the district court to issue a permanent injunction enjoining enforcement of the ordinance.[295]

Judge Boyce F. Martin, in his dissenting opinion, applied a much broader reading of *Frisby* and would have remanded the injunction to the district court for revision consistent with *Madsen*. According to Judge Martin, *Frisby*'s rationale for balancing the constitutional rights involved would permit a restriction on other forms of picketing, not just those taking place in front of one residence.[296] In his view, "the targeted homeowner is as much a captive audience when picketers repeatedly march in front of a home as when they are standing still."[297] Judge Martin interpreted *Frisby* to create a "zone" of prohibition and *Madsen* to somewhat define that zone. He concluded that the three-house zone created by the district court injunction burdened no more speech than necessary to protect residential privacy,[298] but suggested that the Supreme Court should consider modifying the public forum doctrine in this context. Judge Martin proposed that residential streets and sidewalks be reclassified in light of the privacy interests involved.[299]

The Supreme Court may be forced to clarify its position on residential picketing as abortion clinic personnel increasingly become the target of protest activities in their own neighborhoods. In addition, the neighbors of abortion doctors and clinic personnel have become fearful that protests in their neighborhoods will become violent.[300] Activity aimed at intimidating individual doctors and clinic workers is likely to increase as protestors consider it the most effective way to cause those employees to quit their positions.[301] Joseph Scheidler, executive director of the Chicago-based Pro-Life Action League has remarked that "campaigns against doctors are more effective than clinic blockades, which require a steady supply of protestors willing to risk arrest."[302] If the risk of arrest in residential neighborhoods increases, however, perhaps some of the tactics waged against abortion providers and their employees will cease.

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295. *Id.*

296. *Id.* at 1110 (Martin, J., dissenting).

297. *Id.* at 1111.

298. *Id.*

299. *Id.* at 1112.

300. *See* Leef Smith, *Doctor's Neighbors Fear Violence as Abortion Pickets Hit Home*, WASH. POST, Jan. 12, 1995, at Metro 1.

301. *See 1993 Clinic Violence Survey Report supra* note 21, at 5; *see also* Ana Puga, *Pressed, More Providers Halting Their Practices*, BOSTON GLOBE, Nov. 1, 1994, at 1; *Abortion Rights Leaders Plan to Leave Pensacola*, MIAMI HERALD, Oct. 30, 1994, at 6B.

302. Sandra G. Boodman, *Abortion Foes Strike at Doctors' Home Lives Illegal, Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1.

III. FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT

On May 26, 1994, President Clinton signed the "Freedom of Access to Clinic Entrances Act" (FACE).[303] The law amends Chapter XIII of Title 18 of the U.S. Code and prohibits blocking access to clinics, damaging clinic property, and injuring or intimidating patients and staff.[304] It provides criminal penalties and civil remedies including injunctive relief and compensatory and punitive damages.[305] At the signing, both President Clinton and U.S. Attorney General Janet Reno expressed their commitment to ending the nationwide campaigns of violence that prompted the need for more adequate federal legislation.[306]

On June 4, 1994, six protestors in Milwaukee were the first charged with violating FACE when they blocked the entrance to a Milwaukee abortion clinic by chaining and cementing themselves to vehicles in front of the clinic.[307] The six protestors were each convicted of a misdemeanor for a first-time, nonviolent offense.[308] In addition, the U.S. Department of Justice filed the first civil lawsuit under FACE seeking damages against the Milwaukee protestors on December 20, 1994.[309] Recently, two protestors in Fargo, North Dakota who attached themselves with bicycle locks to cars placed in front of the entrance to North Dakota's only abortion clinic, were charged with a civil FACE violation.[310]

The highly publicized trial of former minister Paul Hill marked the first time a FACE violation was sought for murder. Hill was charged and found guilty under FACE for murdering Dr. John Britton and his volunteer escort James H. Barrett on July 29, 1994 outside the Ladies Center in Pensacola, Florida.[311] As a result of the jury verdict on the FACE charge, Hill received two life sentences in federal prison. Florida Circuit Judge Frank Bell sentenced Hill to death on state murder charges.[312]

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303. 18 U.S.C.A. § 248 (1994); *see also* Ruth Marcus, *President Signs Clinic Access Law, Foes File Lawsuit*, WASH. POST, May 27, 1994, at A10.

