

ing feminist legal theory to create space for the feminine imagination to flourish compels an attention to the multiple ghosts that continue to haunt law, the legal academy, and feminist legal theory, and requires a commitment to constant reflexivity about the very framing of the feminist project.

In her reflections on feminist politics, Audre Lorde asked, "What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the narrowest parameters of change are possible and allowable."¹⁰⁰ This Article should function as a starting point for feminist reflexivity about hauntings, a beginning of a conversation about how to destabilize "a racist patriarchy" without drawing on the fruits of that same patriarchy. In attending to what has been absent from feminist discourse, we can locate the sites to which we need to turn our critical attention. Gordon writes,

When a ghost appears, it is making contact with you. Offer it a hospitable reception we must, but the victorious reckoning with the ghost always requires a partiality to the living. Because ultimately haunting is about how to transform a shadow of life into an undiminished life whose shadows touch softly in the spirit of a peaceful reconciliation. In this necessarily collective undertaking, the end, which is not an ending at all, belongs to everyone.¹⁰¹

In collectively interrogating our own silences and granting apparitions "a hospitable reception" in the service of exposing their "seething presence," feminist legal theory will stand to offer robust analyses which will better enable us to destabilize the workings of white heteronormative patriarchy.

"[s]omeone is degraded when they are reduced to stereotypes of their 'sex' or have imposed upon them objectified fantasies of their 'sex' so that they are viewed and treated as *unworthy* of equal citizenship." CORNELL, *IMAGINARY DOMAIN*, *supra* note 10, at 10. Yet, Cornell notes that "[f]or some women, exploration of hard-core pornography is crucial to their sexual imaginary." *Id.* at 103-04. To that end, Cornell stresses legal regulation of pornography both to preserve access to pornography for those who imagine it as part of the process of becoming a sexual subject and to ensure that unwilling viewers never confront pornography. *Id.* at 147-58. Ultimately, Cornell's vision of the use of law is underpinned by an attention to hauntings. That is, Cornell views law as a site that can reinstall and reify precisely the binaries and constructions it seeks to dismantle. In critiquing MacKinnon and Dworkin's anti-pornography statute, Cornell notes that law should not "entrench stereotypes of femininity as the basis of discrimination law." *Id.* at 99. Instead, Cornell argues, law must protect women who are injured through the production of pornography and ensure that unwilling viewers (either men or women) are not forced to confront pornography. *Id.* at 102. Yet feminists must also challenge law to create and protect space for the cultivation of subjects' sexual imaginations. *Id.* at 158.

100. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 110-11 (1984).

101. GORDON, *supra* note 1, at 208.

NOTES

WHERE ARE WE NOW? CLINIC PROTECTION IN THE WAKE OF *SCHEIDLER V.* *NATIONAL ORGANIZATION FOR WOMEN, INC.*¹

*Autumn Nero**

In March 1986, several antiabortion opponents entered the Ladies Center in Pensacola, Florida, a clinic providing abortion services.² The activists were members of the Pro-Life Action Network, a nationwide antiabortion group.³ Upon entering, the group pushed the clinic's administrator down the stairs and slammed a National Organization for Women volunteer escort against a wall, causing serious injuries to both.⁴ They then destroyed the clinic's medical equipment, rendering two abortion suction machines inoperable.⁵ Afterwards, the perpetrators gloated about the success of this clinic "invasion," claiming that by destroying the equipment they had "'shut down an abortuary for a couple of days.'"⁶

The Pensacola incident is by no means an isolated event. Since the Supreme Court's landmark 1973 decision in *Roe v. Wade*,⁷ antiabortion protestors have engaged in a variety of violent and coercive strategies in an attempt to stop clinics from providing abortion services.⁸ These tactics have ranged from the exasperating, such as pour-

1. *NOW v. Scheidler (NOW III)*, 126 S. Ct. 1264 (2006); *NOW v. Scheidler (NOW II)*, 537 U.S. 393, 409 (2003); *NOW v. Scheidler (NOW I)*, 510 U.S. 249, 253 (1994).

* J.D., University of Wisconsin Law School, 2006; B.A., New York University, 1996. I would like to thank the *Wisconsin Women's Law Journal* staff for their hard work, with special thanks to Jennifer Lindsley, Diana Aguilar, and Emily Thompson. I also would like to thank my husband, Jeremy, for his love, understanding, and encouragement during my law school career, and Molly and Otis for reminding me that there are more important things than exams and cite-check packets.

2. Fay Clayton & Sara N. Love, *NOW v. Scheidler: Protecting Women's Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 978-79 (1999).

3. *Id.*

4. *Id.* at 979.

5. *Id.* n.80.

6. *Id.* n.81 (quoting letter from Joseph Scheidler to Dow Pursley (Mar. 31, 1986)).

7. 410 U.S. 113 (1973).

8. See generally H.R. REP. NO. 103-306 (1993). I do not wish to imply that all antiabortion protestors engage in such activities. Many abortion protestors engage in peaceful and constitutionally protected prayer, song, and leafleting. Such lawful protests are not the subject of this Note.

ing glue into clinic locks;⁹ to the despicable, such as screaming "murderer" or "baby-killer" at clinic staff and clients,¹⁰ or, in recent years, making anthrax threats against clinics;¹¹ to the truly horrifying, such as murder, bombings, kidnapping, and arson.¹² Abortion opponents have stalked and threatened doctors, clinic staff, and their families; murdered doctors and clinic staff; destroyed personal property; and distributed "WANTED" posters calling for the execution of abortion providers.¹³ Employing identical techniques, abortion opponents throughout the country have organized in the effort to end abortion completely.¹⁴ Their strategy is threefold: first, prevent patients from accessing clinics;¹⁵ second, prevent doctors and clinic staff from performing abortions;¹⁶ and third, stop the clinics from operating entirely by closing them down permanently.¹⁷

In an early effort to end these tactics, the National Organization for Women and two medical facilities providing abortion services (hereinafter collectively "NOW")¹⁸ filed suit in 1986 in the United States District Court for the Northern District of Illinois against the Pro-Life Action Network¹⁹ and a coalition of connected antiabortion groups and individuals (hereinafter collectively "PLAN"). NOW alleged that the defendants engaged in a conspiracy to close medical

9. Clayton & Love, *supra* note 2, at 970.

10. *Id.* at 971.

11. NARAL, Clinic Violence and Intimidation, at 5-6 (Jan. 6, 2006), available at <http://www.prochoiceamerica.org/assets/files/Abortion-Access-to-Abortion-Violence.pdf>.

12. Clayton & Love, *supra* note 2, at 969.

13. *Id.* at 972; see also Nona LaPlante, *Clinic Blockades: What is the Problem? What is the Harm? What is the Solution?*, 3 CIRCLES BU. W. J. L. & SOC. POL. 15, 23-25 (1995). These "WANTED" or, at times, "unWANTED," posters may have resulted in the murders of three abortion providers in the 1990s: Dr. David Gunn, Dr. George Patterson, and Dr. John Bayard Britton. See Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1063-65 (2002).

14. Clayton & Love, *supra* note 2, at 972-73.

15. H.R. REP. NO. 103-306, at 6 (1993) (noting that certain antiabortion factions sought to stop patients from accessing clinics).

16. *Id.* (noting that certain antiabortion factions sought to prevent doctors and reproductive health professionals from providing services).

17. *Id.* (noting that certain antiabortion factions sought to stop clinics from operating).

18. NOW represented a certified class of both NOW members and nonmembers who previously had used or would use abortion services. *NOW II*, 537 U.S. 393, 397-98 n.2 (2003). The two medical clinics were the National Women's Health Organization of Summit, Inc., and National Women's Health Organization of Delaware, representing a class of clinics providing abortions in the United States. *Id.*

19. The Pro-life Action Network is a coalition of groups opposed to legal abortion. *Id.* at 397. Other defendants to the suit included individuals Joseph Scheidler, Andrew Scholberg, and Tim Murphy, the antiabortion group Operation Rescue, and a medical testing lab providing services to the clinic. *Id.* at 397 n.1. The director of Operation Rescue, Randall Terry, was also initially a defendant to the suit, but eventually settled with NOW. *NOW v. Scheidler*, 267 F.3d 687, 694 (7th Cir. 2001).

facilities providing abortion services²⁰ in violation of antitrust laws and the Racketeer Influenced and Corrupt Organizations Act (RICO)²¹ through extortion.²² What followed was *Scheidler v. National Organization for Women, Inc.*, a case involving nearly twenty years of litigation, including a jury trial, several trips to the Seventh Circuit Court of Appeals,²³ and three separate visits to the United States Supreme Court.²⁴ This trilogy included a 2003 decision reversing a jury finding that PLAN violated RICO (*NOW II*) and, more recently, a 2006 decision concluding the lengthy saga in favor of PLAN (*NOW III*).

This Note analyzes the legal consequences of PLAN's victory in this litigation, specifically considering how the Court's decisions in *NOW II* and *III* impact legal protections available to abortion provid-

20. Throughout this Note, various terms including, but not limited to, "clinic," "abortion facility" or "abortion clinic," and "women's health facility" or "women's health clinic" have been used interchangeably to describe medical facilities providing abortion services. In addition to abortion services, many of these facilities provide a variety of women's reproductive and general health care services. See *infra* notes 272-73.

21. RICO was part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 901-904, 84 Stat. 941, 941-48 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2000)).

22. NOW alleged that PLAN violated the Hobbs Act, 18 U.S.C. § 1951(a) (2000), which reads:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

23. NOW's first trip to the Seventh Circuit occurred in 1992, prior to the jury verdict. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). It arrived at the Seventh Circuit a second time in 1994. *NOW v. Scheidler*, No. 91-2468, 1994 U.S. App. LEXIS 11315 (7th Cir. May 16, 1994) (dismissing antitrust claims and remanding the case to the circuit court for further proceedings regarding the racketeering allegations). NOW again arrived at the Seventh Circuit in 2000. *NOW v. Scheidler*, 223 F.3d 615 (7th Cir. 2000) (upholding a circuit court order denying requests to file amicus briefs). Finally, the Seventh Circuit again considered NOW in 2001, subsequent to the jury verdict in favor of NOW. *NOW v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) (affirming the jury verdict). After the 2003 Supreme Court decision, NOW twice visited the Seventh Circuit, first in 2004, *NOW v. Scheidler*, 91 Fed. Appx. 510 (7th Cir. 2004), and, most recently, the Seventh Circuit denied PLAN's motion for a rehearing in January of 2005, *NOW v. Scheidler*, 396 F.3d 807 (7th Cir. 2005).

24. NOW reached the United States Supreme Court for the first time in 1994. *NOW I*, 510 U.S. 249 (1994). The Court considered it again in 2003. *NOW II*, 537 U.S. 393 (2003). In July of 2005, the Court again accepted certiorari, and heard arguments in November of the same year. *NOW v. Scheidler*, 91 Fed. Appx. 510 (7th Cir. 2004), *reh'g*, 396 F.3d 807 (7th Cir. 2005), *cert. granted*, 125 S. Ct. 2991 (U.S. June 28, 2005) (No. 04-1244); Supreme Court of the United States October Term 2005, Oral Argument Calendar (Sept. 21, 2005), http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalendar2005.pdf (noting date of oral arguments). The Court released its opinion on February 28, 2006. *NOW III*, 126 S. Ct. 1264 (2006). The decision is unpublished in the U.S. Reporter as of this writing; therefore, all citations are to the Supreme Court Reporter.

ers, and consequently the availability of abortion services to American women. In order to provide the background necessary to understand the *NOW* decisions, Part I introduces the general law of racketeering including the history and purpose of RICO and the Hobbs Act—the federal extortion law. Part II details the history of the case including discussion of the early Seventh Circuit and Supreme Court decisions (*NOW I*). Next, Part III scrutinizes *NOW II* and examines how the Supreme Court interpreted the Hobbs Act to effectively end RICO's applicability to antiabortion activities, reviewing both the majority opinion and Justice Stevens's dissent. Next, Part IV considers alternative arguments for RICO liability raised by the plaintiff, and rejected by a unanimous Court, in *NOW III*. Part V follows with an exploration of both the scholarly reaction to the Court's decisions and their legal and practical ramifications, specifically taking into account those laws still available to protect abortion providers from violent and coordinated protests, which include state law protections and the Freedom of Access to Clinic Entrances Act (FACE).²⁵

This Note concludes that the outcome in *NOW* is likely to weaken protections available to abortion providers in two ways. First, by eliminating RICO's applicability in this arena, clinics are now unprotected under federal law from economic attacks by antiabortion advocates seeking to permanently put reproductive health facilities out of business. Second, clinics no longer have a cause of action against antiabortion associations and especially their individual directors, who are responsible for organizing the protests targeted at abortion providers. Consequently, the Court's decisions in *NOW* leave clinics vulnerable to certain types of antiabortion activities, and as a result may hamper a woman's constitutionally protected right to obtain safe and legal abortion services by limiting access to services. Accordingly, Part VI of this Note concludes by encouraging both state and federal lawmakers to adopt legal remedies to address these specific exposed areas, and by offering suggestions for such remedies based on existing laws.

