“FACE”-ing RICO: A Remedy for Antiabortion Violence?

Susan L. Ronn

Rescue those who are being taken away to death; hold back those who are stumbling to the slaughter.¹

(The Bible)

[Person]ersonal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of the government.²

(Justice Blackmun)

More than twenty years after the Supreme Court’s landmark decision in Roe v. Wade,³ the heated debate over abortion continues to make frequent appearances in the media, elections, and courtrooms of this country. The murders of a doctor and his escort at an abortion clinic in Florida⁴ illustrated the fact that for some, the protest over the legalization of abortion has turned a corner into the realm of extreme violence.⁵ The abortion issue now seems to center on just how much violence this country is willing to condone.

¹ Proverbs 24:11 (the verse upon which pro-life group Operation Rescue bases its call to action on the abortion issue).
³ Roe v. Wade, 410 U.S. 113, 154 (1972) (holding that the right to privacy includes the right to choose an abortion).
⁴ William Claiborne, Two Killed at Clinic in Florida; Radical Abortion Foe Charged in Shootings, WASH. POST, July 30, 1994, at A1.
The fuel firing each side of the debate consists of deeply held beliefs, not only about the status of a fetus, but also about women and their role in our culture. A proper examination of the legal issues involved in the abortion controversy must not be based on the morality of the debate. And yet the personal beliefs underpinning the arguments should not be completely disregarded lest it become too easy for either side to dismiss those who disagree as either ignorant or simply unwilling to see the truth. The beliefs are real; the debate should continue; the violence must end.

The terms pro-life and pro-choice, chosen by opposing sides of the abortion issue to represent their causes, are politically charged labels. Indeed, how one chooses to use the language surrounding the debate can often be a statement in itself. Pro-life advocates are commonly referred to as antiabortionists, while pro-choice groups are termed pro-abortion or pro-death. The terms antiabortion and pro-choice are terms used and accepted in the fields of social science and the law, and therefore will be used in this Comment. Also, because this Comment centers on acts of violence directed toward abortion clinics, the term antiabortion, as opposed to pro-life, serves to differentiate the extremist views of those involved in violence against reproductive clinics from the views of those involved in peaceful demonstrations for political change.

An effective remedy for the violence directed against abortion clinics, health care providers, and the women attempting to secure services has yet to be implemented. Such a remedy is necessary not only to punish those responsible for unlawful acts, but is also necessary for the culture as a whole. A woman should be able to secure her right to an abortion, and a doctor should be able to provide abortion services, without having to run a gauntlet of terror. Likewise, peaceful protesters should be able to retain their First Amendment rights.

6. See generally KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984). Luker's book is a sociological study of the abortion issue, examining the history of the debate, the issues involved, and the people choosing to align themselves with each side. Luker argues that the debate draws on deep feelings about such things as children, families, sex, religion, and the basic nature of the individual.

7. See, e.g., Northeast Women's Center, Inc. v. McMonagle, 689 F. Supp. 465, 468-69 (E.D. Pa. 1988) (upholding the grant of a motion in limine to preclude evidence of moral beliefs on the issue of abortion as a justification or motive to be used as a defense to alleged illegal acts).

8. LUKER, supra note 6, at 3.


10. Id., at 13.

11. Judicial opinions in cases involving violence against abortion clinics, in which pro-life groups have frequently been parties, have used the term antiabortionists.
without having to fear unwarranted sanction. The escalation of violence at abortion clinics, combined with the frustration surrounding the lack of a remedy has further polarized the two sides of the abortion debate.

The Supreme Court's decision in National Organization for Women, Inc. (NOW) v. Scheidler and Congress' enactment of the Freedom of Access to Clinic Entrances Act (FACE) should both be applauded for bringing the possibility of a remedy for the violence one step closer to realization. The Supreme Court, by ruling that an economic motivation is not necessary for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), kept alive the possibility of this statute's applicability to antiabortionist violence. Congress, by enacting FACE, provided both private parties and prosecutors with a potential legal remedy for the clinic violence and certain types of illegal obstruction. Both RICO and FACE are necessary in this setting and should be vigorously utilized. Civil RICO is an ideal tool for use against both the leaders of the extremist antiabortion movement who seek to incite others to violence and the violent antiabortion groups themselves. FACE is now available as both a civil remedy and a prosecutorial weapon against those who choose to cross the line from peaceful protest into violence or certain forms of nonviolent obstruction. Nonviolent political protest protected by the First Amendment and the systematic encouragement or commitment of illegal activity are not the same thing.

In Section I, this Comment examines the nature of the violence erupting out of protest activity at abortion clinics. Section II outlines the treatment of different types of federal lawsuits brought by clinics and pro-choice groups against both antiabortion groups and the leaders that spearhead the violent protest campaigns. Section III explores the use of RICO against such groups and individuals, and the imposition of an economic motivation requirement. Section IV discusses both the Seventh Circuit's and the Supreme Court's decisions in NOW v. Scheidler. Section V addresses the concerns surrounding the

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12. The only doctor in Mississippi who performs abortions dons an Army combat helmet and bulletproof vest to go to work. Meanwhile, the National Right to Life Committee has prohibited its staff and board members from picketing clinics for fear that such activity could be illegal. Laurie Goodstein, Life and Death Choices; Antiabortion Faction Tries to Justify Homicide, WASH. POST, Aug. 13, 1994, at A1.
application of RICO to political protest activities. Section VI looks at Congress' intervention with legislation aimed to protect reproductive health care providers and their patients from violence, blockades, threats, and destruction of property, while ensuring the right to speech and conduct protected by the First Amendment. And Section VII briefly describes the possibilities for application of the two statutes.

I. VIOLENCE AGAINST ABORTION CLINICS

We regretted the passing of [Dr. Britton's] life just like a Jew in 1943 Poland who just heard Dr. Josef Mengele and his bodyguard were shot down in Auschwitz that morning. (President of Rescue America)

A bullet will stop me, and psychological violence will stop me . . . . You got one doctor down. All they need to do is kill a couple more, and then everybody quits. (Physician)

Antiabortionists believe that abortion is murder. They believe that a higher law calls them to stop it. As in the pro-choice movement, language is very powerful here; fetuses are babies, clinics are abortuaries, birth control is an abortifacient, and physicians are child-slaughterers. Antiabortionists hold deep beliefs about their actions and compare their movement to those of Ghandi and Dr. Martin Luther King, Jr. However, the violence of the actions

17. Abortion services are provided in hospitals, physician's offices, and various types of clinics. Approximately two-thirds of the procedures are performed in specialized abortion clinics. Stanley K. Henshaw, The Accessibility of Abortion Services in the United States, 23 FAM. PLAN. PERSP. 246, 246 (Nov/Dec 1991). The violence surrounding the abortion debate has not been limited to abortion clinics, but has also included organizations, such as Planned Parenthood, that offer abortion referrals and counseling but do not necessarily perform abortions on site. NATIONAL ABORTION FEDERATION, SUMMARY OF VIOLENCE AGAINST ABORTION PROVIDERS (Oct. 14, 1993). Furthermore, almost all abortion facilities provide other medical services; 94% provide contraceptive care to non-abortion patients, while 74% provide general gynecological care and treatment for sexually transmitted diseases. Henshaw, supra, at 247. It follows that much of the violence and harassment spills over into non-abortion-related patients and clinic personnel. For purposes of this article, the hospitals, physicians' offices, and clinics experiencing acts of violence and harassment will be referred to as abortion "clinics."


19. AMERICAN POLITICAL NETWORK, ABORTION REPORT (May 7, 1993) (statement of physician who performs abortions). Ironically, this statement was made before "they" did kill "a couple more." 