304. 18 U.S.C.A. § 248 (1994).

305. 18 U.S.C.A. § 248(b)-(c) (1994).

306. Marcus, *supra* note 303; *see also As Congress Adjourns, FACE Bill Wins Passage in House and Senate*, WASH. MEMO (The Alan Guttmacher Institute, Wash., D.C.), Nov. 23, 1993, at 1.

307. Stephen Labaton, *Law on Abortion Protestors Gets First Test*, N.Y. TIMES, June 7, 1994, at A14.

308. *6 Convicted of Blocking Milwaukee Clinic*, CHI. TRIB., Nov. 16, 1994, at 13.

309. *U.S. Sues Protestors Who Blocked Milwaukee Clinic*, CHI. TRIB., Dec. 21, 1994, at 3.

310. *Feds Seek Restraining Order, Civil Damages in Abortion Protests*, STAR TRIB., Jan. 20, 1995, at 2B; *2 Who Blocked Abortion Clinic Entry in Fargo May Face Federal Charges*, STAR TRIB., Nov. 23, 1994, at 4B.

311. *Trial in Abortion Doctor's Slaying will Test Clinic Protection Law*, S. F. CHRON., Oct. 3, 1994, at A4; Mike Clary, *Hill Found Guilty in Abortion Shootings Violence: The Former Minister is the First Person Convicted of Violating the Nation's New Clinic Access Law*, L.A. TIMES, Oct. 6, 1994, at A1; Ronald Smothers, *Man Accused in Clinic Slayings Is Convicted on Federal Counts*, N.Y. TIMES, Oct. 6, 1994, at A1.

312. William Booth, *Abortion Clinic Slayer is Sentenced to Death*, WASH. POST, Dec. 7,

John Salvi III, the suspect in the more recent murders of abortion clinic personnel in Brookline, Massachusetts, may also face penalties under the federal clinic access law.[313] The Brookline murders have spurred a new wave of federal action aimed at protecting abortion clinics and their personnel. U.S. Attorney General Janet Reno asked the Department of Justice to evaluate whether additional legislation may be needed to "stem the violence" at abortion facilities.[314] In addition, U.S. Marshalls issued a list of security tips and delivered them by hand to every abortion clinic in the nation. The eight-page document suggested surveillance cameras, buzzers, metal detectors, intercoms, bullet-proof vests, police detail, security guards, escorts for patients, bullet-proof glass, and automatic door locks as means to increase safety.[315] Also, the Justice Department filed the first of several civil lawsuits that implicate protestors who have threatened doctors, against a protestor in Cleveland accused of threatening to kill an abortion doctor and attempting to run him off the road.[316] This new protection effort may assuage the fears of those who believed FACE and its goals would be undermined by the new Republican majority that entered Congress following the November 1994 elections.[317]

Prior to the election, however, there was widespread concern about FACE's effectiveness in deterring violence. On September 22, 1994, the House Judiciary Committee's Subcommittee on Crime and Criminal Justice held an oversight hearing to evaluate the enforcement of FACE.[318] The Subcommittee listened to the statements of Jo Ann Harris from the Justice Department; James Brown from the Bureau of Alcohol, Tobacco and Firearms (ATF); Linda Taggart from the Ladies Center in Pensacola, Florida; Dr. George Klopfer from the Fort Wayne Women's Health Organization, Sergeant William Walsh from the Fort Wayne Police Department; Susan Finn on behalf of the Pro-Life Movement and others.[319] The Justice Department reported

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1994, at A1.

313. Eric L. Wee, *Clinic Slaying Suspect Caught Shooting at Norfolk Abortion Center Tied to Massachusetts Attacks*, WASH. POST, Jan. 1, 1995, at A1.

314. ABORTION REPORT, *Spotlight Story FACE: Pro-Lifers Say it Limits Speech; Reno calls for Review*, 6 ABORTION REPORT NO. 118, Jan. 13, 1995, *available in* WL APN-AB Database, List & Date Query.

315. *Marshalls Advise Clinics—Sniff Mail, Then Open Tips to Protect Abortion Providers*, S. F. CHRON., Jan. 7, 1995, at A11.