I. FIRST, SOME CONTEXT: THE LAW OF RACKETEERING

The *NOW* decisions hinge on interpretations of RICO and the Hobbs Act. Indeed, in order to understand *NOW*, it is essential to have a basic understanding of both laws. Accordingly, this section provides pertinent background information.

25. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248 (2000)).

A. Racketeer Influenced and Corrupt Organizations Act: It's Not Just For Gangsters Anymore

Congress passed RICO in 1970.²⁶ Although originally enacted to combat organized crime, and therefore providing for criminal penalties, over time plaintiffs have urged courts to apply RICO in a wide variety of situations.²⁷ This is likely because of 18 U.S.C. § 1964, which allows for private civil suits for RICO violations with remedies including treble damages and a reasonable attorney's fee, providing a strong incentive to bring RICO actions.²⁸ Thus, RICO is a powerful and lucrative legal tool available to civil plaintiffs in order to combat activities that fall under its umbrella.

Although *NOW* initially argued that PLAN violated numerous RICO sections, these claims eventually narrowed to violations of 18 U.S.C. §§ 1962(c) and 1962(d).²⁹ Under § 1962(c), it is unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity."³⁰ Likewise, § 1962(d) prohibits conspiring to violate other RICO sections.³¹ Accordingly, under both sections, plaintiffs must demonstrate that the defendant was involved in "racketeering" as a predicate to a RICO violation.

This begs the question: what is racketeering? Under 18 U.S.C. § 1961(1)(b), racketeering requires that the defendant commit certain illegal predicate acts.³² One such predicate offense is a violation of Hobbs Act, 18 U.S.C. § 1951, which prohibits, among other activities, extortion and interference with commerce.³³ This is the predicate offense that PLAN allegedly violated. Thus, it was essential to *NOW*'s claim to prove both violations of RICO through a pattern of racketeering and racketeering itself through predicate acts of extortion under the Hobbs Act.

B. Extortion and the Hobbs Act: What Does it Mean to "Extort"?

In order to fully understand the *NOW* decisions, one must examine not only RICO, but also the law of extortion. At its roots, extortion is a common law property offense involving the taking of another person's property by a public official "under the pretense that he was

26. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 901-904, 84 Stat. 941, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968 (2000)).

27. See generally Alexander M. Parker, Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819 (1996).

28. 18 U.S.C. § 1964 (2000).

29. 18 U.S.C. §§ 1962(c), 1962(d) (2000).

30. 18 U.S.C. § 1962(c).

31. 18 U.S.C. § 1962(d).

32. 18 U.S.C. § 1961(1)(b) (2000).

33. 18 U.S.C. § 1951 (2000).

entitled to such property by virtue of his office."³⁴ Under this common law definition, courts did not recognize the applicability of extortion to private individuals. However, the modern law of extortion is far broader; Congress expanded the scope of extortion to allow for actions against private individuals when it passed the Hobbs Act in 1946.³⁵ Thus, under the Hobbs Act, courts can fine or imprison all individuals who "obstruc[t], dela[y], or affec[t] commerce" by extortion.³⁶

What exactly is extortion? In writing the Hobbs Act's definition, Congress drew on two primary legal models: the Penal Code of New York and the Field Code.³⁷ Each of these statutes partly defined extortion as the "obtaining of property."³⁸ This language carried over into 18 U.S.C. § 1951(b)(2), which includes in its definition of extortion the "obtaining of property."³⁹ This requirement has been the subject of significant legal debate as courts struggled to define the word "obtaining."⁴⁰ The main thrust of the legal dilemma is whether obtaining property requires only that the accused take property from the plaintiff, thereby denying her use of the property, or whether "obtaining property" actually requires that the accused acquire the use of the property for herself.⁴¹

This distinction between merely depriving a plaintiff of property and actually acquiring the use of that property is at the very heart of the *NOW* decisions, in which the Court considered whether abortion protestors were extortionists. In order to answer this question fully, the Court was first asked to consider the outer boundaries of the definition of "property." For RICO's purposes, what is a clinic's property? Is it merely the tangible—the ground, building, or equipment—or does property extend to the intangible assets of the clinic, such as its ability to conduct business and service clients? Second, the Court was asked to determine whether a protestor who damages a clinic's right to conduct business has "obtained" that property even though the protestor has not actually acquired anything for himself or herself. Is it enough that the clinic can no longer exercise its right to conduct business, or does the protestor actually have to get his or her hands on something? These are some the questions the Court faced in the *NOW* decisions, most specifically in *NOW II*, which will be discussed in more depth in Part III.

34. *NOW II*, 537 U.S. 393 (2003) (citing BLACKSTONE, COMMENTARIES, *141; 3 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1393, 790-91 (1957)).

35. *Id.*

36. 18 U.S.C. § 1951(a).

37. *Evans v. United States*, 504 U.S. 255, 262 n.9 (1992).

38. *Id.*

39. 18 U.S.C. § 1951(b)(2).

40. *See infra* Part III.

41. *See infra* Part III.

II. THE ORIGINS OF THE LITIGATION AND *NOW I*: 1980-2001

The *NOW* litigation stemmed from activities of antiabortion protestors starting in the 1980s and continuing into the 1990s, during a period that two attorneys involved in the case, Fay Clayton and Sara Love, referred to as a "campaign of terrorism," in which antiabortion extremists attempted to "chill the exercise of" the constitutional right to obtain an abortion.⁴² Extremists "vowed to stop at nothing to prevent abortions from being performed,"⁴³ and engaged in a broad range of violent tactics, including blockades and invasions designed to stop clinics from providing services,⁴⁴ kidnapping,⁴⁵ and, as time progressed, even murder.⁴⁶ Women who sought abortions found

42. Clayton & Love, *supra* note 2, at 969-72 (includes a detailed discussion of PLAN's activities in the 1980s). For statistics regarding clinic violence and disruption in the United States from 1977 to the present, see National Abortion Federation, NAF Violence and Disruption Statistics (Dec. 2005), available at http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf.

43. Clayton & Love, *supra* note 2, at 969.

44. Blockades have resulted in over 33,000 arrests in the United States since 1977. National Abortion Federation, *supra* note 42, at 1. In a blockade, [d]ozens and often hundreds of persons trespass onto clinic property and physically barricade entrances and exits by sitting or lying down, by standing and locking arms or by chaining themselves to fences, doors or other clinic property. Shoving, pushing and other violence often results as blockaders attempt to prevent access by patients and staff.

H.R. REP. NO. 103-306, at 7 (1993). Similarly, in an "invasion," "a number of pro-life demonstrators storm[] and enter[] clinics that are in the process of offering services to patients." *Id.* These tactics cripple a clinic's ability to offer abortion services because no one is able to enter the clinic to receive those services. Blockades and invasions are used together in a campaign against a particular clinic. One such campaign in Wichita, Kansas, in 1991 lasted for forty-six days, during which hundreds of protestors engaged in acts of trespass and obstruction resulting in over 2600 arrests. *Id.* The Wichita clinic was closed for weeks at a time. *Id.* Even when open, patients attempting to enter were trapped in cars outside the clinic for three full days. *Id.*

45. In 1982, Don Benny Anderson, along with two accomplices, kidnapped an Illinois abortion provider and his wife. Jennifer Del Medico, *The Terrorist Campaign Against Abortion*, VILLAGE VOICE, Nov. 10, 1998, at 40. Anderson, believed to be the founder of an antiabortion group called the Army of God, held the couple for eight days in an ammunition bunker before releasing them. *Id.*

46. In 1993, a member of Operation Rescue named Michael Griffith shot and killed Dr. David Gunn. LaPlante, *supra* note 13, at 24-25. Dr. Gunn was attempting to enter a side door at the Pensacola Women's Health Medical Services in Pensacola, Florida, during a blockade. *Id.* According to witnesses, Griffith chased him down and shot him three times in the back. *Id.* Sixteen months later, former Reverend Paul Hill opened fire on an automobile in front of the Ladies Center, another clinic in Pensacola, Florida. *Id.* at 25. Three passengers were inside the car: Dr. John Britton and his volunteer escorts, James and June Barrett. *Id.* Both Dr. Britton and Mr. Barrett died of gunshot wounds to the head. *Id.* June Barrett sustained injuries, but survived. National Abortion Federation, History of Violence, http://www.prochoice.org/about_abortion/violence/murders.asp (last visited Mar. 31, 2006). Florida sentenced Hill to death; he was executed in 2003. *Id.* Acts of murder are not, however, confined to Florida. That same year John C. Salvi III, a twenty-two-year-old hairdresser from Hampton, New Hampshire, entered a Planned Parenthood in Brook-

themselves impeded from entering clinics.⁴⁷ In one instance, a patient, a devout Catholic who decided to terminate her pregnancy in the third trimester after learning that the baby did not have a functioning heart, spent two days trapped in a car, along with two teenage rape victims, in 110-degree heat outside a clinic in Kansas.⁴⁸ Operation Rescue blockaders "spat on them, attacked and shook their car, screamed foul names at them, and physically prevented them from getting close to the clinic."⁴⁹ Threats were not limited to women seeking abortions; antiabortion protestors harassed patients regardless of the purpose of their visit.⁵⁰ Operation Rescue blockaders attacked a woman attempting to enter a clinic in Los Angeles.⁵¹ The woman was a cancer patient with an appointment at the clinic for a post-operative check up.⁵² Although the woman was accompanied by her minister, protestors scratched, clawed, and hit her with signs until her surgical sutures ruptured.⁵³ Antiabortion protestors also stalked, intimidated, and destroyed the property of doctors, staff, and their families.⁵⁴

line, Massachusetts, and shot and killed Shannon Lowney, a twenty-five-year-old receptionist, continuing to fire bullets around the clinic before exiting. Michael D. Lemonick & Margot Hornblower, *An Armed Fanatic Raises the Stakes: A Deadly Rampage at Two Clinics Shocks Boston and Raises a National Outcry Over Unchecked Antiabortion Terrorism*, TIME, Jan. 9, 1995, at 34. Ten minutes later, he entered Preterm Health Services, less than two miles away, and shot and killed Leanne Nichols, also a receptionist at the clinic, and again continued to fire bullets around the clinic, stopping only when a security guard returned fire. *Id.* In addition to killing the two women, Salvi injured five people, and his bag contained a second gun and 700 rounds of ammunition. *Id.* Salvi was not linked to any particular antiabortion group. *Id.* Violence again erupted in 1998, with the murders of Officer Robert Sanderson, killed during a clinic bombing in Birmingham, Alabama, in January, and Dr. Barnett Slepian, shot and killed in his home in Amherst, New York. National Abortion Federation, *supra*. Olympic Park bomber Eric Rudolph, a member of the Army of God, has been charged with the Birmingham bombing. National Abortion Federation, Anti-abortion Extremists/Eric Rudolph, http://www.prochoice.org/about_abortion/violence/eric_rudolph.html (last visited Mar. 31, 2006). Dr. Slepian's killer was James Kopp, a man suspected in other abortion-related shootings. National Abortion Federation, Anti-abortion Extremists/James Kopp, http://www.prochoice.org/about_abortion/violence/james_kopp.html (last visited Mar. 31, 2006). Kopp is believed to be a member of the Army of God and was linked at one time to Operation Rescue. *Id.*

47. See Clayton & Love, *supra* note 2, at 982-83.

48. *Id.* But see H.R. REP. NO. 103-306, at 7-8 (1994) (stating that the women were trapped in the car for three days).