20. See generally, LUKER, supra note 6.


committed by some of these groups hardly paints a picture of peaceful civil disobedience.

The number of violent incidents at abortion clinics is staggering. More than one thousand acts of violence were committed against abortion clinics from 1977 to April, 1993. In addition, over six thousand clinic blockades and disruptions have been reported since 1977. Seventy-three percent of abortion clinics have been the target of at least one illegal activity.

Even more staggering, however, is the growing sense of disregard for the law and the conviction that the existence of abortion justifies any action to stop it. Since the highly-publicized murders of Dr. John Bayard Britton and his escort in Pensacola, Florida, Dr. David Gunn, also in Pensacola, the killings of two Planned Parenthood staff workers and the woundings of others present, and the wounding of Dr. George Tiller in Wichita, Kansas, many antiabortion groups have publicly condemned the shootings. Other groups,

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23. S. REP. NO. 117, 103d Cong., 2d Sess. 6 (1993) (citing NATIONAL ABORTION FEDERATION, INCIDENTS OF VIOLENCE & DISRUPTION AGAINST ABORTION PROVIDERS (Apr. 16, 1993)) (summary submitted to the committee with the testimony of Willa Craig). The acts within that time frame include one murder, 131 death threats, 84 assaults, 81 arsons, at least 36 bombings, 2 kidnappings, and 327 clinic invasions. Id.

24. Id.


26. An Operation Rescue coordinator testified before a House Committee that he believed it would be appropriate to kill someone involved in abortion services. S. REP. NO. 117, supra note 23, at 4 (citing a Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, May 6, 1992, at 170). Such beliefs are also widely reported in the newspapers. See, e.g., Goodstein, supra note 12, at A1 (reporting that thirty-two antiabortion leaders have signed a petition declaring an abortion doctor's murder a justifiable homicide).

27. Sandra G. Boodman, Abortion Foes Strike at Doctors' Home Lives; Illegal Intimidation or Protected Protest?, WASH. POST, April 8, 1993, at A1. The irony in the commission of this murder is that Griffin, the man accused of the shooting, did not deny the act; rather, he attempted to use insanity as a defense, claiming that antiabortion propaganda drove him mad. William Booth, Antiabortion Propaganda is Cited in Florida Murder Trial, WASH. POST, Mar. 1, 1994, at A3.

28. Sylvia Adcock, This is a War; Abortion Clinics Intent on Improving Security, NEWSDAY, Dec. 31, 1994 at A5.


31. The National Conference of Catholic Bishops strongly condemned the killing of Dr. David Gunn. Booth, supra note 28, at A1. Also, several mainstream antiabortion groups, including Operation Rescue, through its new director, Flip Benham, have publicly announced their opposition to the more recent killings. David Van Biema, Avenging the Unborn, TIME, Aug. 8, 1994, at 26.
however, have condoned or even applauded the events. While it may be argued that these shootings were isolated incidents among both legal and illegal protest activities, the death threats, wanted posters, and picketing of physicians’ homes are generating fear among those who perform abortions. Lately, antiabortion groups have advocated a widespread targeting of physicians in the campaign against abortion, including a recent attempt to encourage attorneys to bring malpractice suits against physicians who perform abortions. More terrifying, however, is the radical groups’ commitment to the justified slaying of these physicians under the theory that they are “serial child killers.”

In the quest to stop abortions, some extremely powerful antiabortion groups systematically encourage their supporters to perform illegal acts. For example, the term rescue has become a household word in the United States, and is practically synonymous with its founding organization, Operation Rescue. While a rescue has been defined by antiabortion groups as simply a physical placing of oneself between the pregnant woman and the abortion, rescues frequently entail the

32. Andrew Burnett, the publisher of Life Advocate, an antiabortion magazine with a monthly circulation of 3,700, is quoted as writing about the death of Gunn:

Was his life really more valuable than the lives of his thousands of victims? When you examine your own convictions, I pray that God will encourage you to take an even stronger stand and be willing to do even more to protect the lives of those we say are precious in God’s sight.

Balzar, supra note 21, at A1. Joseph M. Scheidler, one of the founders of the militant antiabortion movement and head of the Pro-Life Action Network (PLAN), stated “What’s happening is that those who live by the sword now face dying by the sword. Violence begets violence, and abortion is the ultimate violence.” Id. He insists that he does not condone violence; rather, his attitude is one of no longer condemning the violence committed by others. Id.

33. Antiabortion groups create “Wanted” posters offering rewards for the arrest of a physician or the revocation of a physician’s medical license, and circulate these posters throughout an area. Boodman, supra note 28, at A1. Posters of another Florida physician, Dr. Frank Snydle, featured addresses and phone numbers of family members, along with the automobile license plate numbers of his former girlfriends. Id.

34. Id.

35. Life Dynamics, a new Texas antiabortion group, mailed a 72-page guide, along with a video and television commercial, to 4,000 attorneys across the country in an effort to educate and equip them for malpractice suits against abortionists. The kit argues that a woman has the right to sue for emotional damages resulting from an abortion because abortionists do not obtain informed consent from the women, and these women then experience “post-abortion syndrome.” Life Dynamics has also produced a comic book of abortion doctor jokes, such as: “What would you do if you found yourself in a room with Hitler, Mussolini and an abortionist, and you had a gun with only two bullets?—Shoot the abortionist twice.” Vivienne Walt, Group Offers Case in a Kit; New Tactic vs. Abortion Docs, NEWSDAY, Sept. 6, 1993, at 8.


illegal acts of protesters pouring glue into clinic locks,\textsuperscript{39} locking themselves to clinic doors,\textsuperscript{40} damaging medical equipment,\textsuperscript{41} hitting, pinching, and kicking clinic personnel,\textsuperscript{42} trespassing on clinic property despite warnings from law enforcement personnel,\textsuperscript{43} and strewing nails in parking lots and on roadways leading to clinics.\textsuperscript{44} Other tactics include mass scheduling of no-show appointments,\textsuperscript{45} sending hate mail, making harassing calls, stalking,\textsuperscript{46} and using chemicals to destroy equipment or evacuate clinics.\textsuperscript{47}

As would be expected, the violence and harassment greatly affect abortion clinics.\textsuperscript{48} Clinics have incurred increased expenditures in providing additional security personnel, as well as increased legal expenses. Malpractice, fire, and casualty insurance policies are routinely canceled. Additionally, many of the clinics have been informed that they must meet new licensing requirements in order to operate their facilities.\textsuperscript{49}

The violence and harassment also affects patients. In addition to the obvious emotional effects,\textsuperscript{50} the violence and harassment have an economic effect on patients as well. Most abortions are performed in specialized reproductive health clinics. It is these clinics, rather than traditional hospitals, that are most often targeted by antiabortion

40. Id.
42. Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 221 (6th Cir. 1991).
44. S. REP. NO. 117, supra note 23, at 9 (testimony of David R. Lasso).
45. Forrest & Henshaw, supra note 25, at 11.
46. NATIONAL ABORTION FEDERATION, INCIDENTS OF VIOLENCE & DISRUPTION AGAINST ABORTION PROVIDERS (Oct. 1993) (stalking is defined as the persistent following, threatening, and harassing of an abortion provider, staff member, or patient away from the clinic).
47. NATIONAL ABORTION FEDERATION, SUMMARY OF EXTREME VIOLENCE AGAINST ABORTION PROVIDERS AS OF OCT. 14, 1993. Chemicals such as mace or tear gas are sprayed into clinics. There have also been incidents of butyric acid vandalism. This foul-smelling acid permeates the environment and can also cause illness. Kurt Chandler, Operation Rescue Boot Camp, STAR TRIB., Apr. 18, 1993, at 1A.
49. Forrest & Henshaw, supra note 25, at 12.
50. Now, it doesn't take a brain surgeon to figure out . . . that a mob . . . sitting on the sidewalk or chained to a radiator, bugging you, "praying" for you, hurling names at you, playing tape recordings of crying babies saying "Mommy, please don't kill me," . . . is intimidating, coercive, or threatening . . . . These are women undergoing a very personal, painful event in their lives. . . .

groups. These clinics also provide the least expensive services. The majority of the violence and harassment forms part of a continuous campaign of pressure. Therefore, patients can purposefully seek to avoid these targeted clinics. Because abortion services are not readily available, and the clinics offering the least expensive services are targeted by antiabortion groups, violence against these clinics affects low-income women to a disproportionate degree. It becomes necessary to either obtain services from a more expensive provider, travel a long distance to obtain services, or simply forego the abortion altogether. The additional financial burden is more difficult for the poor.