316. *Id.*

317. *See generally* Carol Jouzaitis, *Abortion Foes' Strength in Congress Could Impede Medical Research*, CHI. TRIB., Nov. 20, 1994, at 1; Fawn Vrazo, *Conservative Ascendancy Propels Abortion to the Crossroads in '92, Anti-Abortion Forces Felt Doomed. Now, Since Tuesday's Vote, They Suddenly Can Count on Powerful Sympathizers in the Majority At Many Levels*, PHILA. INQUIRER, Nov. 13, 1994, at A15; Nirmala Bhat, *Abortion Factions Draw New Battle Lines in Anticipation of GOP-Controlled House*, STAR TRIB., Nov. 16, 1994, at A10. However, on Nov. 16, 1994, in a telephone interview with the author, William R. Yeomans, Legislative Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, stated there was "no reason to believe [FACE] will go by the wayside," and that the Justice Department will continue to enforce FACE "as the facts and terms of the statute dictate."

318. Robert Pear, *Abortion Clinic Workers Say Law is Being Ignored*, N.Y. TIMES, Sept. 23, 1994, at A16.

319. *Witness List*, House of Representatives Committee on the Judiciary, Subcommittee

that it had, along with the ATF, FBI, and Marshalls' service, undertaken a task force investigation into the criminal activities of protestors to assess the existence of a nationwide conspiracy.[320] Despite this and other federal efforts, Linda Taggart testified that local police and the F.B.I. refused to enforce FACE when she contacted them in June 1994.[321] Susan Hill, president of the National Women's Health Organization, also testified that she had difficulty finding someone to enforce the new law.[322] This lead subcommittee chairman, Rep. Charles E. Schumer, to conclude that, "[t]he Justice Department must do better. There is not adequate enforcement of this law."[323] While the Senate voted 99-0 at the end of January 1995 to approve a non-binding resolution asking the attorney general to fully enforce FACE, Senator Barbara Boxer, who introduced the resolution, felt protection for clinics is not high on the new Republican majority's agenda.[324]

FACE has also been attacked in numerous lawsuits filed in federal district courts by protestors challenging the law's constitutionality. Five of the six cases have affirmed that FACE does not violate the First Amendment rights of protestors and is a permissible use of congressional law-making power under the Commerce Clause.[325] On June 17, 1994, Judge Leonie Brinkema for the U.S. District Court for the Eastern District of Virginia issued the first FACE ruling in *American Life League, Inc. v. Reno*.[326] Judge Brinkema found the law reasonable and appropriate because it only prohibited the conduct of protestors who threaten violence, commit violence, or physically block a clinic

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on Crime and Criminal Justice, *available in* 1994 WL 51762, Sept. 22, 1994. For full text of the prepared statements of the witnesses at the Sept. 22, 1994 hearing before the House Subcommittee on Crime and Criminal Justice, see WL "USTESTIMONY" database.

320. *See* Testimony of Jo Ann Harris, Assistant Attorney General, Criminal Division, U.S. Department of Justice, before the House Subcommittee on Crime and Criminal Justice, Sept. 22, 1994, *available in* 1994 WL 517647, at *4; *see also Jury Seeks Link Among Abortion Clinic Attacks, Justice Department Task Force Subpoenas Witnesses*, CHI. TRIB., Dec. 15, 1994, at 24.

321. Pear, *supra* note 318.

322. "Federal officials tell us to go to local authorities and the local authorities," she said, "tell us that they have no jurisdiction, that we have to get the Feds to do it." *Id.* In a telephone interview with the author, William R. Yeomans, Legislative Counsel with the Justice Department, explained that local law enforcement are initially responsible for making arrests and then, one of ninety-six U.S. attorneys across the country, in conjunction with the Civil Rights Division at the Justice Department, would make the decision whether or not to press FACE charges. He also remarked that clinics had been advised they can call the Civil Rights Division directly regarding possible FACE violations. *See supra* note 317.

323. Pear, *supra* note 318.

324. Fox Butterfield, *Abortion Clinics Fortify Defenses; U.S. Faulted on Protecting Sites*, N.Y. TIMES, Jan. 21, 1995, at A1.

325. *See* United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994); American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994). *But see* United States v. Wilson, No. 94-CR-140, 1995 WL 114802 (Mar. 16, 1995 E.D. Wis.).