49. See Clayton & Love, *supra* note 2, at 982-83.

50. LaPlante, *supra* note 13, at 26. For example, one woman, Karen Maxwell, testified in 1991 before a House subcommittee that while accompanied by her twelve-year-old daughter, blockaders prohibited her from entering a clinic to receive prenatal care. *Id.* Protestors said that her doctor was a "baby killer" and refused to allow her entry. *Id.*

51. Clayton & Love, *supra* note 2, at 988.

52. *Id.*

53. *Id.* at 988-89.

54. *Id.* at 972. Examples of such events are legion, so only a few are noted. Prior to his 1993 murder, antiabortion activists followed, threatened, and harassed Dr. Gunn for years, *supra* note 46, and had distributed "WANTED" posters that included

They bombed clinics,⁵⁵ burned them down,⁵⁶ and contaminated them with butyric acid.⁵⁷ As Clayton and Love noted, "While the tactics varied, the goals were the same: to shut down the clinics so that women could not receive medical services there and to stop clinics [from] performing abortions."⁵⁸

Joseph Scheidler, Andrew Scholberg, and Timothy Murphy, all defendants in the NOW cases, formed PLAN in the 1980s as a nationwide organizational tool for antiabortion groups.⁵⁹ They held conventions throughout the country, teaching protestors creative ways to close clinics by interfering with their operation.⁶⁰ At one such convention held in Appleton, Wisconsin, in 1985, during a period marked with frequent clinic bombings and arsons, the motel marquee greeting convention attendees read "Have A Blast," and attendees wore miniature dynamite stick lapel pins.⁶¹ In furtherance of their goal of closing clinics permanently, Scheidler authored a book entitled *Closed: 99 Ways to Stop Abortion*, an "operations manual" promoting methods "intended to interfere with and even stop the business of abortion."⁶² PLAN specifically excluded antiabortion groups seeking to oppose

his picture, home address, phone number, and daily itinerary. Amy M. Sneirson, *No Place to Hide: Why State and Federal Enforcement of Stalking Laws May Be the Best Way to Protect Abortion Providers*, 73 WASH. U. L. Q. 635, 642 (1995). In testimony before a Senate subcommittee, one abortion provider described how he had "been threatened repeatedly at home and at work. One message left on his answering machine said: 'I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off.'" S. REP. NO. 103-117, at 10 (1993). His wife received threatening voice mail messages at work, including one stating, "I'm just very thankful that you weren't killed by that car that you pulled out in front of the other day, cause [sic] you certainly are not ready to meet your maker." *Id.*

55. H.R. REP. NO. 103-306, at 9 (1993).

56. *Id.*

57. The 1993 House Report described these acid attacks as follows:

[Butyric acid] is a controlled substance with an extremely noxious odor that makes those who inhale the fumes sick and dizzy. Easily shot with a hypodermic needle through key holes, under doors, or holes drilled in the roofs or sides of clinic buildings, enough acid to cover one square foot of carpet is all that is needed to close a clinic for a week. . . . In 1992, [the National Abortion Federation] recorded 57 of these attacks, with estimated clean-up costs of almost half a million dollars. From January 1, 1993, through May 5, 1993, there were 14 reported attacks, with clean-up costs alone totalling [sic] over \$65,000.

Id. (footnotes omitted). When a clinic is contaminated with butyric acid, it forces the clinic to close for weeks in order to replace anything the acid came into contact with, including equipment and flooring. NARAL, Clinic Violence and Intimidation 5 (Jan. 6, 2006), available at <http://www.prochoiceamerica.org/assets/files/Abortion-Access-to-Abortion-Violence.pdf>.

58. Clayton & Love, *supra* note 2, at 970-71.

59. *Id.* at 974-75.

60. *Id.*

61. *Id.* at 985-86.

62. JOSEPH SCHEIDLER, *CLOSED: 99 WAYS TO STOP ABORTION* 18 (1985). The book is characterized as an "operations manual" on its back cover.

abortion through legal means, and allegedly planned violent attacks in closed groups to which they allowed entry to only a select group of proven protestors.⁶³ PLAN leaders conspicuously were not present when the illegal activities took place, thus protecting themselves from arrest.⁶⁴ As Clayton and Love stated, "PLAN operated much like the Mafia," and Scheidler, Scholberg, and Murphy were the "godfathers," organizing a structured and illegal enterprise from behind the scenes.⁶⁵ This pattern of activity led Clayton and Love to declare that RICO was "tailor-made" for NOW.⁶⁶

In an attempt to terminate PLAN's assault on abortion clinics, NOW filed suit in the Northern District of Illinois in 1986.⁶⁷ In its complaint, NOW alleged that PLAN encouraged and committed unlawful activities in order to interfere with the business operations of women's clinics.⁶⁸ NOW contended that these activities were in violation of the Sherman Antitrust Act, RICO, and various state laws.⁶⁹ Examples of the unlawful activities alleged in the NOW complaints include tampering with clinic locks and entrances, harassing clinic patients, storming and vandalizing centers, making false appointments in order to prevent legitimate patients from making appointments, stealing medical waste drums containing aborted fetal tissue (and then announcing to the public that they had the tissue), and harassing and threatening businesses providing services to the facilities, including landlords and medical testing providers.⁷⁰ NOW alleged that the stated goal of these activities was to put abortion providers out of business.⁷¹

A. Act One: The First Trip to Court (NOW I)

In May 1991, the Northern District of Illinois granted PLAN's motion to dismiss NOW's claim.⁷² First, the court dismissed NOW's antitrust claim, finding that the defendants did not have an economic motive, but instead were engaged in an effort to influence government action.⁷³ Because of their political goals, they were entitled to antitrust immunity.⁷⁴ Next, addressing the RICO arguments, the court dismissed NOW's claim again because PLAN's activities were po-

63. Clayton & Love, *supra* note 2, at 976-77.

64. *Id.* at 977; *see also id.* at 978-79 (noting that during the 1986 invasion of a Florida clinic, Joseph Scheidler limited his role to "public relations" in front of the clinic while other PLAN members destroyed the equipment within).

65. *Id.* at 976.

66. *Id.* at 973.

67. *Id.* at 979.

68. NOW v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992).

69. *Id.*

70. *Id.* 615-16.

71. NOW I, 510 U.S. 249, 253 (1994).

72. *Id.* at 254.

73. NOW v. Scheidler, 765 F. Supp. 937, 940 (N.D. Ill. 1991).

74. *Id.*

litically motivated.⁷⁵ The court held that RICO required an economic motive "to the extent that some profit-generating purpose must be alleged."⁷⁶ Consequently, because the defendants' motivation to "destroy clinic property, threat[en] clinic employees, and blo[ck] access to the clinics, among other alleged acts, was not to obtain money, but rather to otherwise further their antiabortion cause by limiting the availability of abortion services," the court reasoned that RICO was inapplicable.⁷⁷ Because the court dismissed all federal claims, it lacked jurisdiction to hear the pendent state claims, and dismissed the case in its entirety.⁷⁸

NOW appealed this dismissal to the Seventh Circuit, which affirmed the lower court's ruling, holding that the defendants' activities did not fall within the reach of either antitrust law or RICO.⁷⁹

NOW again appealed the ruling, this time to the United States Supreme Court, which reversed the judgment of the lower court regarding the RICO issue.⁸⁰ In an opinion by Chief Justice Rehnquist, the Court held in NOW I that an enterprise for purposes of RICO did not require an economic motive.⁸¹ Accordingly, under the Court's ruling, the fact that PLAN aimed for political change rather than monetary benefit did not bar NOW from pursuing a RICO claim. However, in order to prove its RICO claim, NOW was still required to show that PLAN engaged in a "pattern of racketeering," a question not addressed by the Court in NOW I.⁸²

B. The Trial

The Court remanded the case for further proceedings to address the remaining issues, mainly to discover whether PLAN had engaged in a pattern of racketeering.⁸³ As a predicate to proving a RICO violation, NOW had to prove at trial that PLAN had violated the Hobbs Act.

The trial began on March 4, 1998.⁸⁴ NOW presented numerous witnesses who testified as to the illegal actions of PLAN and established that these actions were part of a concerted effort—a larger plan to close clinics—rather than merely isolated and unrelated occurrences, and that PLAN used fear, force, and violence to accomplish

75. *Id.* at 943.

76. *Id.*

77. *Id.* at 944.

78. *Id.* at 945.

79. NOW v. Scheidler, 968 F.2d 612, 630-31 (7th Cir. 1992).

80. NOW I, 510 U.S. 249, 262 (1994).

81. *Id.* at 259.

82. *Id.* at 262.

83. NOW v. Scheidler, No. 91-2468, 1994 U.S. App. LEXIS 11315, at *3-5 (7th Cir. May 16, 1994).

84. NOW v. Scheidler, No. 86 C 7888, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. July 16, 1999).

this.⁸⁵ They presented patient testimony regarding activities at clinic blockades and staff, administrator, and doctor testimony regarding property destruction, security expenses, and threats.⁸⁶ Additionally, NOW's attorneys relied on the defendants' own documents, videotapes, and hotline recordings.⁸⁷ After reviewing the evidence, the jury decided unanimously in favor of the plaintiffs, specifically finding twenty-one acts or threats of extortion, twenty-five violations of state law, and four acts or threats of physical violence to persons or property.⁸⁸ The jury awarded monetary damages to the plaintiffs, and as an added coup, the court granted a permanent nationwide injunction preventing PLAN from interfering with the plaintiffs' right to provide or receive abortion services.⁸⁹

III. ACT TWO: THE SUPREME COURT'S OPINION IN *NOW II*

PLAN appealed the jury verdict to the Seventh Circuit, arguing, among other things, that they were not engaged in conduct prohibited under RICO.⁹⁰ PLAN contended that NOW failed to prove the predicate act—that PLAN had violated the Hobbs Act.⁹¹ Specifically, PLAN argued that the Hobbs Acts defined extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear,” and that this case involved neither obtaining nor property.⁹² Thus, the defendants maintained that they did not extort.

The Seventh Circuit rejected the argument that the case did not involve “property,” noting that the Seventh Circuit had “repeatedly held that intangible property such as the right to conduct a business can be considered ‘property’ under the Hobbs Act,” and refused “to revisit that holding [again].”⁹³

The defendants, however, also argued that they had not obtained anything as a result of their actions, and thus did not violate the Hobbs Act.⁹⁴ Even if they indeed had attempted to deprive the plaintiffs of their businesses, the defendants had not actually acquired the businesses for themselves.⁹⁵ The court again quickly rejected the de-

85. Testimony described PLAN operatives pinning clinic employees between the clinic entrance and a large group of protestors, harassing patients as they entered clinics, forcibly entering and then vandalizing clinics, chaining themselves to equipment in the clinics, and assaulting patients. *Id.*; see also Clayton & Love, *supra* note 2, at 981-92.

86. Clayton & Love, *supra* note 2, at 981-90.

87. *Id.*

88. *NOW*, 1999 U.S. Dist. LEXIS 11980, at *18.

89. *Id.* at *60.

90. *NOW v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001).

91. *Id.*

92. *Id.* (quoting 18 U.S.C. § 1951).