II. THE BATTLE IN THE FEDERAL COURTS

The pro-aborts are completely misusing the justice system. Judges need to know they should not capitulate. They also need to know very clearly that we will not be intimidated. If a judge bows to the pressure . . . [h]e will look foolish to the public for issuing an order because rescuers won't obey.

(Randall Terry)

There is a tradition of civil disobedience. But with civil disobedience goes the fact of accepting punishment. Operation Rescue and all those . . . have this weird idea that they can blockade clinics but that the law ought not to be enforced and that there should be no punishment for that.

(Rep. Schumer)

51. Forrest & Henshaw, supra note 25, at 10.
52. Henshaw, supra note 17, at 248-49. Abortions performed in hospitals are fifty percent more expensive than those performed in specialized clinics for the same type of service. Id.
53. Forrest & Henshaw, supra note 25, at 11.
54. See generally, Henshaw & Van Vort, supra note 48 (discussing the availability of abortion services in different types of facilities and their geographic locations); Henshaw, supra note 18 (discussing types of providers and the barriers to the services in terms of distance, cost, harassment, period of gestation, and HIV status).
56. Id.
Beleaguered abortion clinics have brought countless lawsuits into the federal court system due to frustration with the unwillingness or inability of local authorities to deal with the problem of violence directed at abortion clinics. Because the antiabortion groups target particular clinics, the numbers of protesters engaged in illegal acts often overwhelm local law enforcement personnel. Additionally, many of the organizers are from outside the immediate vicinity, thereby making it difficult to charge or seek injunctions against them. Some groups train their participants to effectively resist arrest and encourage individuals to disregard court orders. Moreover, the fines imposed on individuals at the state level are so small as to have virtually no deterrent effect.

Lawsuits at the federal level have hardly proved less frustrating. Indeed, although injured parties have turned to the federal courts for relief denied them at the state level, these parties have been met with a lack of any adequate remedy at the federal level as well. Faced with a total lack of prosecutorial initiative, clinics, women's groups, and individuals have primarily utilized the Sherman Anti-Trust Act, the Ku Klux Klan Act, and RICO in their efforts to obtain relief. The courts have been absolutely unwilling to uphold claims under the anti-trust laws, leaving RICO and the Ku Klux Klan Act as possibilities for recovery.

61. Id. at 13.
62. SCHEIDLER, supra note 37, at 286-88.
64. Id.
65. 15 U.S.C. §§ 1-7 (1988) (providing, in pertinent part, that "[e]very . . . conspiracy, in restraint of trade or commerce among the several States . . . is . . . illegal . . . ").
66. 42 U.S.C. § 1985(3) (1988) ("If two or more persons . . . conspire . . . 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 within such State or Territory the equal protection of the laws . . . ").
With its decision in Bray v. Alexandria Women's Health Clinic,\textsuperscript{69} however, the Supreme Court significantly limited the possibility of recovery under the Ku Klux Klan Act. The Court held that the first clause of the Act, the "deprivation" clause, did not provide injunctive relief for the medical facilities seeking to restrain Operation Rescue from acts of obstruction and trespass. The Court stated that opposition to abortion is not discrimination against a class of "women seeking abortions."\textsuperscript{70} Furthermore, the Court rejected the claim that the class-based discrimination was directed at the class of "women in general."\textsuperscript{71} An additional failure of the claim was attributed to the clinic's failure to identify any right that was guaranteed against private action; the rights alleged to have been violated were the right to interstate travel and the right to abortion.\textsuperscript{72} The second clause of the Act, the "hindrance" clause, was discussed in dicta, as the parties had not alleged a claim under this clause in the lower courts.\textsuperscript{73}

Decisions in the lower courts could revive the Act as a potential source of recovery. One court has upheld a claim under the hindrance clause.\textsuperscript{74} Recovery under this clause is far from secure, however, as courts addressing this issue recently have gone both ways.\textsuperscript{75}

Before the enactment of FACE, RICO was the sole remaining possibility for federal relief. The relief, however, has not been satisfactory, and may be won only after running the gauntlet that this application of RICO entails.

III. THE USE OF RICO AGAINST ANTIABORTIONISTS

[D]o everything we can to torment these people... to expose them for the vile, blood-sucking hyenas that they are.\textsuperscript{76}

(Randall Terry)

\textsuperscript{69} 113 S. Ct. 753 (1993).
\textsuperscript{70} Id. at 759.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 764.
\textsuperscript{73} Id. at 764-67.
\textsuperscript{74} See National Abortion Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993) (upholding a cause of action under the hindrance clause by analyzing the respective justices' views in Bray's dictum as to its application in the antiabortion violence context).
\textsuperscript{75} See id.; Upper Hudson Planned Parenthood v. Doe, 836 F. Supp. 939 (N.D.N.Y. 1993) (holding that the practical effect of Bray is to foreclose section 1983(3) as an avenue of relief for abortion providers; antiabortionists are motivated by their disapproval of abortions, therefore, neither women seeking abortions nor women in general are a class of persons against whom a discriminatory animus is directed), aff'd, 29 F.3d 620 (2nd Cir. 1994).
\textsuperscript{76} Boodman, supra note 28, at A1 (statement of Randall Terry, founder of Operation Rescue).
Let's pray no one gets hurt, but this is a war and we have to be realistic.  

(Shelly Shannon)

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) to "seek the eradication of organized crime in the United States. . . ." The statute's label of racketeer, however, has been applied to many outside the archetypal gangster, especially after the Supreme Court's decision in Sedima, S.P.R.L. v. Imrex Co. Indeed, the Sedima Court, in ruling that the statute shall be interpreted broadly, fully recognized that RICO had swollen well beyond its original conception. Rather than signaling an ambiguity problem,

77. Balzar, supra note 21, at A1 (statement of Shelly Shannon, before she shot and wounded Dr. George Tiller).
78. 18 U.S.C. §§ 1961-1968 (1988). The statute encompasses both civil and criminal actions. Section 1961 sets out definitions of racketeering activity, which constitute the predicate acts for which a party is prosecuted or sued. 18 U.S.C. § 1961. For purposes of suits against antiabortion groups, the alleged predicate act is extortion, as defined by the Hobbs Act. 18 U.S.C. § 1951(b)(2) (1988) (defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear"); see infra text accompanying notes 98-103.

Section 1962 makes it unlawful:

(a) . . . for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .
(b) . . . for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) . . . for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) . . . for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.