326. 855 F. Supp. 137 (E.D. Va. 1994); *see* AMERICAN POLITICAL NETWORK *Spotlight Story FACE First Ruling Says its Constitutional*, 5 ABORTION REPORT NO. 225, Jun. 17, 1994, *available in* WL APN-AB Database, List & Date Query.

door.[327] Subsequent cases followed Judge Brinkema's reasoning in holding that FACE does not abridge the First Amendment freedoms of abortion protestors. Additionally, in *Council for Life Coalition v. Reno*,[328] Judge Gonzalez pointed to ample congressional findings to uphold the legitimacy of congressional power to regulate in this area.[329]

The U.S. Supreme Court may soon have the opportunity to make its own determination with regard to FACE.[330] Considering the overwhelming approval of FACE thusfar in the courts, it seems unlikely that the Court would strike down the law as unconstitutional. Some scholars, however, would disagree.[331] For now, anyway, FACE remains an important tool in the effort to protect abortion providers, their staff, and patients. FACE was designed and approved by a Congress and an Administration that could no longer let violent protest go unnoticed. While Congress may now house fewer supporters of a woman's right to choose abortion, almost all agree that violent social protest cannot hide behind the First Amendment. Future administrations as well will likely support FACE and other efforts to stop domestic terrorism perpetrated by opponents of abortion.

IV. THE RESULTING FRAMEWORK

Solutions to the problem of abortion clinic violence are gradually acquiring some cohesiveness. After much trial and error, advocates for choice are discovering what works in the courtroom and what does not. Abortion clinic personnel and patients must tolerate the peaceful dissemination of antiabortion views. They should not, however, be made to fear for their lives and the lives of their families on a daily basis. Over the past few years, lengthy legal battles have provided some guidance about what is appropriate behavior for both sides. In addition, recent legislation and other efforts have given abortion providers the tools for protection against day-to-day harassment.

A. *The Short-term Solutions*

Arrest by local law enforcement is the first step in stopping illegal protest. Law enforcement personnel have become more aware of the increased risk of violence associated with antiabortion activity and may be more likely to respond than in the past. While many protestors are not deterred by arrest, fines, or even jail time, state and local authorities must continue their efforts to uphold applicable laws and enforce standing court orders. A local arrest is also the first step in bringing FACE charges. After a suspected violator has been

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327. *American Life League*, 855 F. Supp at 142.

328. 856 F. Supp. 1422 (S.D. Cal. 1994).

329. *Council for Life Colation v. Reno*, 856 F. Supp at 1431.

330. Assessing the constitutionality of FACE was listed among issues that may be in the offing for the Supreme Court's 1994-95 term. *See* Lyle Denniston, *Supreme Court Justices Get On-The-Bench Training*, BALT. MORNING SUN, Oct. 2, 1994, at 1A.

331. *See, e.g.*, Michael S. Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL'Y & L. 261 (1994).

arrested, local police and clinic administrators should contact the closest U.S. attorney or the Civil Rights Division of the Department of Justice. Provided there is enough evidence, the U.S. attorney may then proceed with a FACE prosecution.[332]

Obtaining a state court injunction may be the best way to prevent clinic blockades. As is clear in *Madsen*, a picket-free zone to maintain clinic access is an acceptable restriction on the protestors' First Amendment freedoms. On the federal level, under § 248(3)(c)(A) of FACE, a "person involved in providing or seeking to provide, or obtaining or seeking to obtain services in a facility that provides reproductive health services"[333] may seek a preliminary or permanent injunction in federal court. FACE provides injunctive relief not only for the protection of clinics and patients, but may also be used to establish a picket-free zone around the residences of clinic staff. In order to comply with *Madsen*, however, such a zone must be less than 300 feet and must be supported by sufficient evidence.[334]

In general, FACE provides a quicker remedy than is available under § 1985(3) of the Ku Klux Klan Act or § 1962(c) of RICO. For a RICO case in particular, evidence may take years to compile. An attorney general may immediately seek an injunction,[335] compensatory damages, or civil penalties under FACE. A prosecution under FACE, however, may only be sought against those who directly participate in a specific incident, while RICO provides a means to impose liability on antiabortion leaders who coordinate nationwide demonstrations. Nevertheless, FACE is an extraordinary tool for those who seek to protect women's access to reproductive health care.