93. *Id.*

94. *Id.*

95. *Id.*

fendants' assertions, and relied on what it considered settled law—that the Hobbs Act did not require that the extortionist actually receive property. The court stated that the defendants' argument was “contrary to a long line of precedent . . . holding that as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.”⁹⁶ Thus, according to the Seventh Circuit, it was sufficient for purposes of proving extortion to demonstrate that PLAN interfered with the plaintiffs' right to offer or receive abortion services.⁹⁷

PLAN appealed the ruling of the Seventh Circuit to the United States Supreme Court. In an eight-to-one decision penned by Chief Justice Rehnquist (*NOW II*), the Court held that PLAN did not commit extortion under the Hobbs Act because it did not “obtain” property, meaning that they did not actually acquire anything.⁹⁸

A. *The Majority Opinion*

The majority in *NOW II* held that under the Hobbs Act, antiabortion activists had not committed extortion because they did not “obtain” the property of the abortion providers.⁹⁹ Instead, they merely deprived the plaintiffs of their property without actually acquiring it for themselves.¹⁰⁰ The Court concluded that when a defendant merely deprives a plaintiff of property without actually acquiring it, he or she is not an extortionist.¹⁰¹

The majority declined to identify the outer boundaries of property, and therefore did not address whether the right to conduct business is, in fact, “property” under the Hobbs Act.¹⁰² Instead, it concerned itself with the “obtaining” requirement, beginning by ascertaining the meaning of the Hobbs Act under the common-law doctrine of extortion.¹⁰³ Recognizing that extortion under common law was the taking of property under the pretense of public office, the Court acknowledged that Congress had expanded extortion to include private citizens by enacting the Hobbs Act.¹⁰⁴ However, the Court also noted that despite this expansion, extortion retained the requirement that property must be “obtained.”¹⁰⁵ Thus, the Court looked at cases interpreting “obtaining” under the New York Penal

96. *Id.* (citing *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

97. *Id.*

98. *NOW II*, 537 U.S. 393, 409 (2003).

99. *Id.* at 409.

100. *Id.* at 404-05.

101. *Id.* at 409.

102. *Id.* at 402.

103. *Id.*

104. *Id.* at 402-03.

105. *Id.* at 403-04.

Code and Field Code, because those laws contained the same requirement and had been the basis for the Hobbs Act.¹⁰⁶

The Court first examined how courts had interpreted the Field Code and the New York Penal Code's "obtaining" requirement, relying on two New York cases, *People v. Ryan*¹⁰⁷ and *People v. Weinseimer*.¹⁰⁸ In *Ryan*, in which the defendant threatened to burn down buildings unless creditors gave her \$500, the New York Court of Appeals stated that extortion required an "intent to extort or gain money or property."¹⁰⁹ Similarly, in *Weinseimer*, which involved payments to the president of a plumbers' union to avoid a strike, the New York court concluded that the "material issue" in the case was whether the defendant had "receive[d] [money] from the complainant."¹¹⁰ According to the Supreme Court, these two cases demonstrated that New York case law prior to the enactment of the Hobbs Act "included both a deprivation and acquisition of property."¹¹¹

The Court then contemplated its own past interpretations of the laws. In doing so, the Court concluded that it had on past occasions recognized that "obtaining" requires acquisition, relying on its own interpretation of *People v. Cuddihy*,¹¹² a New York case, discussed in *United States v. Enmons*,¹¹³ a Supreme Court case. In *Cuddihy*, the New York court established the rule that "intent to extort or gain must be wrongful or unlawful 'to obtain that which in justice and equity the party is not entitled to receive.'"¹¹⁴ Therefore, when an employer, *Cuddihy*, required his employee to return a portion of each week's wages, the New York court concluded that it was not extortion because there was nothing unlawful about the employer setting the terms of employment.¹¹⁵ In *United States v. Enmons*,¹¹⁶ the Supreme Court relied on *Cuddihy* to hold that the Hobbs Act did not prohibit the use of strikes to obtain higher wages because the goal was legitimate—to receive higher compensation for services for which the employer contracted.¹¹⁷ Although neither case stated the principle directly, from these two cases' requirement of a "wrongful taking," the *NOW* Court interpreted the law to require "not only the deprivation but also the acquisition of property."¹¹⁸

106. *Id.* at 404; see also *supra* note 37 and accompanying text.

107. 133 N.E. 572 (N.Y. 1921).

108. 102 N.Y.S. 579 (N.Y. App. Div. 1907).

109. 133 N.E. at 573 (emphasis added).

110. 102 N.Y.S. at 588 (emphasis added).

111. *NOW II*, 537 U.S. 393, 403 (2003).

112. 271 N.Y.S. 450, 456 (N.Y. Gen. Term 1934).

113. *NOW II*, 537 U.S. at 404.

114. 271 N.Y.S. at 456 (citation omitted).

115. *Id.*

116. 410 U.S. 396 (1973).

117. *Id.* at 398.

118. *NOW II*, 537 U.S. at 404.

Applying this interpretation of the Hobbs Act to PLAN's actions, the Court held that there was no extortion. Although it recognized that PLAN had "disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights," the Court reasoned that

even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received "something of value from" respondents that they could "exercise, transfer, or sell." To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.¹¹⁹

Additionally, the Court relied on the difference between "coercion" and "extortion," two distinct crimes.¹²⁰ According to the Court, coercion "involves the use of force or threat of force to restrict another's freedom of action," and this "more accurately describe[d] the nature of [PLAN's] actions."¹²¹ Interpreting the Hobbs Act to include deprivation without acquisition would not only "conflict with the express requirement of the Hobbs Act," but would "also eliminate the recognized distinction between extortion and the separate crime of coercion."¹²² This was further evidence that PLAN's actions did not fall within the statutory purview of the Hobbs Act.

In sum, the Court determined that the Hobbs Act required that in order for PLAN to be culpable, it must actually acquire the property of NOW, not merely deprive NOW of the use of its own property or the exercise of its own rights.¹²³ Because PLAN did not "receive something of value" from the plaintiffs—something it could transfer or sell—the Court held that no extortion had taken place.¹²⁴ Accordingly, the Court reversed the jury's verdict and vacated the district court's injunction.¹²⁵

B. Justice Stevens's Dissent

Justice Stevens took a different approach to the Hobbs Act, concluding that PLAN in fact did violate the Hobbs Act by attempting to

119. *Id.* at 404-05 (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)).

120. *Id.* at 405-06.

121. *Id.* at 405.

122. *Id.*

123. *Id.* at 406.

124. *Id.*

125. *Id.* at 411.

deprive NOW of its clinics.¹²⁶ In doing so, he relied on what he referred to as a "settled" and "uniform" interpretation of property under the Hobbs Act throughout all circuits, one that applied to intangible assets and did not require both deprivation and acquisition in order to "obtain" property by extortion.¹²⁷

Stevens noted that courts have generally given property an expansive definition that includes the intangible right to control one's own assets.¹²⁸ Thus, under Stevens's view, surrender of one's right to control his or her own property is "an appropriation of control embraced by the term 'obtaining.'"¹²⁹ Accordingly, under what Stevens considered to be a well-settled definition of "property," PLAN obtained the plaintiffs' property when it attempted to take control of their lawful business assets.¹³⁰

Stevens relied on a variety of circuit cases to support this assertion, noting that the interpretation of the Hobbs Act was so uniform that he would discuss only "a few of the more significant cases."¹³¹ From cases such as the Second Circuit's decision in *United States v. Tropiano*,¹³² he concluded that the right to solicit business was "property."¹³³ In *Tropiano*, the defendants were charged with violations of the Hobbs Act for threatening other waste removal businesses in an attempt to stop them from soliciting potential customers.¹³⁴ The Second Circuit held that "property," for purposes of the Hobbs Act, is not "limited to physical or tangible property or things . . . but includes, in a broad sense, any valuable right considered as a source or element of wealth . . . and does not depend upon a direct benefit being conferred on the person who obtains the property."¹³⁵ Recognizing that the ability to "pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right," the court concluded that the entitlement to solicit business constituted "property" under the Hobbs Act.¹³⁶ Accordingly, even though the defendant did not literally acquire this right, the court held that the Hobbs Act prohibited the defendants' activities.¹³⁷

Similarly, considering the holding in *United States v. Provenzano*,¹³⁸ Stevens concluded that "property" was not limited to goods or things,

126. *Id.* at 412 (Stevens, J., dissenting).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 413.

132. 418 F.2d 1069 (2d Cir. 1969).

133. *Id.* at 1076.

134. *Id.* at 1072.

135. *Id.* at 1076.

136. *Id.*

137. *Id.*

138. 334 F.2d 678 (2d Cir. 1964).

but also can also be intangible.¹³⁹ In *Provenzano*, the defendant was convicted under the Hobbs Act of extorting \$17,100 from a transportation company, Dorn, through "economic fear."¹⁴⁰ Provenzano was a Teamsters officer who arranged for Dorn to make payments to a third party, a local prosecutor, in exchange for Provenzano's agreement to smooth over the company's issues with the local labor union.¹⁴¹ When Dorn ceased making the payments, labor problems again occurred.¹⁴² Because Dorn sent the payments directly to the prosecutor, there was no direct evidence that Provenzano obtained any actual benefit.¹⁴³ However, the Second Circuit held that under the Hobbs Act "it is not necessary to prove that the extortionist himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom."¹⁴⁴ Consequently, it was enough that Provenzano had directed Dorn to make the payments to another regardless of whether he himself received money.¹⁴⁵

Likewise, Stevens considered the holding in *United States v. Green*,¹⁴⁶ and concluded that a person need not have a direct benefit conferred upon him or her in order to "obtain property."¹⁴⁷ In *Green*, a 1956 United States Supreme Court case, a jury convicted labor union members of extortion under the Hobbs Act after they forced employers, through threats of violence, to pay for unwanted and unrequested labor services.¹⁴⁸ However, the trial court in that case had interpreted the Hobbs Act to cover only the taking of property for the extortionist's advantage and in fact threw out the jury's verdict.¹⁴⁹ The Supreme Court reversed the lower court's ruling on direct appeal, holding that in an action under the Hobbs Act extortion "in no way depends upon having a direct benefit conferred on the person who obtains the property."¹⁵⁰ Therefore, even though the labor union did not itself receive property, it was sufficient for purposes of the Hobbs Act to prove that it had used threats to deprive the employers of their money.

In total, Stevens identified sixteen cases in which federal courts had applied this view of "obtaining property," concluding:

[W]here the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in or-

139. *NOW II*, 537 U.S. 393, 412 (2003) (Stevens, J., dissenting).

140. 334 F.2d at 680-81.

141. *Id.* at 681-84.

142. *Id.* at 683-84.

143. *Id.* at 685.

144. *Id.* at 686.

145. *Id.*

146. 350 U.S. 415 (1956).

147. *NOW II*, 537 U.S. 393, 413-14 (2003) (Stevens, J., dissenting).

148. 350 U.S. at 417.

149. *Id.* at 418.

150. *Id.* at 420.

der to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act.¹⁵¹

Applying this reasoning to NOW's claims, Stevens concluded that the plaintiffs' right to pursue a lawful business, that of providing abortion services, was, under Stevens's view, a long-recognized property right that PLAN "obtained" when they attempted to take control of the clinics, and therefore PLAN's actions were extortion under the Hobbs Act.

In sum, in *NOW II*, the Supreme Court interpreted the Hobbs Act's requirement of "obtaining" very narrowly, thereby limiting the scope of RICO. Under *NOW II*, when a defendant takes property, he or she must actually acquire the use of the property, not merely obtain control of it. Thus, in the context of abortion, it is not enough that protestors close a clinic; they must actually acquire the clinic or its business. Consequently, it appeared that *NOW II*'s interpretation of the Hobbs Act likely ended RICO's applicability in the context of anti-abortion protests.