80. Civil actions brought under RICO have included novel ideas of what constitutes a racketeer, especially in the white collar crime area. See, e.g., Bowling v. Founders Title Co., 773 F.2d 1175 (11th Cir. 1985), cert. denied, 475 U.S. 1109 (1986) (investors claim against title company arising from collapse of land sales agreements); Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806 (7th Cir. 1987) (securities fraud); Acampora v. Boise Cascade Corp., 635 F. Supp. 66 (D.N.J. 1986) (sexual harassment and termination of employee because of theft discoveries).
82. Id. at 497-98.
83. Id. at 500.
however, the Court stated that this use of the statute against parties not originally anticipated by Congress demonstrates breadth.\textsuperscript{84} If this breadth is a defect in the statute, the Court reasoned, its remedy lies with Congress.\textsuperscript{85} Congress has considered amendments to the statute, but has not enacted such legislation.\textsuperscript{86}

Although the use of the civil side of the statute for other than organized crime purposes has been widely criticized, RICO is often invoked because it offers plaintiffs seductive possibilities. The extraordinary civil remedy entices potential litigators with its provisions for treble damages and attorney’s fees.\textsuperscript{87} The legislative history of the statute makes clear, however, that the primary purpose of allowing civil suits is to promote the public interest through the use of private attorneys’ general suits.\textsuperscript{88} In other words, civil RICO suits should be the type which might be brought by the Department of Justice, but which, for lack of resources or otherwise, are not.\textsuperscript{89}

Suits brought under civil RICO to combat the violence and harassment against abortion clinics fit this description. Attorney General Janet Reno has publicly declared her intolerance for the violent acts directed against clinics.\textsuperscript{90} Also, these suits promote the public interest. Abortion is legal. The rights of those both seeking and providing such services should be protected. When local law enforcement has failed, it is necessary to find a federal remedy. Recovery under civil RICO would compensate beleaguered abortion providers. Furthermore, such recovery would send a clear signal to the public that violence and harassment against clinics will not be tolerated. Nonviolent, peaceful protest simply does not fall under the statute. RICO would also provide the possibility of a remedy against the leaders of extremist antiabortion groups—those who incite others to commit violent acts, but who may not necessarily be present at the scene.

Many RICO suits have been brought against antiabortion groups, but problems have arisen in both the application of the statute to these groups and the reality of the relief available. Both the Sherman Anti-

\textsuperscript{84} Id. at 499 (citing Haroco, Inc. v. American Nat’l. Bank & Trust, 747 F.2d 384, 398 (7th Cir. 1984), aff’d, 473 U.S. 606 (1985)).
\textsuperscript{85} Id.
\textsuperscript{87} 18 U.S.C. § 1964(c) (1988).
\textsuperscript{88} H.R. REP. NO. 312, supra note 86, at 7.
\textsuperscript{89} Id. at 8.
Trust Act and the Ku Klux Klan Act provide for injunctive relief;91 RICO does not.92 In addition, only one court has awarded RICO's treble damages to an entity harmed by antiabortion violence,93 and that award would certainly not be labeled extravagant. The plaintiff in *Northeast Women's Center v. McMonagle* recovered $2,600 in damages94 and was also awarded attorney's fees slightly in excess of $60,000.95

The section of the statute applied in *McMonagle*, and also most successfully applied in other RICO suits against antiabortion groups, is section 1962(c). Under this section, it is unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."96 A pattern of racketeering activity is defined as two or more predicate acts that are related and pose a threat of continued criminal activity.97 The predicate act for antiabortion violence suits is Hobbs Act extortion, which is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear."98

In granting relief to the women's center, the *McMonagle* court ruled on the question that has precluded awards in many of these suits: whether the enterprise charged with the predicate acts must be economically motivated.99 The defendants argued that Hobbs Act extortion, the predicate act under RICO, requires an economic

94. Id. at 1163.
95. *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 476 (3d Cir. 1989) (ruling that the proportionality rule to reduce the award under RICO does not apply), cert. denied, 494 U.S. 1068 (1990).
motivation.\textsuperscript{100} The court, however, concluded that no such economic motive was necessary.\textsuperscript{101} In so ruling, the court relied on prior decisions holding that the lack of an economic motivation is not a defense to Hobbs Act crimes.\textsuperscript{102} Therefore, the court reasoned, the lack of an economic motivation is not a defense to a RICO antiabor-tion violence suit when Hobbs Act crimes serve as the predicate acts.\textsuperscript{103}

\textit{McMonagle} further explained that the Hobbs Act protects intangible property rights.\textsuperscript{104} In this case, the rights alleged were the right to continue to provide services, the right to continue employment, and the right to enter into contractual relationships with the clinic. The defendants, while not completely successful in obtaining these property rights by means of extortion, violated RICO through attempted extortion, which is also criminalized by the Hobbs Act.\textsuperscript{105}

Although the court's reasoning in \textit{McMonagle} may seem conclusory, it should be noted that RICO encompasses several different predicate acts that include extortion in the definitions of racketeering activity listed in section 1961. Subsection 1(A) lists extortion among other common law acts or threats. Subsection 1(B) defines racketeering activity as any act indictable under any of several provisions of Title 18, including the Hobbs Act.\textsuperscript{106} One of these indictable acts is Hobbs Act extortion. It would seem, then, that cases interpreting Hobbs Act extortion should be followed when such is alleged as the predicate act under RICO; a strict, common law definition of extortion need not be applied.

While the Third Circuit court in \textit{McMonagle} did not require an economic motivation, the Second,\textsuperscript{107} Eighth,\textsuperscript{108} and Seventh\textsuperscript{109}

\begin{itemize}
  \item 100. Id. at 1350.
  \item 101. Id.
  \item 102. Id. (citing United States v. Cerilli, 603 F.2d 415, 420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980)); United States v. Starks, 515 F.2d 112, 124 (3d Cir. 1975); United States v. Anderson, 716 F.2d 446 (7th Cir. 1983).
  \item 103. 18 U.S.C. § 1961 (1)(B).
  \item 104. 868 F.2d at 1350 (quoting Unites States v. Local 560, 780 F.2d 267, 281 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986)).
  \item 105. Id. (citing 18 U.S.C. § 1951(a)).
  \item 106. 18 U.S.C. § 1961 provides, in pertinent part;
  \item (1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code . . . section 1951 (relating to interference with commerce, robbery, or extortion). . . .
  \item 107. United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) (finding that the statute does not reach political activity when such activity is not economically based); United States v. Bagaric, 706
Circuits all have ruled that an economic motivation is necessary to impose RICO liability. The case from the Seventh Circuit, NOW v. Scheidler, (Scheidler I) details the reasoning behind those decisions.

IV. NOW v. SCHEIDLER AND THE ECONOMIC MOTIVATION REQUIREMENT

We would take them [the fetuses] home to my house. I had the garage all cleaned out. And with spotlights and everything, we would lay them out. A pathologist would judge the age of the babies and a photographer would take pictures. (Joseph Scheidler)

Their criminal acts include murder, arson, bombings, invasions, stalking school children, chaining locks to clinic doors, stealing from pathology labs, telephone harassment and other offenses. Though the named defendants themselves may not have personally committed all of these crimes, they are the organizers behind them.

(Patricia Ireland, President of NOW)

The National Organization for Women (NOW) joined with two women's health centers in bringing suit on behalf of themselves and similarly situated women and clinics to recover against the defendant antiabortion activist groups and their leaders. The complaint

F.2d 43 (2d Cir. 1983), cert. denied, 464 U.S. 840 (1983) (distinguishing Ivic, and ruling that either the enterprise itself or the predicate acts of racketeering, if economically motivated, fulfill the requirement); United States v. Ferguson, 758 F.2d 843 (2d Cir. 1985), cert. denied, 474 U.S. 1032 (1985) (motivation behind predicate acts need only be based in part on economics).