B. *Long-term Solutions*

While collecting large monetary judgments from abortion protestors may be difficult, imposing liability under § 1985(3) of the Ku Klux Klan Act and § 1962(c) of RICO is a viable means to curb lawless behavior in the long run. Interpretation of the hindrance clause under § 1985(3) remains unclear after *Bray*.[336] The Ninth Circuit, in two opinions following *Bray*, has read the hindrance clause to require only proof of a conspiracy to prevent or hinder state

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332. *See generally Stop the Terrorism: Understanding Your Rights Under the Freedom of Access to Clinic Entrances Act* (NOW Legal Defense and Education Fund, Inc., Wash., D.C.) (1994).

333. 18 U.S.C.A. § 248(3)(c)(A) (1994).

334. *See* Kaplan v. Prolife Action League of Greensboro, 431 S.E.2d 828 (N.C. 1993) (modifying a restriction on residential picketing after *Madsen*), *cert. denied*, 114 S. Ct. 2783 (1994).

335. For example, U.S. Attorney Steve Hill successfully obtained an injunction under FACE against Rescue Radio producer Regina Dinwiddie to prevent her from coming within 500 feet of all abortion clinics in western Missouri and from threatening staff and clients outside the Planned Parenthood of Greater Kansas City clinic. *See* AMERICAN POLITICAL NETWORK, *State Reports Missouri: Pro-Lifer Gets 1st Restraining Order under FACE*, 6 ABORTION REPORT NO. 114, Jan. 9, 1995, *available in* WL APN-AB Database, List & Date Query.

336. 113 S. Ct. 753 (1993).

law enforcement from securing for women the constitutional right to an abortion. In both *National Abortion Federation v. Operation Rescue*[337] and *Portland Feminist Women's Health Center v. Advocates for Live, Inc.*,[338] the Ninth Circuit rejected the contention that proof of a class-based animus and a constitutional right protected from private interference are necessary to make out a claim under the second clause of § 1985(3).[339] Until the Supreme Court clarifies application of the hindrance clause, such a remedy may be available in the lower courts.

On remand from the Supreme Court, *NOW v. Scheidler*[340] is still awaiting trial in the district court to determine whether plaintiffs' evidence demonstrates a RICO conspiracy. Since then, the U.S. Supreme Court has denied, without comment, two requests for review of other cases involving RICO liability in the context of abortion protest.[341] Most notably, the U.S. District Court for the District of South Carolina issued a final order October 11, 1994, in *Palmetto State Medical Center, Inc. v. Operation Rescue*,[342] which included a jury award of $25,000 in actual damages on a RICO claim against abortion protestors. An appeal is pending in the Fourth Circuit.[343]

As mentioned above, RICO provides a means to impose liability on the leaders of antiabortion organizations. These leaders may be able to escape prosecution under FACE by never participating directly in the protest efforts they orchestrate. If they can be linked to various nationwide demonstrations, however, they are susceptible to liability under RICO. The current federal task force investigation into the sources of clinic violence may unearth enough evidence to support a federal RICO prosecution. The time-consuming and costly nature of such a lawsuit makes it an unlikely option for clinics and their advocates who have limited resources. In addition, organizers hide their assets and claim insolvency, making it less worthwhile for civil plaintiffs.[344] Proof of an "enterprise" may also become tougher as the organizers of antiabortion events scramble to conceal evidence of their alliance.[345] Nevertheless, RICO

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337. 8 F.3d 680 (9th Cir. 1993).

338. 34 F.3d 845 (9th Cir. 1994).

339. *But cf.* Women's Health Care Services, P.A. v. Operation Rescue, National, 24 F.3d 107, 109 (10th Cir. 1994) (adhering to Justice Scalia's dicta claiming the hindrance clause and deprivation clause are similarly restricted); Upper Hudson Planned Parenthood, Inc. v. Doe, 836 F. Supp. 939, 949 (N.D.N.Y. 1993) (predicting that the Supreme Court would, in all liklihood, impose the extratextual requirements on the hindrance clause as well).

340. 114 S. Ct. 798 (1994).

341. *See Supreme Court Rejects Another Anti-choice Appeal in Racketeering Suit*, REPROD. FREEDOM NEWS (Center for Reprod. L. and Pol'y, N.Y.C.) Dec. 16, 1994, at 2.