IV. ACT THREE: THE FINAL CURTAIN (*NOW III*)

Although to many it seemed that *NOW II* completed the saga, NOW itself was unconvinced. Upon remand, the plaintiffs raised new arguments that the defendants' actions were indeed within RICO's reach. Based on these arguments, the Court once again granted certiorari.¹⁵²

In *NOW II*, the Supreme Court determined that NOW did not prove the predicate act of extortion because the defendant did not "obtain" property;¹⁵³ the Court therefore reversed the judgment and vacated the injunction.¹⁵⁴ The Court did not address, however, whether grounds for an alternative predicate offense under RICO might exist.¹⁵⁵ Therefore, NOW did not perceive *NOW II* as the final nail in its proverbial coffin; instead, they argued upon remand that the jury had found "four acts or threats of physical violence to . . . person or property."¹⁵⁶ NOW contended that these four acts were

151. *NOW II*, 537 U.S. at 416 (Stevens, J., dissenting) (quoting *McLaughlin v. Anderson*, 962 F.2d 187, 194 (2d Cir. 1992)).

152. *NOW v. Scheidler*, No. 04-1244, 04-1352, 2005 WL 3198020 (Nov. 30, 2005), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1244.pdf.

153. *NOW II*, 537 U.S. 393, 410 (2003).

154. *Id.* at 411.

155. Nonetheless, in *NOW II* the court did indicate that it had reversed all of the acts supporting the jury's finding, stating "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.*

156. *NOW v. Scheidler*, 91 Fed. Apprx. 510, 511 (2004), *reh'g*, 396 F.3d 807, 809 (7th Cir. 2005).

also Hobbs Act violations completely independent of extortion, and they were therefore predicate acts under RICO.¹⁵⁷ The plaintiffs contended that the Supreme Court did not address these freestanding offenses, and that these alternative Hobbs Act violations sustained both the verdict and the injunction.¹⁵⁸ In contrast, the defendants argued that the Hobbs Act did not prohibit freestanding acts or threats of violence outside the extortion and robbery context, and that the Court's opinion in *NOW II* was decisive with respect to any RICO claims.¹⁵⁹

Because the litigants had not previously addressed this issue, the Seventh Circuit remanded the case to the district court to determine "whether the four predicate acts involving 'acts or threats of physical violence to any person or property' are sufficient to support [the injunction district court] imposed."¹⁶⁰ According to the Seventh Circuit, the Hobbs Act was ambiguous as to whether it prohibits only two acts (robbery and extortion) or three acts (robbery, extortion, and acts or threats of physical violence).¹⁶¹ Therefore, it required the district court to determine whether physical violence is an independent violation of the Hobbs Act, or, alternatively, whether these four acts of violence found by the jury sustain an injunction outside of the Hobbs Act and RICO.¹⁶²

In response to this ruling, PLAN filed a writ of certiorari with the United States Supreme Court requesting review of the Seventh Circuit's decision.¹⁶³ Specifically, PLAN argued first that in *NOW II* the Court reversed all predicate acts supporting the jury's findings and vacated the injunction.¹⁶⁴ PLAN therefore contended that the Seventh Circuit's decision disregarded the Court's mandate in *NOW II*. In the alternative, PLAN claimed that the Hobbs Act does not prohibit acts or threats of violence unconnected to either extortion or robbery, so-called "freestanding" offenses.¹⁶⁵ The Supreme Court granted certiorari on June 28, 2005¹⁶⁶ and heard arguments on November 30 of the same year.¹⁶⁷

157. 396 F.3d at 809.

158. *Id.* at 810.

159. *Id.*

160. *Id.* at 811.

161. *Id.*

162. *Id.*

163. *Scheidler v. NOW*, 91 Fed. Apprx. 510 (7th Cir. 2004), *reh'g*, 396 F.3d 807 (7th Cir. 2005), *petition for cert. filed*, 126 S. Ct. 618 (U.S. Mar. 16, 2005) (No. 04-1244).

164. *Id.* at i.

165. *Id.*

166. *NOW v. Scheidler*, 91 Fed. Apprx. 510 (7th Cir. 2004), *reh'g*, 396 F.3d 807 (7th Cir. 2005), *cert. granted*, 125 S. Ct. 2991 (U.S. June 28, 2005) (No. 04-1244).

167. *NOW v. Scheidler*, No. 04-1244, 04-1352, 2005 WL 3198020 (Nov. 30, 2005), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1244.pdf.

On February 28, 2006, nearly twenty years after NOW filed its initial complaint, the Supreme Court issued its opinion in *NOW III*.¹⁶⁸ In a unanimous opinion penned by Justice Breyer, it rejected NOW's argument that the Hobbs Act prohibits freestanding acts of violence, holding that "physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act"; thus, the Court compelled an entry of judgment in PLAN's favor.¹⁶⁹

The Court's decision in *NOW III* hinged on an interpretation of a section of the Hobbs Act, codified at 18 U.S.C. § 1951(a), which reads, in pertinent part,

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . .¹⁷⁰

Specifically at issue in *NOW III* was the interpretation of the phrase that modifies "physical violence": "*in furtherance of a plan or purpose to do anything in violation of [the Hobbs Act]*."¹⁷¹ As Justice Breyer succinctly explained, "[d]o those words refer to violence (1) that furthers a plan or purpose to 'affect commerce . . . by robbery or extortion,' or to violence (2) that furthers a plan or purpose simply to 'affect commerce'?"¹⁷² The Court adopted the "former, more restrictive, reading of the text," concluding that the Hobbs Act only prohibits acts of physical violence when accompanied by plan of extortion or robbery.¹⁷³ Applying this restrictive reading to the claim at issue, because PLAN did not commit extortion, the Hobbs Act did not prohibit their acts or threats of physical violence, and, in turn, their actions did not fall under the umbrella of RICO.¹⁷⁴

The Court relied on a variety of legal arguments to reach its interpretation. First, looking at the language of the statute, the Court concluded that the restrictive reading was the more "natural" interpretation.¹⁷⁵ This is because the text of the statute does not prohibit obstructing, delaying, or affecting commerce generally, but instead prohibits obstructing, delaying, or affecting commerce "'by robbery or extortion.'"¹⁷⁶ According to Justice Breyer,

[t]his language means that behavior that obstructs, delays, or affects commerce is a "violation" of the statute only if that behavior also

168. *NOW III*, 126 S. Ct. 1264 (2006).

169. 126 S. Ct. at 1270.

170. 18 U.S.C. § 1951(a) (2000).

171. *Id.* (emphasis added).

172. *NOW III*, 126 S. Ct. at 1271 (quoting 18 U.S.C. § 1951(a)).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

involves robbery or extortion (or related attempts or conspiracies). Consequently, the reference in the physical violence clause to actions or threats of violence "in furtherance of a plan or purpose to do anything in violation of this section" would seem to mean acts or threats of violence in furtherance of a plan or purpose to engage in robbery or extortion, for that is the only kind of behavior that the section otherwise makes a violation.¹⁷⁷

Second, the Court noted that Congress generally uses terms like "affecting commerce" to connect the statute to the constitutional provision under which Congress is empowered to legislate, here the Commerce Clause.¹⁷⁸ Thus, the language limits the scope of the statute by extending it only so far as Congress may permissibly act; it does not define the crime itself.¹⁷⁹ Next, the Court turned to the statute's history, considering predecessors to the Hobbs Act.¹⁸⁰ According to the Court, these predecessors clearly did not prohibit freestanding violations.¹⁸¹ Given that in passing the Hobbs Act Congress did "not intend[] to create new crimes but to recodify those then in existence," this supported an interpretation of the new language consistent with the past statutes, which further bolstered PLAN's argument.¹⁸² Finally, the Court noted that PLAN's interpretation was consistent with related Hobbs Act case law, in which the Court had worked under the assumption that freestanding violent acts did not independently violate the Hobbs Act.¹⁸³ Indeed, the only two federal appellate courts to review this precise issue, the Sixth Circuit and the Ninth Circuit, both rejected the construction of the Hobbs Act NOW offered.¹⁸⁴ Moreover, the Court took Congress's 1994 adoption of Freedom of Access to Clinic Entrances Act of 1994, which directly prohibits certain types of clinic violence, as evidence that Congress and the Court were of the same mind; Congress also assumed that the Hobbs Act does not prohibit violence absent extortion or robbery.¹⁸⁵ Considering all these arguments, the Court concluded that a restric-

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 1272 (quoting *Morissette v. United States*, 342 U.S. 246, 269 n.28 (1952)).

183. *Id.* at 1272 (citing *NOW II*, 537 U.S. 393, 405 (2003); *id.* at 411 (Ginsburg, J., concurring); *United States v. Enmons*, 410 U.S. 396 (1973)).

184. *Id.* at 1272-73 (citing *United States v. Franks*, 511 F.2d 25 (6th Cir. 1975); *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999)).

185. *Id.* at 1273 (citing Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(3) (2000) (noting that the act "impos[es] criminal liability on anyone who 'intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services'")). Indeed, logic dictates that if these activities are already unlawful, there is no necessity for a law such as FACE; Congress would be outlawing something already illegal. Therefore, the Court reasoned that because Congress felt it was necessary to enact FACE, Congress itself

tive interpretation of the statute was correct because it was consistent with legislative intent.

In contrast, NOW urged the Court to utilize a canon of statutory construction favoring interpretations that "give a function to each word in a statute, thereby avoiding linguistic superfluity."¹⁸⁶ They pressed that by already including the terms "robbery" and "extortion," the language of the statute encompassed robbery and extortion occurring with or without acts of violence.¹⁸⁷ Therefore, unless violence constituted a freestanding offense, the words "commits or threatens physical violence to any person or property" serve no function in the statute.¹⁸⁸ Nonetheless, the Court rejected this argument because even NOW itself had "found a small amount of additional work for the words to do."¹⁸⁹ More importantly, because the Court had already concluded that Congress intended to prohibit "not all physical violence, but only physical violence in furtherance of a plan or purpose to engage in robbery or extortion," the Court could not use canons of interpretation to reach a contrary conclusion.¹⁹⁰ Therefore, the Court rejected NOW's interpretation, and held "that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act."¹⁹¹ Accordingly, the Court reversed the Seventh Circuit's decision and remanded the case for entry of judgment in favor of PLAN.¹⁹²

As a result of this decision, after twenty years and three trips to the United States Supreme Court, it appears that this drama is finally over; the curtain has closed. PLAN has finally succeeded in defeating NOW's RICO claim, thus establishing the inapplicability of RICO actions in the protestor context. Hence, clinics must look to legal alternatives in order to ensure their clients access to legal and safe abortions. However, it appears that doctors and clinic operators are left with very limited options, if any.

V. WHERE ARE WE NOW?: PROTECTION WITHOUT RICO

The NOW decisions, in particular *NOW II*, received a mixed reaction from commentators. At least one noted that the Court's narrow interpretation of the Hobbs Act was "inconsistent with construction of

did not think the Hobbs Act was broad enough to reach these activities, and thus interpreted its meaning in the same way as the Court. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* ("Those canons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent.").

191. *Id.* at 1274.

192. *Id.*

[the Act] by federal courts over the past forty years."¹⁹³ Another commentator concluded that it "substantially altered the traditional, common-law understanding of the meaning of extortion which evolved under the Hobbs Act" and "undermine[d] the effectiveness of the Hobbs Act as a tool for effective law enforcement and prosecution of organized crime."¹⁹⁴ Others found the majority's decision rational, compelling, and consistent with congressional intent, noting that this interpretation was likely to quell further RICO expansion.¹⁹⁵ One commentator applauded the decision as affirming First Amendment protest protections and freeing "civil non-violent protestors from threats of RICO."¹⁹⁶ Another argued that the outcome of the case ensured that "the legal system w[ould] be able to draw a reasonable distinction between an organized criminal enterprise, which acquires money by force, and any future protestor, whose objective is not profit but the promulgation of a political message."¹⁹⁷

Commentary, however, has focused almost entirely on the interpretation of the Hobbs Act, paying little or no attention to the impact that the decision will have on the availability of abortion services in America.¹⁹⁸ Consequently, in an attempt to round-out the critical commentary on this important issue, this Note considers the legal landscape of clinic protection in the absence of RICO by evaluating the legal avenues that remain to protect abortion providers after the *NOW* decisions.