111. 968 F.2d 612 (7th Cir. 1992), rev'd, 114 S. Ct. 798 (1994).


114. Joseph Scheidler and Randall Terry, two of the grandfathers of the antiabortion movement, were included as defendants. Scheidler is the founder and executive director of the
alleged that defendants engaged in a conspiracy to close abortion clinics through a pattern of illegal activity, with many of these activities organized through a coalition of antiabortion groups known as the Pro-Life Action Network (PLAN). NOW specifically alleged that the defendants have led a nationwide battle against clinics through the distribution of a manual detailing methods of harassment and violence. This nationwide battle is illustrated by the fact that the manual's instructions are followed, resulting in identical methods of protest, framed in identical language, regardless of the demonstration's location. Hobbs Act extortion was alleged as the predicate act of racketeering under RICO, and the claim was brought under sections 1962(a), (c), and (d).

A successful claim under section 1962(c) requires proof of (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The question of an economic motivation requirement includes the interpretation of the term enterprise. RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." The court found the defendants to be a "group of individuals associated in fact though not a legal entity"; in other words, the defendants were considered an informal association.

In addition to dismissing the subsections (a) and (d) claims, the Scheidler I court also reluctantly affirmed the district court's

Pro-Life Action League; Terry is the founder of Operation Rescue and has served as the group's National Director. Both are extremely active in the antiabortion movement and both have published works on the subject. Scheidler, supra note 37; Randall A. Terry, Operation Rescue (1988); Randall A. Terry, To Rescue the Children (1990).

115. 968 F.2d at 614-15.
116. Id. at 615.
117. See id. The demonstrations are known as "blitzes" and the method is termed "lock and block." Glue is poured into locks and the protesters chain and lock themselves to the doors of the clinic. See Scheidler, supra note 37, at 214-16; Scheidler, 968 F.2d at 615.
118. 968 F.2d at 623. The 1962 (d) claim is for conspiracy; its success depends on the party being found liable under either sections (a), (b), or (c). The 1962(a) claim is a relatively novel one in RICO suits against antiabortionists. The court in Scheidler dismissed the claim on a theory of proximate cause and a comparison to RICO criminal forfeiture actions under section 1963. This reasoning led the court to apply a but for test: Income derived, directly or indirectly is income the party would not have received but for the racketeering conduct. The court noted that the plaintiffs had not alleged that defendants would not have received donations but for their acts, and therefore the income was not derived from racketeering activity. 968 F.2d at 612-25.
121. 968 F.2d at 626.
122. Id. at 614.
dismissal of the section 1962(c) claim, stating that RICO requires either an "economically motivated enterprise or economically motivated predicate acts." The plaintiffs unsuccessfully argued that they need only show an economic effect on interstate commerce in order to state a claim under the statute. This argument did not succeed, but the Scheidler I court did go so far as to find that "it is clear that the aim of the extortion is to close women's health centers." Through extortion, the antiabortion groups seek to interfere with a business to such an extent as to close its doors. Although the Scheidler I court recognized defendant's economic effect on the plaintiff clinics, it refused to equate that effect with the required economic motivation.

In NOW v. Scheidler (Scheidler II), the United States Supreme Court was called on to decide the narrow issue of whether RICO requires such an economic motivation. The Court unanimously ruled that it does not.

A. Scheidler I: The Evolution of the Economically Motivated Enterprise Requirement

The Scheidler I court reasoned that it was bound to follow the Eighth Circuit's line of analysis involving the economic motivation requirement because it had previously adopted that circuit's definition of enterprise in United States v. Anderson. In Anderson, the Eighth Circuit laid out the parameters for determining when an informal association may be classified as an enterprise. Anderson concerned two individuals who were charged with defrauding their employers by utilizing a false purchase-order scheme. The court addressed the question of whether the relationship between these individuals and those who supplied the false invoices constituted a RICO enterprise.

123. Id.
124. Id. at 626.
125. Id. at 630.
126. Id.
128. Id. at 800.
130. 626 F.2d at 1372.
131. Id. at 1361.
The stated, narrow issue before the Anderson court was whether the term enterprise includes an illegitimate association that is proved only by facts that also establish the predicate acts of racketeering.132 The Anderson court held that an informal association encompasses a structured association that maintains operations directed toward an economic goal and that has an existence apart from the commission of the predicate acts which constitute the pattern of racketeering activity.133 Rather than standing for an additional requirement in the interpretation of when a group of individuals associated in fact is an enterprise, Anderson could be read as simply requiring a clear differentiation between the alleged enterprise and the alleged predicate acts in a RICO action.

Anderson was decided before the Supreme Court’s decision in United States v. Turkette,134 which ruled on an analogous issue dealing with informal associations. Turkette rejected the First Circuit’s ruling that because each of the specifically enumerated enterprises in RICO’s definition is legitimate, an informal association must also be legitimate.135 In holding that an enterprise embraces illegitimate entities, the Court found that the phrase “any union or group associated in fact” contained no uncertainty as to its meaning, and therefore the rule of ejusdem generis136 could not be applied.137 Taking the Turkette Court’s reasoning further, one could argue that no economic motivation requirement should have been applied to an informal association simply because it may be suggested by the specifically enumerated items which precede it in the definition of enterprise.

The Scheidler I court also analyzed and applied cases that expressly addressed the question of economic motivation under RICO. The court relied on the Second Circuit’s line of reasoning in three cases involving actions against terrorist groups: United States v. Ivic,138 United States v. Bagaric,139 and United States v. Ferguson.140 Ivic ruled that an economic motivation is necessary under RICO and based

132. Id. at 1365.
133. Id. at 1372.
135. Id. at 581.
136. This rule is an aid to statutory construction suggesting that where general words follow specific enumeration, the general words are construed as applying only to persons or things similar to those specifically enumerated. BLACK’S LAW DICTIONARY 517 (6th ed. 1990).
137. 452 U.S. at 581.
138. 700 F.2d 51 (2d Cir. 1983).
140. 758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 1032 (1985).
its reasoning, in part, on RICO’s legislative history. In examining the legislative history, the Ivic court stated that Congress did not intend RICO to reach terrorist activities when it sought to eradicate the evil of organized crime, at least not when such activities were unaccompanied by any financial motive.\(^{141}\) In light of the rationale of Turkette, the Ivic court reasoned that RICO could arguably apply to any organization whose activities generate funds which can serve as a “springboard into the sphere of legitimate enterprise.”\(^{142}\) The court found, however, that political terrorist organizations do not generate funds that allow them to “springboard into,” or infiltrate, legitimate businesses; the Scheidler I court relied on this finding.\(^{143}\) Scheidler I thus ruled that the activities of political terrorists do not fall within RICO’s reach when the activities do not obtain or yield any money.

Scheidler I also pointed to the Supreme Court’s decision in Northwestern Bell, which refused to uphold a lower court’s restriction of RICO’s scope to organized crime.\(^{144}\) The Northwestern Bell Court stated that RICO liability extends beyond organized crime because the statute does not limit the racketeering conduct to that of a group and does not explicitly state such a limitation.\(^{145}\) But, despite the Supreme Court’s refusal to embrace a judicially imposed restriction on the plain language of the statute, Scheidler I determined that Congress did not intend to reach the activities of political terrorists that involve neither an economic motivation nor economic crimes.\(^{146}\)

Scheidler I employed Ivic’s reasoning, combined with the Eighth Circuit’s definition of enterprise, to conclude that RICO does not extend to enterprises which are not economically motivated. This reasoning was flawed; the Supreme Court has consistently rejected judicial restrictions on the plain language of RICO.\(^{147}\) The requirement of an economic motivation is such a judicially imposed restriction. And, indeed, the Court has now rejected the requirement of an economic motivation.\(^{148}\)

\(^{141}\) 700 F.2d at 62-63.