342. Information regarding this final order can be obtained from the court. The case docket number is CA-89-2548-3-6.

343. A prior appeal was dismissed upon the Fourth Circuit's finding that the district court order was not yet final. Palmetto State Medical Center, Inc. v. Operation Rescue; Operation Lifeline, No. 90-2688, 1994 WL 468123 (4th Cir. Aug. 31, 1994) (unpublished opinion).

344. *See* Paul M. Barrett, *New Legal Weapon in Abortion Fight Is Hard to Use and Hard to Enforce*, WALL ST. J., Jan. 28, 1994, at B1, B3; Ana Puga, *Battle Against Illegal Protests Follows the Money Trail*, BOSTON GLOBE, Oct. 31, 1994, at 1.

345. Interview with Katie Reinisch, Director of Public Affairs, Planned Parenthood of the

is a valid remedy to combat the source of organized violent protest.

Another long-term solution may come in the form of state and local legislation. Many states are preparing to draft their own clinic protection legislation in the hopes of stemming the violence.[346] States or municipalities may also draft legislation to create bubble zones around clinics and residences in compliance with the limitations set out in *Frisby* and *Madsen*. Additionally, introduction of the new abortion pill, RU-486, into the U.S. is seen by some as a possible end to abortion clinic violence.[347] RU-486, however, will not eliminate the need for some surgical abortions.[348] It may also cause protestors to single out patients taking the drug for increased harassment.[349]

CONCLUSION

Whatever form it may take, protection for abortion clinics, their personnel, and patients is imperative so long as the violent tactics of abortion protestors continue. Social protest is a legitimate form of expression protected by the First Amendment to the Constitution. A woman's right to terminate her pregnancy is also protected by the Constitution. Thus, there exists a conflict between two equally justified constitutional guarantees. One should not necessarily be elevated over the other. The only solution seems to be a compromise. Women walking into an abortion clinic must tolerate voices and signs that oppose abortion. Protestors must allow women to exercise their right of reproductive choice. Only when those who oppose abortion respect others' right to choose will the violence cease.

There is much room in the public forum for speech—even outrageous speech that many would find offensive. Only in a truly "open" public forum will opposing viewpoints lead to enlightenment and change. There is no room within that discussion, however, for violence and hate. It is the duty of the courts to draw the line at violence masquerading as protected free speech. Neither side in the abortion debate is likely to convince the other that their

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Rocky Mountains, in Denver, Colo. (June 8, 1994).

346. *See* Rebecca Blumenstein, *Assembly Votes to Protect Clinics*, NEWSDAY, Jan. 24, 1995, at A14; AMERICAN POLITICAL NETWORK, *State Reports Virginia: Legislature May See Clinic-Access, Notification*, 6 ABORTION REPORT NO. 115, Jan. 10, 1995, *available in* WL APN-AB Database, List & Date Query; *Maine Meeting Will Discuss Abortion Access*, BOSTON GLOBE, Oct. 25, 1994, at Metro 22.

347. *See RU-486 and the Abortion War*, ATLANTA CONSTITUTION, Jan. 10, 1995, at A14 (arguing that RU-486 could diffuse the abortion war); *The Brookline Clinic Murders*, WASH. POST, Jan. 3, 1995, at A14, (arguing that RU-486 provides a long-run defense to abortion clinic violence). *But see* Anita Manning, *Abortion Pill: An Answer or A New Problem?*, USA TODAY, Jan. 24, 1995, at A1 (reporting on the protest efforts aimed at clinics and patients participating in the clinical trials of RU-486).

348. For an in-depth report on RU-486, see Carol Jouzaitis, *RU-486: Europe's Use Shows Problems of Pill Abortions Still Are Not Easy to Obtain or to Experience*, CHI. TRIB., Oct. 2, 1994, at 1, and Carol Jouzaitis, *Abortion Pill's Next Hurdle: U.S. Testing to Begin RU-486 Fate Here Uncertain Despite Success in Europe*, CHI. TRIB., Oct. 3, 1994, at 1.

349. In November 1994, the Portland Life Ministries group launched its "No Place to Hide" campaign outside the homes of participants in the clinical trials of RU-486. *See Across the USA: News From Every State*, USA TODAY, Nov. 18, 1994, at 9A.

viewpoint is right. Individuals will be forever entrenched on both sides of the abortion issue. Let the battle, however, be fought with pens and on podiums, not with guns and bombs on the steps of abortion clinics.

Tracy S. Craige