In the wake of *NOW*, clinics have two primary legal protections from antiabortion protestors: state statutes and the Freedom of Access

193. Mary Hamm, Note, *Torts-RICO-Predicate Crime of Extortion Requires that the Defendant Obtain or Attempt to Obtain Property*, 71 TENN. L. REV. 365, 380 (2004).

194. Matthew T. Grady, *Extortion May No Longer Mean Extortion After Scheidler v. National Organization for Women, Inc.*, 81 N.D.L. REV. 33, 35 (2005).

195. Andrew H. Nelson, *An Offer They Couldn't Refuse: Rolling Back RICO Through a Direct Interpretation of Hobbs Act Extortion*, 82 N.C.L. REV. 1239, 1256-57 (2004). Indeed, prior to the Court's decision in *NOW II*, at least one commentator advocated for this narrow interpretation of the act. See generally Kristal S. Stippich, *Behind the Words: Interpreting the Hobbs Act Requirement of "Obtaining Property From Another,"* 36 J. MARSHALL L. REV. 295 (2003).

196. Sue Ann Mota, Essay, *Scheidler v. NOW: The Supreme Court Holds That Abortion Protestors Are Not Racketeers*, 16 REGENT U. L. REV. 139, 149-50 (2003).

197. Daniel B. Kelly, *Defining Extortion: RICO, Hobbs, and Statutory Interpretation in Scheidler v. National Organization for Women, Inc.*, 123 S. Ct. 1057 (2003), 26 HARV. J.L. & PUB. POL'Y 953, 971 (2003).

198. The sole discussion I have located within legal literature regarding the consequences of the decision was in Mary Hamm's note, which recognizes that *NOW II* will "negatively affect many Americans as they try to obtain and to provide reproductive health services." Hamm, *supra* note 193, at 381. Additionally, she briefly addresses the consequences of the decision, noting that the inadequacy of existing remedies was "the impetus for many victims to pursue claims under RICO and the Hobbs Act." *Id.* at 380. She also mentions the advantages of RICO, including treble damages and the ability to single out organizations and directors for prosecution or civil lawsuits. *Id.* at 379-80.

to Clinic Entrances Act of 1994 (FACE).¹⁹⁹ As this section reveals, both of these protections have significant deficiencies because they do not address many of the activities undertaken by antiabortion protestors and they are unable to reach the people behind organized and violent antiabortion campaigns. These failures leave clinics vulnerable to certain types of protest activity meant to impede their ability to operate, putting them at risk of closure. Moreover, by failing to pierce the directorship of antiabortion organizations, those who actually coordinate the violence go unpunished and, more importantly, are undeterred from committing future acts.

A. The Limited Protection of State Statutes

One avenue that clinics, their employees and clients, and pro-choice advocacy groups may pursue after *NOW* is the use of state law to obtain remedies. Abortion clinics, providers, and their patients have the same rights as any citizen and may utilize a number of state statutes (not enacted specifically for the abortion context) to protect themselves against such attacks.²⁰⁰ Clinics may find relief in statutes protecting property rights by prohibiting trespassing and damage to property.²⁰¹ Furthermore, general statutes prohibiting acts of violence and harassment may serve as effective legal recourse if enforced by local authorities. Indeed, as one commentator urges, clinic staff may use state anti-stalking laws as a means of providing protection.²⁰² Antiabortion protestors are not above the law; the general laws of the state may provide protection against certain actions taken by antiabortion groups in their efforts to close clinics.

In addition to general state laws, some states have enacted specific provisions designed to redress and prevent clinic violence. As of 2005, sixteen states and the District of Columbia had adopted statutes specifically designed to protect abortion clinics from blockades, violence, and harassment.²⁰³ Similar to FACE, these statutes generally

199. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248 (2000)).

200. However, because state statutes may be somewhat unclear, this leads to discretionary interpretation by local courts and law enforcement, which may lead to a failure to enforce these laws in the abortion context. John H. Henn & Maria Del Monaco, Recent Developments, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251, 268 (1990).

201. Wisconsin Statutes provide an example of this. See WIS. STAT. ch. 943 (Crimes Against Property) (prohibiting among other things damage to property (WIS. STAT. § 943.01 (2003-2004)), arson (WIS. STAT. § 943.02 (2003-2004)), injury caused by arson (WIS. STAT. § 943.065 (2003-2004)), and burglary (WIS. STAT. § 943.10 (2003-2004))); see also *id.* ch. 947 (Crimes Against Public Peace) (prohibiting among other things disorderly conduct (WIS. STAT. § 947.01 (2003-2004)), unlawful use of the telephone (WIS. STAT. § 947.012 (2003-2004)), harassment (WIS. STAT. § 947.013 (2003-2004)), bomb scares (WIS. STAT. § 947.015 (2003-2004)), and threats to release chemical, biological, or radioactive substances (WIS. STAT. § 947.017 (2003-2004))).

202. See generally Sneirson, *supra* note 54.

203. These states include the following:

provide law enforcement and/or clinics, providers, and patients with

1. California: CAL. PENAL CODE §§ 423 - 423.6 (West Supp. 2006) (enacted 2001) (prohibits intentional injury, intimidation, and interferences with, or attempts to injure, intimidate, or interfere with, reproductive health services' clients, providers, or assistants, and damage to clinic property); CAL. PENAL CODE § 594.4 (West 1999) (enacted 1993; last amended 1994) (protects against clinic damage by the use of butyric acid); CAL. PENAL CODE § 602.1 (West 1999) (enacted 1994) (protects against persons obstructing entrances); CAL. GOV'T CODE §§ 6215 - 6217 (West Supp. 2006) (enacted 2002) (protects the confidentiality of personal information for clinic employees and volunteers in order to protect them from violence and threats of violence).
2. Colorado: COLO. REV. STAT. ANN. § 18-9-122 (West 2004) (enacted 1993) (creates a 100-foot no-approach zone in which a person cannot approach within eight feet of another for the purpose of passing a leaflet, displaying a sign, or engaging in oral protest, education, or counseling, or knowingly impede another person's entry to or exit from a health care facility); see also COLO. REV. STAT. ANN. § 13-21-106.7 (West 2005) (enacted 1993) (allows recovery of damages and obtainment of injunctive relief from any person who commits or incites others to break COLO. REV. STAT. ANN. § 18-9-122).
3. Connecticut: CONN. GEN. STAT. ANN. § 53-37b (West 2001) (prohibits the threat or use of force in order to deprive a person of equal protection under Connecticut or federal laws, which includes the right to seek abortion); see also CONN. GEN. STAT. ANN. § 52-571a (West 2005) (enacted 1993) (allows for injunctive relief and damages for those aggravated by a violation of CONN. GEN. STAT. ANN. § 53-37b).
4. District of Columbia: D.C. CODE ANN. §§ 22-1314.01, 1314.02 (LexisNexis 2001) (enacted 1996) (protects against obstruction of access to facilities, disruption of peace within facilities, threatening or harassing phone calls, threats of injury, or preventing a medical services provider or his or her family from entering or exiting their home).
5. Kansas: KAN. STAT. ANN. § 21-3721(2) (1995 & Supp. 2005) (prohibits entering or remaining on clinic property in a manner that interferes with access to or from any health care facility without authorization or in defiance of an order not to enter or leave).
6. Maine: ME. REV. STAT. ANN. tit. 5, § 4684-B (2002) (enacted 1995) (makes it illegal to "to intentionally interfere or attempt to intentionally interfere with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State by" physically obstructing a building, "[m]aking or causing repeated telephone calls to a person or a building, whether or not conversation ensues, with the intent to impede access to a person's or building's telephone lines or otherwise disrupt a person's or building's activities," "[a]ctivating a device or exposing a substance that releases noxious and offensive odors within a building," and "continuing making noise after being asked to stop with the purpose of jeopardizing the health of those receiving services or interfering with safe and effective delivery of services").
7. Maryland: MD. CODE ANN., CRIM. LAW § 10-204 (LexisNexis 2002) (enacted 2002) ("A person may not intentionally act, alone or with others, to prevent another from entering or exiting a medical facility by physically: (1) detaining the other; or (2) obstructing, impeding, or hindering the other's passage.").

redress against violence and threats of violence, trespass, and damage

8. Massachusetts: MASS. ANN. LAWS ch. 266, § 120E (LexisNexis 2002) (enacted 1993) (prohibits impeding entry and egress from clinics and the entering or remaining in clinics with the purpose of impeding services); MASS. ANN. LAWS ch. 266, § 120E 1/2 (LexisNexis 2002) (enacted 2000) (creates a no-protest zone around clinic entrances/exits; prohibits knowingly obstructing, detaining, hindering, impeding, or blocking another person's entry to or exit from a clinic).
9. Michigan: MICH. COMP. LAWS ANN. § 333.20198 (West 2001) (enacted 1998) ("[A]n individual shall not enter upon the premises of a health facility . . . for the purpose of engaging in an activity that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes a health facility or agency employee, patient, resident, or visitor to feel terrorized, frightened, intimidated, threatened, harassed, or molested.").
10. Minnesota: MINN. STAT. ANN. § 609.7495 (West 2003) (enacted 1993) (prohibits "intentionally and physically obstruct[ing] any individual's access to or egress from a facility").
11. Montana: MONT. CODE ANN. § 45-8-110 (2005) (enacted 2005) (makes it an offense for a person to "knowingly obstruct[], hinder[], or block[] another person's entry into or exit from a health care facility . . . includ[ing] . . . knowingly approaching within 8 feet of a person who is entering or leaving a health care facility to give the person written or oral information, to display a sign, or to protest, counsel, or educate about a health issue, when the person does not consent to that activity and is within 36 feet of an entrance to or exit from the health care facility").
12. Nevada: NEV. REV. STAT. ANN. § 449.760 (LexisNexis 2005) (enacted 1991) (makes it unlawful to "intentionally prevent another person from entering or exiting [a medical facility] by: (a) Detaining the other person; or (b) Obstructing, impeding or hindering the other person's movement").
13. New York: N.Y. PENAL LAW §§ 240.70-240.71 (McKinney 2000 & Supp. 2006) (enacted 1999) (makes it illegal to "by force or threat of force or by physical obstruction, . . . intentionally injure[], intimidate[] or interfere[] with, or attempt[] to injure, intimidate or interfere with, another person because such other person was or is obtaining or providing reproductive health services" or to do the same in order to "discourage . . . any other person or persons from obtaining or providing reproductive health services"; illegal to "intentionally damage[] the property of a health care facility, or attempt[] to do so, because such facility provides reproductive health services"); see also N.Y. CIV. RIGHTS LAW § 79-m (McKinney Supp. 2006) (1999) (allows the attorney general or district attorney with "reasonable cause to believe that any person or group of persons is being, has been, or may be injured" by conduct violating section 240.70 or 240.71, to bring an action).
14. North Carolina: N.C. GEN. STAT. § 14-277.2 (2005) (enacted 1981) (makes it illegal for clinic protestors to "willfully or intentionally possess or have immediate access to any dangerous weapon"); N.C. GEN. STAT. § 14-277.4 (2005) (enacted 1993) (prohibits "obstruct[ing] or block[ing] another person's access to or egress from a health care facility or from the common areas of the real property upon which the facility is located," and "injur[ing] or threaten[ing] to injure a person" obtaining, providing, or lawfully aiding in the provision of health care services).

to clinic property, and prohibit obstructing any entrance to or egress from clinic facilities.²⁰⁴ Additionally, some states have created no-approach zones wherein protestors may not attempt to leaflet or counsel clinic employees and patients.²⁰⁵ Thus, a small number of states have sought to explicitly guarantee the safety of clinic operations within their jurisdictions.