\(^{142}\) Id. at 63.

\(^{143}\) NOW v. Scheidler, 968 F.2d 612, 627 (7th Cir. 1992), rev’d, 114 S. Ct. 798 (1994).

\(^{144}\) Id. at 628 (citing H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989)).

\(^{145}\) 492 U.S. 229, 244 (1989).

\(^{146}\) 968 F.2d at 628.


\(^{148}\) It is interesting to note that the Seventh Circuit, since its decision in Scheidler, has explicitly resisted reading into the statute a qualification that does not appear on its face. In
B. Scheidler II: The Supreme Court Rules No Economic Motivation Required

In its unanimous decision holding that RICO does not require an economically motivated enterprise nor economically motivated predicate acts, the Court addressed arguments regarding the plain language of RICO, statutory interpretation, the congressional statement of findings, prior case law, Department of Justice Guidelines, legislative history, and lenity—and did so in a relatively brief, cursory fashion. Indeed, Justice Rehnquist began the opinion in an exasperated tone, signaling the Court's intention to follow its previous rulings of not encouraging judicial restrictions on the plain language of RICO.

In looking at the plain language of section 1962(c), the Court pointed out that the words "any enterprise engaged in, or the activities of which affect interstate . . . commerce" come closest to suggesting a requirement of economic motive. However, the plain meaning of affect led the Court to conclude that an enterprise can affect—have a detrimental influence on—interstate commerce without being motivated by its own profits.

In interpreting the statute, the Scheidler II Court distinguished subsections (a) and (b) from subsection (c) by viewing the (a) and (b) enterprises as the victims of unlawful activity. While these enterprises may be profit-seeking enterprises, the statute does not require them to be; it simply requires that the entity be acquired through illegal activity or illegally generated funds. The enterprise in subsection (c), on the other hand, is the vehicle through which the illegal acts are committed. Therefore, because this enterprise is not being acquired, the Court found that it need not have a property interest that can be acquired, nor any economic motivation at all.

The Supreme Court addressed the Scheidler I court's reliance on Bagaric's reasoning that an economic motivation is necessary partly because of the congressional statement of findings which prefaces RICO. The preface refers to activities that "drain billions of dollars..."

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ruling on whether to limit standing to sue under RICO to those who have been injured by reason of predicate acts committed as part of a RICO violation, the court stated that such a reading would be "tantamount to rewriting the statute." The court cited Sedima in ruling that RICO must be interpreted broadly, despite judicial notions of desiring a limit on the reach of the statute. Schiffels v. Kemper Fin. Servs., Inc., 978 F.2d 344, 350 (1992).

149. 114 S. Ct. at 800 ("We are required once again to interpret the provisions of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970 . . . ").

150. Id. at 804.

151. Id.
from America's economy"; the Scheidler I court determined that such activities must require an economic motivation. The Supreme Court rejected this analysis for two reasons. First, the Court stated that predicate acts, such as the alleged Hobbs Act extortion, could financially drain the economy by harming businesses such as abortion clinics. Second, the Court found a congressional statement of findings a "thin reed" on which to base a requirement of economic motivation which was neither express nor implied in the substantive portion of the statute; had Congress wished to include the requirement, it would have done so.\(^{152}\)

Scheidler I relied in part on Department of Justice Guidelines.\(^{153}\) The Ivic court noted that the 1981 Department of Justice Guidelines provide that a RICO prosecution should not charge an informal association as an enterprise unless such association exists "for the purpose of maintaining operations directed toward an economic goal. . . ."\(^{154}\) In Scheidler II, the Court rejected this reliance, noting that the Department of Justice amended its guidelines in 1984. The amended guidelines dilute whatever force this document had as to the requirement of economic motivation. As amended, the guidelines state that an informal association must be "directed toward an economic or other identifiable goal."\(^{155}\)

Furthermore, although the Scheidler II Court did not raise the point, the Department of Justice opposes efforts by Congress to dilute the strength of sections 1962, 1963 and 1964.\(^{156}\) The added requirement of economic motivation dilutes the strength of the statute. Also, as noted by the Ivic court, these guidelines are simply prosecutorial guidelines; no defendant could argue their noncompliance in court.\(^{157}\)

In Scheidler II, the Supreme Court quickly raised and dismissed the use of legislative history to prove that RICO requires an economic motivation. The Court found that the statute is unambiguous and that there is no clear expression in the legislative history that warrants a different construction. Therefore, the Court ruled that the statute should be construed according to its plain meaning.\(^{158}\)

\(^{152}\) Id. at 805.

\(^{153}\) 968 F.2d at 627.

\(^{154}\) United States v. Ivic, 700 F.2d 51, 64 (2nd Cir. 1983).

\(^{155}\) 114 S. Ct. at 805 (citing U.S. Dept. of Justice, United States Attorney's Manual § 9-110.360 (Mar. 9, 1984)).


\(^{157}\) 700 F.2d at 64.

\(^{158}\) 114 S. Ct. at 806.
Finally, the Court addressed the argument that the rule of leniety should be applied.\(^{159}\) Abruptly stating that the statute is not ambiguous and that the rule of leniency should not be applied at the front of a statutory construction process in order to provide considerations of leniency, the Court dismissed the argument.\(^{160}\)

V. CONCERNS WITH THE REMEDY UNDER RICO

The leaders aren’t going to change. This is an effort to intimidate the rank and file so they won’t associate with us . . . [W]e’re going to see who’s brave and who listens to God, not to man.\(^{161}\)

(Joseph Scheidler)

I am very much disturbed by some of the tactics of the persons associated with the antiabortion movement. It’s a very sophisticated form of harassment, not something that the average patrolman can say “I’m going to charge them with such and such.”\(^{162}\)

(a Chief of Police)

In the Supreme Court’s Scheidler II opinion, Justice Souter, joined by Justice Kennedy, wrote a separate concurrence both to explain why the First Amendment does not demand reading an economic motivation into RICO and also to stress the fact that the opinion does not bar First Amendment challenges to RICO’s use.\(^ {163}\)

Justice Souter explained that, in construing a statute in a way which addresses First Amendment concerns,\(^{164}\) the Court looks first to a determination that the statute is ambiguous. Because RICO’s language is unambiguous, such an interpretation is unnecessary.\(^{165}\) Furthermore, even if RICO were ambiguous, Justice Souter would not

\(^{159}\) If there is ambiguity in the language of a statute that provides for multiple punishments, the ambiguity should be resolved in favor of leniency when sentencing. BLACK’S LAW DICTIONARY 902 (6th ed. 1990).

\(^{160}\) 114 S. Ct. at 506.

\(^{161}\) News Services, Abortion Clinics Can Use RICO Law to Sue Protesters, STAR TRIB., Jan. 25, 1994, at 1A (statement of Joseph Scheidler).

\(^{162}\) Boedman, supra note 28, at A1.

\(^{163}\) 114 S. Ct. at 806.

\(^{164}\) Justice Souter cites Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961), where the Court held that antitrust laws do not apply to businesses combining to lobby the government, even where such conduct has an anticompetitive purpose and an anticompetitive effect, because the alternative “would raise important constitutional questions” under the First Amendment.

\(^{165}\) 114 S. Ct. at 806-07.
interpret the statute to include an economic motivation requirement. He reasoned that such a requirement would be both over and
underinclusive. It would reach too widely in protecting entities whose
activities we would not wish to chill, and yet might sweep other fully
protected activity under RICO because of a failed economic motivation
test. 166 Lastly, Justice Souter cautioned the courts to look toward the
First Amendment both as a proper defense in a RICO suit and as a
command that relief be limited if a RICO violation has occurred but
the activity is protected under the First Amendment. 167 Through
this concurrence, the Court raised its concerns as to the propriety of
litigants using RICO as a tool to chill First Amendment speech.