Three states have gone even further and provide additional protections that seek to guard the clinic's ability to function normally, ensuring not only the safety of clinic workers and patients, but also the continuing provision of services.²⁰⁶ For example, the State of Washington has made it illegal to "disrupt the normal functioning" of a health facility through such means as noise and telephone calls.²⁰⁷ Maine has banned "[m]aking or causing repeated telephone calls to a person or a building, whether or not conversation ensues, with the intent to impede access to a person's or building's telephone lines or otherwise disrupt a person's or building's activities."²⁰⁸ Similarly, Oregon prohibits "intentionally interfering with, obstructing or adulterating in any manner the service of a . . . medical facility; or [i]ntentionally using, manipul[at]ing, arrang[ing] or rearrang[ing]

15. Oregon: OR. REV. STAT. § 164.365 (2003) (enacted 1972) (makes it illegal to intentionally damage or destroy clinic property; "intentionally interfere[] with, obstruct[] or adulterat[e] in any manner the service of a . . . medical facility; or [i]ntentionally use[], manipulate[], arrange[] or rearrange[] the property of a . . . medical facility used in direct service to the public so as to interfere with its efficiency").
16. Washington: WASH. REV. CODE ANN. §§ 9A.50.005-9A.50.070, 9A.50.900-9A.50.902 (West 2000) (enacted 1993) (see especially WASH. REV. CODE ANN. § 9A.50.020 (West 2000)) (makes it unlawful to "willfully or recklessly interfere with access to or from a health care facility or willfully or recklessly disrupt the normal functioning of such facility by . . . [p]hysically obstructing or impeding the free passage of a person seeking to enter or depart from the facility or from the common areas of the real property upon which the facility is located; Making noise that unreasonably disturbs the peace within the facility; Trespassing on the facility or the common areas of the real property upon which the facility is located; Telephoning the facility repeatedly, or knowingly permitting any telephone under his or her control to be used for such purpose; or Threatening to inflict injury on the owners, agents, patients, employees, or property of the facility or knowingly permitting any telephone under his or her control to be used for such purpose").
17. Wisconsin: WIS. STAT. § 943.145 (2003-2004) (enacted 1985) (makes it illegal to "intentionally enter[] a medical facility without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace").

204. See statutes listed *supra* note 203.

205. COLO. REV. STAT. ANN. § 18-9-122; MASS. ANN. LAWS ch. 266, § 120E 1/2; MONT. CODE ANN. § 45-8-110.

206. ME. REV. STAT. ANN. tit. 5, § 4684-B; OR. REV. STAT. § 164.365; WASH. REV. CODE ANN. § 9A.50.020.

207. WASH. REV. CODE ANN. § 9A.50.020.

208. ME. REV. STAT. ANN. tit. 5, § 4684-B.

the property of a . . . medical facility used in direct service to the public so as to interfere with its efficiency."²⁰⁹ These statutes offer some protection against certain activities that, although they do not always endanger safety, do endanger access to abortion by rendering the clinic unable to operate.

Despite the availability of state legal mechanisms, health facilities offering abortion services encounter difficulties in state enforcement that lead them to seek remedies at the federal level.²¹⁰ Previously, such difficulties forced past plaintiffs to seek federal relief under laws such as the Ku Klux Klan Act and RICO.²¹¹ Indeed, the failure of state law to remedy the issue of clinic violence was a driving force behind congressional support of FACE.²¹²

These difficulties take a variety of forms. Abortion providers and seekers have found and may continue to find local authorities unwilling to enforce clinic or patient rights because local police and prosecutors support the protestors' cause.²¹³ As a result, authorities may refuse to arrest or prosecute those who break the law.²¹⁴ Additionally, on some occasions protestors outnumber the police.²¹⁵ This makes it difficult for police to arrest or control the large crowd; it overwhelms police capabilities.²¹⁶ Moreover, local government may lack both the manpower and the financial resources to address the problem effectively.²¹⁷ In fact, protest organizers recognize and rely on the inability and ineffectiveness of police, and specifically inform protestors that

209. OR. REV. STAT. § 164.365.

210. See H.R. REP. NO. 103-306, at 10 (1993).

211. Hamm, *supra* note 193, at 380. Pro-choice advocates attempted to utilize 42 U.S.C. § 1985, a portion of the Ku Klux Klan Act (KKKA) protecting citizens from private groups attempting to infringe on rights to privacy and equal protection. The Court has allowed KKKA claims only in racially motivated actions, however. In *Bray v. Alexandria Women's Health*, 506 U.S. 263, 278 (1993), the Court held that the KKKA does not protect a general right to privacy (abortion being protected under that general right) and therefore could not be used against antiabortion protestors. See Joy Hollingsworth McMurtry & Patti S. Pennock, *Ending the Violence: Applying the Ku Klux Klan Act, RICO, and FACE to the Abortion Controversy*, 30 LAND & WATER L. REV. 203, 210 (1995). Prior to *NOW II*, successful RICO suits were brought in a number of cases. See Hamm, *supra* note 193, at 370-72 (discussing cases containing RICO claims in the abortion context).

212. H.R. REP. NO. 103-306, at 10 (1993) ("The laws currently in place at the Federal, state, and local level have proven inadequate to prevent the violent conduct described above. . . . State and local law enforcement authorities have failed to address effectively the systematic and nationwide assault that is being waged against health care providers and patients.")

213. LaPlante, *supra* note 13, at 21; see also H.R. REP. NO. 103-306, at 10 (1993).

214. LaPlante, *supra* note 13, at 21.

215. *Id.* at 22.

216. *Id.*; see also S. REP. NO. 103-117, at 20 (1993).

217. LaPlante, *supra* note 13, at 22-23 (noting a campaign in Buffalo, New York, which cost the city almost \$400,000). Similarly, a blockade in Wichita, Kansas cost local government more than \$500,000. H.R. REP. NO. 103-306, at 7 (1993).

the likelihood of arrest and punishment are low.²¹⁸ This is particularly worrisome when protestors purposefully target clinics located in low-income communities with limited police resources, thus disproportionately impacting the poor.²¹⁹ Indeed, because protestors target specialized women's health facilities, and because these facilities offer the least expensive health and abortion services, antiabortion protest tactics are more likely to impact lower income women and communities.²²⁰ Additionally, many antiabortion blockade organizers travel from other parts of the country, and state law enforcement agencies may face additional difficulties in their attempts to enforce injunctions and penalties against those people.²²¹ Local action may be unable to combat larger, interstate plans to close clinics made by nationwide organizations such as PLAN, whose activities are scattered throughout various jurisdictions.²²² Although eight of the seventeen jurisdictions that provide abortion-specific remedies allow private enforcement of those rights,²²³ it stands to reason that the clinics themselves would also be ineffective in investigating and combating these larger inter-jurisdictional conspiracies: how can local clinics with limited resources be expected to succeed where law enforcement has failed? Finally, even when these violations are prosecuted, "the possible criminal punishments faced by the perpetrators under state law are remarkably slight."²²⁴ Consequently, due to the numerous problems with state enforcement, abortion providers sought a federal solution to this problem.

218. Karen Beretsky, Note, *Civil RICO and Anti-Abortion Protest: Must Protestors Profit?*, NOW, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992), 30 CAL. W. L. REV. 119, 121 n.21 (1993) (citing Operation Rescue pamphlets).

219. Susan L. Ronn, Comment, "FACE"-ing RICO: A Remedy for Antiabortion Violence?, 18 SEATTLE U. L. REV. 357, 363-65 (1995).

220. *Id.*

221. *Id.* at 365.

222. S. REP. NO. 103-117, at 19-20 (1993).

223. These states include California (CAL. PENAL CODE §§ 423 - 423.6 (West Supp. 2006)), Colorado (COLO. REV. STAT. ANN. § 13-21-106.7 (West 2005)), Connecticut (CONN. GEN. STAT. ANN. § 52-571a (West 2005)), Maine (ME. REV. STAT. ANN. tit. 5, § 4681-4685 (2002)), Massachusetts (MASS. ANN. LAWS ch. 266, §§ 120E, 120E 1/2 (LexisNexis 2002)), Minnesota (MINN. ANN. STAT. § 609.7495 (West 2003)), North Carolina (N.C. GEN. STAT. § 14-277.4 (2005)), and Washington (WASH. REV. CODE ANN. § 9A.50.040 (West 2000)).

224. Grady, *supra* note 194, at 35-36 (discussing United States v. Arena, 180 F.3d 380, 387-88 (2d Cir. 1999) (defendants who contaminated a clinic with acid, injuring patients and staff, closing the clinic for numerous days, and causing the clinic economic damage, were charged with criminal mischief and endangering safety and received only five years probation as punishment)).

B. *The Freedom of Access to Clinic Entrances Act of 1994*

Fortunately, Congress provided such a remedy, the Freedom of Access to Clinic Entrances Act²²⁵ (FACE). From 1977 to 1993, abortion providers and facilities were the victims of more than one thousand acts of violence and six thousand clinic blockades.²²⁶ In order to combat acts of violence against abortion providers, Congress passed FACE in 1994.²²⁷ FACE provides protection to abortion providers and women seeking abortions against physical interference with the exercise of their rights, or threats of such physical action, and provides protection to the property of reproductive health facilities.

Initial commentary regarding FACE questioned its constitutionality on a variety of grounds.²²⁸ However, despite this initial reaction, courts have generally concluded that FACE's prohibition on certain activities does not violate the constitutional rights of protestors; FACE has withstood numerous legal challenges including arguments that it violates the freedom of speech,²²⁹ the Free Exercise Clause,²³⁰ and the Religious Freedom and Restoration Act;²³¹ that it is vague and overbroad;²³² and that it violates the Tenth Amendment.²³³

1. Staring FACE in the Face: Plaintiffs, Defendants, and Activities Included

Similar to many state statutes, FACE prohibits the use of "force or threat of force or physical obstruction" to "intentionally injure[], intimidate[] or interfere[]" with a person "obtaining or providing reproductive health services."²³⁴ Additionally, FACE prohibits

225. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248 (2000)).

226. McMurry & Pennock, *supra* note 211, at 203. These acts of violence included 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, and 327 clinic invasions. *Id.*

227. Heather J. Blum-Redlich, Annotation, *Validity, Construction, and Application of Freedom of Access to Clinic Entrances Act (FACE)* (18 U.S.C.A. § 248), 134 A.L.R. Fed. 507 (2004).

228. See generally, e.g., Katherine A. Hilber, Note, *The Constitutional Face-Off: Testing the Validity of the Freedom of Access to Clinic Entrances Act*, 72 U. DET. MERCY L. REV. 143 (1994); Lan Hoang, Note, *Freedom of Access to Clinic Entrances Act: The Controversy Behind this Remedy*, 20 SETON HALL LEGIS. J. 128 (1996) (discussing the uncertainty of constitutionality absent a Supreme Court decision); Kristine L. Sendek, Comment, "FACE"ing The Constitution: Battles Over the Freedom of Access to Clinic Entrances Shifts from Reproductive Health Facilities to Federal Courts, 46 CATH. U.L. REV. 165 (1996).

229. See, e.g., *New York v. Operation Rescue Nat'l*, 273 F.3d 184 (2d Cir. 2001); *United States v. Scott*, 975 F. Supp. 428 (D. Conn. 1997); *United States v. Weslin*, 964 F. Supp. 83 (W.D.N.Y. 1997); *United States v. Gregg*, 947 F. Supp. 872 (E.D. Pa. 1996).

230. *Operation Rescue Nat'l*, 273 F.3d 184; *Weslin*, 964 F. Supp. 83.

231. *Weslin*, 964 F. Supp. 83.

232. See, e.g., *United States v. Scott*, 958 F. Supp. 761 (D. Conn. 1997), *aff'd*, 145 F.3d 74 (2d Cir. 1998).

233. See, e.g., *United States v. Scott*, 919 F. Supp. 76 (D. Conn. 1996).

234. 18 U.S.C. § 248(a)(1) (2000).