The lower courts are perfectly able to address First Amendment
concerns, should they arise, in the application of RICO to antiabortion
groups. However, bombings, arson, the use of chemicals to damage
property, the pushing and shoving of pregnant women, death threats
to doctors and the like are not protected activities. No sane society
should fear the "chilling" of such conduct. The claim that First
Amendment protest activity is at risk in this scenario trivializes the
harm that is being inflicted against women, their doctors, and abortion
clinics every day. While violent protest activity may be a part of
American history, this argument does not address why we would want
to continue making it a part of American history.

Moreover, the statute itself contains several safeguards which
make it highly unlikely that RICO will be successfully applied to
peaceful protest activity protected by the First Amendment. These
safeguards also serve to highlight RICO's suitability for relief against
the leaders of the antiabortion movement and the unlikely possibility
of successful prosecution if RICO is applied to a generally peaceful
protester who performs a potentially criminal act in the heat of the
moment.

First, the most obvious hurdle a plaintiff must successfully jump
is the proving of the predicate acts. In cases involving violence against
abortion clinics, this has always consisted of Hobbs Act extortion. In
Northeast Women's Center, Inc. v. McMonagle, 168 the court analyzed
whether the defendant's activities rose to the level of Hobbs Act
extortion. The court found that only non-peaceful activities, not
protected by the First Amendment, will rise to such a level as to form

166. Id. at 807.
167. Id.
the basis for a successful extortion claim. 169 While First Amendment analysis is beyond the scope of this Comment, it does appear obvious that extortion and protected First Amendment activity are easily separable. Although a conviction itself is not necessary to bring a RICO civil suit, the activities that are necessary to find a defendant liable under civil RICO are activities for which the defendant could be criminally convicted. 170

RICO's second safeguard consists of section 1962(c)'s requirement of a "pattern of racketeering activity." A defendant demonstrates a "pattern of racketeering activity" when two predicate acts are committed within a ten-year period. 171 The Supreme Court has further interpreted the pattern requirement as necessitating both (1) a relationship between the predicate acts or an outside organizing principle that renders the acts "ordered" or "arranged", and (2) a threat of continued criminal activity. 172 Additionally, the enterprise through which this pattern of racketeering activity is conducted must have an existence separate and apart from the predicate acts themselves. 173

A third safeguard is the requirement that these acts must have been committed by an individual who has "participate[d], directly or indirectly, in the conduct of such enterprise." 174 The Supreme Court has interpreted this phrase to require that an individual have a part in directing the enterprise's affairs; one must have participated in the operation or management of the enterprise to be held liable. 175

These stringent requirements of section 1962(c) provide safeguards for any real concern that RICO, applied to political organizations, will chill protected protest activity or reach the generally peaceful protester who may commit one potentially criminal act. Defendants may also raise the First Amendment as a direct defense to a RICO civil suit. If RICO is successfully applied to antiabortion groups and leaders of the antiabortion movement who attempt to incite others to violence, the statute may indeed have a chilling effect. However, the chilled activities are precisely the types of activities for which this extraordinary remedy was created—the systematic encouragement of the commission of violent acts that interfere with interstate commerce. These suits have not been, and will not be, successful against peaceful

169. Id. at 1308.
protesters. Perhaps RICO can help return the abortion debate to a debate, and discourage the organizations and individuals responsible for the creation of the abortion war.

VI. CONGRESSIONAL INTERVENTION

Then there are the noisy advocates of women's rights . . . and, of course, the advocates of the destruction of the most innocent, most helpless humanity imaginable—unborn babies. These advocates chant that they are pro-choice and the Senate never gives a thought to the question about the choice to do what.176

(Sen. Jesse Helms)

If you did it for bunny rabbits, can we not at least give women equal rights?177

(Rep. Pat Schroeder)

The Freedom of Access to Clinic Entrances Act of 1993 (FACE) passed both a Senate and a House vote178 and was signed into law by President Clinton on May 26, 1994.179 In efforts to "send an unmistakable message that violent conduct will not be tolerated,"180 Congress, led by Senator Ted Kennedy, passed the bill to ensure access to abortion clinics. FACE is designed to ensure such access, while protecting the free speech rights of those who choose to peacefully demonstrate in opposition to abortion.

In short, FACE amends the Public Health Service Act, subjecting to both criminal penalties and a civil remedy persons who intentionally (1) by force, threat of force, or physical obstruction injure, intimidate, or interfere with or attempt to injure, intimidate or interfere with any person because that person is or has been providing or obtaining reproductive health services;181 or (2) damage or destroy the property of a medical facility because such facility provides reproductive health services.182 Private civil remedies include compensatory and punitive damages, injunctive relief, and costs.183 Criminal penalties include

182. Id. § 248(3)(a)(1), (3).
183. Id. § 248(3)(c)(1)(B).
prison terms and fines.  

In addition, the United States or State Attorneys General may file civil actions.  

It should be noted that such actions may be filed when the Attorney General has reasonable cause to believe that any person "is being, has been, or may be injured" by a violation of the Act.  

FACE does not interfere with the ability of the state or local law enforcement authorities to prosecute.  

Furthermore, Congress has expressly provided the assurance that the law shall not prohibit expression protected by the First Amendment.  

Proponents of FACE urged that such legislation was necessary because of the nationwide pattern of violence that has continued to plague abortion clinics.  

Federal criminal remedies are generally imposed where important federal rights are at issue, where interstate activity is involved, and where a need exists for uniform federal sanctions and protections.  

These three characteristics are all present in the problems posed by abortion clinic violence. The federal right at issue is the right to choose an abortion. The interstate activity involves the antiabortion groups themselves, which are interstate by design. The need for federal intervention exists because of instances where local law enforcement officers have either failed or refused to implement the laws.  

Violence directed at particular clinics ceased, or at a minimum, lessened, when strict penalties were enforced.  

FACE was, and continues to be, vigorously attacked by opponents both in Congress and within the antiabortion movement.  

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184. Id. § 248(3)(b)(2)(B).  
185. Id. § 248(3)(c)(2)(A), § 2483(3)(A).  
186. Id. § 248(2)(A) (emphasis added).  
187. Id. § 248(3)(d)(3).  
188. Id. § 248(3)(d)(5).  
189. See, H.R. REP. NO. 306, 103d Cong., 1st Sess. 6 (1993). In addition, Congress determined that the Supreme Court's decision in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), eliminated injunctive relief as a remedy available at the federal level, thereby necessitating legislation to provide such a remedy.  
191. Id.  
192. Id.  
193. Several suits have been brought, questioning the constitutionality of FACE; all but one court has upheld the statute. United States v. Brock, 863 F. Supp. 851 (E.D. Wis.), mandamus denied sub nom., Hatch v. Stadtmueller, 1994 U.S. App. LEXIS 32656 (7th Cir. Nov. 10, 1994) (suit brought under FACE against defendants for obstruction; FACE found to be content-neutral; FACE is an appropriate time, place, and manner restriction; FACE is not overbroad or vague; and FACE does not violate the Religious Freedom Restoration Act (RFRA)); Riley v. Reno, 860 F. Supp. 693 (D. Ariz. 1994) (FACE does not violate the First Amendment's right to freedom of speech, freedom of the press or freedom of religion, the Due Process Clause's equal protection rights, the Eighth Amendment's right to be free of excessive fines and cruel and unusual
nent's arguments against FACE include: antiabortion demonstrators are singled out for punishment in the absence of protection; the right to abortion is the only right protected by the statute; the statute is overbroad and/or vague; and, perhaps most importantly, criminal and civil sanctions under the statute will chill important First Amendment rights to free speech.\textsuperscript{194}

Congressional opponents of FACE argued that the statute is unfair in that it singles out antiabortionists for punishment. They argued that FACE should also protect antiabortionists from violence directed against them by pro-choice proponents.\textsuperscript{195} However, while there have been incidents of violence committed by pro-choice activists against antiabortionists, such incidents are isolated and do not form part of a national campaign.\textsuperscript{196}

Antiabortion legislators stated that FACE is a clear attempt to punish an antiabortion viewpoint because the law does not encompass violence arising out of other types of protest activity. In other words, the only right protected by the statute is the right to abortion.\textsuperscript{197} An amendment to the statute extended the protection guaranteed to reproductive health facilities to places of worship.\textsuperscript{198} However, some legislators would have liked to see similar attempts to curtail the

\begin{footnotesize}
\begin{enumerate}
\item Id. In Washington state, charges were filed under FACE against a pro-choice advocate, for threatening to kill staff at an antiabortion group. Davied Johnston Abortion Rights Advocate is Accused of Threats, N.Y. TIMES, Apr. 12, 1995, at A20.
\item Id. (statement of Sen. Kennedy).
\item Id. (statement of Sen. Helms).
\item 18 U.S.C.S. § 248(3)(a)(2).
\end{enumerate}
\end{footnotesize}
violent activity of labor union members, gay rights activists, animal rights activists, anti-nuclear groups, and so on. Again, however, there has been no national campaign of violence from these groups. Antiabortion groups are unique in their national, single-minded, systematic attempts to threaten and harass. Indeed, one of the larger, nationally-based antiabortion groups, Operation Rescue, has, in the past, freely admitted that its purpose is simply "to prevent women from having abortions." 

The arguments in Congress about the overbreadth and vagueness of FACE centered on the terms "physical obstruction," "interfere," "intimidate," and "injury." The statute defines physical obstruction as "rendering impassable ingress to or egress from a medical facility that provides abortion-related services, or rendering passage to or from such a facility unreasonably difficult or hazardous"; interference is "to restrict a person's freedom of movement"; intimidate means "to place a person in reasonable apprehension of bodily harm to him or herself or to another." The argument that FACE is overbroad or vague was based upon the assertion that sheer numbers of protesters may block a facility and "intimidate," and that "interference" is too subjective a term to adequately safeguard, for example, a protestor who is passing out literature on options to abortion. Furthermore, opponents argued that the term "injury" was not defined, thereby leaving open the possibility that the term encompasses pain and suffering or emotional damages.

Briefly stated, FACE is not overbroad or vague. In United States v. Brock, the court ruled that FACE, to the extent it reaches expressive activity, is a permissible time, place, and manner regulation; the statute is therefore not overbroad. The court also ruled that FACE is not vague because a person of average intelligence would not have to guess at its meaning, and because the statute gives fair notice

205. Id. at 865.
A Remedy for Antiabortion Violence

to those it addresses. The court noted that the same terms incorporated into FACE have survived a vagueness challenge in other contexts.

Speech, if protected by the First Amendment, does not lose its protected status simply because it may embarrass others or coerce them into action. Therefore, protesters legitimately exercising their right to free speech need not fear that their conduct or speech will be criminalized simply because the injury caused is emotional damage or pain and suffering. The Supreme Court has also recognized that abusive or inexact language, which is sometimes the language of the political arena, is protected speech. An emotional injury would obviously not be compensable if suffered at the hands of protected speech. Emotional damages suffered at the hands of nonprotected speech, however, may indeed be compensable.

The statute provides that "nothing . . . shall be construed to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." While the final determination of the statute's constitutionality lies with the courts, this provision appears to adequately safeguard the right to free speech under the First Amendment.

VII. FACE-ING RICO: APPLICATION OF THE STATUTES

Hey... Boyd. Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very very soon and you wont know when like the babies don't. Get ready your [sic] dead.

(anonymous letter to a physician)

What's happening is that those who live by the sword now face dying by the sword. Violence begets violence, and abortion is the ultimate violence.

(Joseph Scheidler)

206. Id. at 866 (citing Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Grayned v. City of Rockford, 408 U.S. 104, 112 (1972)).

207. Id. (citing Cameron v. Johnson, 390 U.S. 611, 616 (1968)).


The remedy for the violence should reach both the individual leaders of antiabortion groups and those organizations that advocate the use of violence to achieve their goals. A complete remedy must also reach the individual protester who takes the law into his own hands. If FACE and RICO are each available to be applied to this extremist conduct, an adequate remedy will be effected. In order for this to be achieved, however, both statutes must be liberally utilized by both private parties and prosecutors.

FACE is necessary to effect a total remedy for the violence and obstructionist tactics directed toward abortion clinics. Congress' enactment of FACE sends a strong message to the antiabortion community that acts of obstruction and violence will no longer be tolerated. It provides for desperately needed injunctive relief which RICO does not provide. FACE also may be better suited to providing a federal forum in instances where the violence is either sporadic or committed by different individuals and thus may not rise to the level of the pattern of extortionate activity required by RICO. The FACE statute may help to discourage antiabortionists from specifically targeting clinics in areas where local law enforcement has failed. Furthermore, it appears that prosecutors are willing to charge individuals with violations of FACE, whereas RICO remains unused by the government in clinic violence actions.

Rather than singling out an entire protest movement with legislation, RICO actions can be brought specifically against the directors of the antiabortion groups who encourage illegal action. Their presence or absence at the scene of the protest is immaterial. The statute can also be used against the actual organizations that support such violence through the use of newsletters and donations received. Because of safeguards written into the statute, it is highly unlikely, if not impossible, for a successful RICO suit to be brought against an individual acting on his or her own initiative and engaging in protected conduct. It is just as unlikely that a successful RICO action could be brought against the individual protester who steps over the picket line into violence as a first-time offender. RICO's safeguards make it an ideal weapon to aim at the directors and organizers encouraging illegal acts.

Liability under RICO imposes severe penalties and serves to label an individual or organization as a "racketeer." This serves two purposes: It undermines the individual or organization financially and it sends a strong message to the organization's supporters as to how their methods of protest are being viewed in the culture. RICO is an appropriate remedy for those injured by antiabortion violence. It is the
best, indeed, the only remedy that encompasses those attempting to incite others to violence.

VIII. CONCLUSION

The law of equality and the law of freedom of speech are on a collision course in this country.213

(Catherine MacKinnon)

The violence against and harassment of abortion clinics damages not only the clinics, the clinic's patients, and women in general, but it also damages the pro-life movement. Violence damages the movement in that it becomes simple for the media, and therefore the average American, to fail to distinguish between those seeking to incite others to illegal acts and those engaged in violence from the person on the sidewalk who peacefully protests in order to bring about social change. Further polarization of the two sides of the abortion debate can lead only to a cycle of further frustration and violence.

A remedy for the violence is necessary. RICO may be the preferred remedy because of the statute's ability to single out both the leaders spearheading and the antiabortion groups advocating violence against clinics. FACE, however, is necessary to effect a total remedy because it can be applied to individuals whose conduct involves illegal obstruction or violence that does not rise to the level of extortion. FACE also provides clinics with an injunctive remedy and promises the hope for federal prosecutorial intervention. Any political question so deeply rooted in spiritual and emotional beliefs will sometimes adopt harsh, perhaps even abusive, arguments. However, the systematic encouraging of illegal activity should not be confused with what this country values as protected speech.