"intentional[] damage[] or destr[uction]" of "the property of a facility," or "attempts to do so, because such facility provides reproductive health services."²³⁵

FACE provides definitions of many key terms defining the scope of its application. For example, as defined in the Act, "interfere with" means to "restrict a person's freedom of movement."²³⁶ FACE defines "intimidate" as "plac[ing] a person in reasonable apprehension of bodily harm to him- or herself or to another."²³⁷ Finally, FACE defines "physical obstruction" as "rendering impassable ingress to or egress from a facility that provides reproductive health services."²³⁸ Congress, however, left it to courts to define both "force" and "threat of force." In doing so, courts generally have interpreted the word "force," as used in FACE, to include actual physical force and threats of actual physical force.²³⁹

FACE is applicable to a limited group of plaintiffs. Only "a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility" can bring a suit for force, threats of force, or physical obstruction.²⁴⁰ Conversely, "[a]ny person aggrieved by reason of conduct prohibited [by FACE]" can bring a suit for damage to facility property.²⁴¹ Thus, while a diverse group of potential plaintiffs including facility owners, landlords, and adjoining businesses can bring suits for property damage, only those actually seeking or providing reproductive health services can bring suits based on the use of force, physical obstruction, and threats of force. However, courts have given the term "provider" as used in the Act a broad definition, to include security guards,²⁴² maintenance workers,²⁴³ and volunteers,²⁴⁴ thus allowing FACE to provide recourse to a large scope of plaintiffs.

In addition to civil plaintiffs, either the United States Attorney General or a state attorney general may file a civil action if he or she has a "reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of [FACE]."²⁴⁵ Thus, the individual plaintiff, the United States Department of Justice, or a state department of justice can enforce

235. 18 U.S.C. § 248(a)(3) (2000).

236. 18 U.S.C. § 248(e)(2) (2000).

237. 18 U.S.C. § 248(e)(3) (2000).

238. 18 U.S.C. § 248(e)(4) (2000).

239. See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *United States v. Scott*, 958 F. Supp. 761 (D. Conn. 1997), *aff'd and remanded*, 145 F.3d 74 (2d Cir. 1998).

240. 18 U.S.C. § 248(c)(1)(A) (2000).

241. *Id.*

242. *United States v. Hill*, 893 F. Supp. 1034 (N.D. Fla. 1994).

243. *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996).

244. *Greenhut v. Hand*, 996 F. Supp. 372 (D.N.J. 1998).

245. 18 U.S.C. §§ 248(c)(2)(A), (c)(3)(A) (2000).

FACE in order to protect reproductive health clinics and the rights of those operating and using those facilities.

In sum, plaintiffs can utilize FACE against four types of defendants: 1) those who use actual physical force intentionally to injure, intimidate, or interfere with—or attempt to injure, intimidate, or interfere with—a person providing or seeking reproductive health services; 2) those who physically obstruct a person who is seeking or providing reproductive health services from entering or exiting a facility, and, in doing so, intentionally injure, intimidate or interfere with—or attempt to injure, intimidate, or interfere with—such person; 3) those who use threatened or actual physical force to intentionally injure, intimidate, or interfere with—or attempt to injure, intimidate, or interfere with—a person providing or seeking reproductive health services; and 4) those who intentionally destroy facility property because the facility provides reproductive health services. Thus, FACE requires actual force, threats of force, or physical obstruction coupled with actual or attempted intentional injury, intimidation, or interference, or, in the alternative, intentional destruction motivated by the facility's services, in order to provide a cause of action.

2. "FACE"ing Consequences: Penalties Under FACE

For plaintiffs whose actions fall under its purview, FACE allows for monetary and injunctive relief. For actions brought by a civil plaintiff, FACE provides for "appropriate relief" including temporary, preliminary, and permanent injunctions.²⁴⁶ A court can award compensatory damages, punitive damages, costs, and reasonable fees for attorneys and expert witnesses to a plaintiff suing under FACE.²⁴⁷ Moreover, plaintiffs may receive statutory damages in the amount of \$5,000 for each FACE violation in lieu of actual damages.²⁴⁸ A successful plaintiff therefore can receive monetary compensation in addition to injunctive relief. Additionally, FACE provides criminal penalties ranging from six months to three years imprisonment.²⁴⁹ In actions brought by the United States Attorney General or a state attorney general, a court can assess a fine of \$10,000 to \$25,000 against each defendant in order to "vindicate the public interest."²⁵⁰

3. "FACE"ing Its Shortcomings

FACE is a powerful weapon that abortion seekers and providers can use as protection. Commentators have noted that it gives abortion providers much-needed injunctive relief,²⁵¹ allows for a federal

246. 18 U.S.C. § 248(c)(1)(B) (2000).

247. *Id.*

248. *Id.*

249. 18 U.S.C. § 248(b) (2000).

250. 18 U.S.C. § 248(c)(2)-(3) (2000).

251. The Ninth Circuit has concluded that RICO does not allow for injunctive relief; however, other courts such as the Seventh Circuit have issued injunctions in

claim in instances of sporadic activities that do not rise to the level of racketeering, and discourages protestors from targeting clinics in low-income areas due to a lack of law enforcement protection.²⁵²

FACE has been effective in reducing violence against abortion providers and clinics.²⁵³ However, it is not without its shortcomings, and it does not adequately protect clinics from antiabortion tactics. Although many plaintiffs likely were attracted to RICO because of its treble damages,²⁵⁴ it also provides a cause of action for certain activities and against certain individuals not available under FACE. Most notably, FACE only applies to a limited range of antiabortion activities: those that involve force, threat of force, or physical obstruction combined with actual or attempted intentional injury, intimidation, or interference, or, alternatively, destruction of property.²⁵⁵ Accordingly, FACE does not protect clinics from the type of economic terrorism they encounter—the organized and concerted effort undertaken by antiabortion groups to put clinics out of business.²⁵⁶ When antiabortion groups use coercive financial tactics to close clinics permanently rather than just blocking the entrances, FACE does not apply.

RICO cases. *NOW v. Scheidler*, 267 F.3d 687, 695 (7th Cir. 2001). Thus, in this sense, FACE is a superior remedy to RICO, in that injunctive relief is automatically allowed.

252. *Ronn*, *supra* note 219, at 386 (noting that by providing a federal remedy, antiabortion protestors may choose not to target clinics where state law enforcement officials have been ineffective at providing protection).

253. According to the National Organization for Women,

The level of violence has declined in some instances, largely because of the 1994 Freedom of Access to Clinic Entrances (FACE) Act that prohibits anyone from using "force, threat, or physical obstruction" in preventing someone access to a clinic. . . . The number of violent incidents at abortion clinics in [the United States and Canada] has gone from 637 in the period of 1977-1987 to an annual high of 452 in 1993, then declining to 143 in 2003. The total number of violent incidents reported from 1977 to 2003 is 4,203, with a total of 696 clinic blockades. . . . These statistics include the seven murders of clinic personnel and escorts, 17 attempted murders, 41 bombings, 169 cases of arson, 1,081 acts of vandalism and numerous other instances of anthrax threats, acid attacks, kidnapping and burglary. Extremists have limited their violent activities confronting the federal law's civil and criminal penalties: the number of arrests has gone from a high of 12,358 in 1989 to none in 2003. But the overall total of violent and disruptive incidents over the 1977 to 2003 period is 88,531, not including the nearly 700 blockades.

National Organization for Women, *Reproductive Rights Steadily Eroded in the States* (Mar. 17, 2004), <http://www.now.org/issues/abortion/031704states.html>.

254. *Hamm*, *supra* note 193, at 379 ("A successful RICO lawsuit by an abortion clinic could bankrupt a violent or coercive anti-abortion protest group and deter others from using illegal tactics in their protests.").

255. See *supra* Part V.B.1 (explaining activities prohibited by FACE).

256. Such tactics have been used by antiabortion groups in *NOW* and in other cases. See Audra K. Hamilton, Note, *RICO, the Unexpected Protector Unveiled in National Organization for Women, Inc. v. Scheidler*, 48 ARK. L. REV. 851, 874-75 (1995). In *NOW*, activities that would not fall under FACE, but were a part of an effort to stop clinic operations include harassing landlords and those providing services to the clinics and making false appointments so that actual patients could not be seen, thereby generating no revenue.

The economic losses suffered by clinics as a result of protest are substantial.²⁵⁷ Between 1990 and 2000, bombings and arson resulted in over \$8.5 million in property damage;²⁵⁸ during the period of 1991 to 2005, reported damage from chemical contamination exceeded \$1 million.²⁵⁹ Actual economic losses, however, far exceed these numbers because the statistics ignore the potential financial losses due to the remaining ninety-two thousand reported acts of disruption in service through other, less forceful tactics.²⁶⁰ In an age when the greatest threat to freedom of choice may not be physical violence, but instead a lack of access to abortion services, it is essential that abortion providers stay in business.²⁶¹ Accordingly, abortion seekers and providers need a remedy to protect against economic attacks.

Moreover, FACE does not apply to organizations and the directors who orchestrate the activities, but instead protects only against actions perpetrated by individual actors.²⁶² Therefore, although the individual protestor is accountable for violent acts, FACE does not penalize the organization and its directors, even though it is they who incite the violence and organize the actions.²⁶³ Accordingly, FACE allows those behind the action to legally continue to run their organizations using a pattern of illegal conduct. It is protection against the cog, but not against the machine. In contrast, as one commentator stated prior to *NOW II*, RICO (unlike FACE) is "an ideal weapon to aim at the directors and organizers encouraging illegal acts."²⁶⁴ Without this weapon, if they wish to pursue those behind the attacks, po-

257. See generally Melanie K. Nelson, Comment, *The Anticompetitive Effects of Anti-Abortion Protest*, 2000 U. CHI. LEGAL F. 327 (2000) (discussing economic harms inflicted on abortion clinics and advocating for the application of antitrust law in the antiabortion context).

258. *Id.* at 327; NARAL, *supra* note 57, at 1.

259. Nelson, *supra* note 257, at 327; NARAL, *supra* note 57, at 5.

260. Nelson, *supra* note 257, at 327; NARAL, *supra* note 57, at 1.

261. As NARAL has noted, "[a]ccess to abortion services is already perilously close to non-existent in many parts of the country." NARAL, *Liberty at Risk: The Vulnerability of Reproductive Rights Under Alito I* (Dec. 14, 2005), available at <http://www.prochoiceamerica.org/assets/files/Courts-SCOTUS-Liberty-at-Risk-Report.pdf>. In fact, "[o]nly 13 percent of all counties—and just three percent of metropolitan counties—have an identifiable abortion provider." National Organization for Women, *supra* note 253. Moreover, fewer physicians are both providing and being trained to perform abortions. *Id.* Indeed, to stop new physicians from providing abortions, antiabortion activist distribute booklets to medical students explaining the consequences of providing abortions. NARAL, *supra* note 57, at 8. With worryingly few providers, if abortion access is to continue, those providers that remain in business must keep their doors open.

262. Hamm, *supra* note 193, at 379; Ronn, *supra* note 219, at 386.

263. Actual threats of force perpetrated by an organization and its directors, however, can be prosecuted under FACE. See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (holding that "wanted" posters for abortion providers were threats of force for purposes of FACE and not protected expression under the First Amendment).

264. Ronn, *supra* note 219, at 386.

tential plaintiffs such as clinics, clinic employees and clients, and pro-choice advocates must consider alternative protections for clinic operations.

VI. CONCLUSION AND RECOMMENDATIONS

With its decisions in *NOW*, the Court altered the legal landscape of clinic protection. In the wake of this decision, recognizing the limitations of FACE and state statutes, what alternative avenues of protection remain for clinics? One potential avenue is the adoption of federal or state legislation that provides a cause of action for clinics to use against organizations and individuals who encourage and organize illegal activities in an attempt to close clinic doors permanently.

As previously discussed,²⁶⁵ FACE is a powerful, but incomplete, weapon. An alternative solution is needed. Given the current conservative makeup of Congress, it seems unlikely that it will adopt additional federal protections for abortion clinics.²⁶⁶ Although state legislation might provide an alternative, if not ideal, option, it is equally implausible that many state legislatures are prepared to protect access to abortion.²⁶⁷ Moreover, potential plaintiffs would be faced with the same difficulties in state enforcement that led to the passage of FACE in 1994.²⁶⁸ Regardless of its plausibility, however, the best defense against organizations, directors, and economic attacks may be new legislation. Concerned parties may wish to seek enact-

265. See *supra* Part V.B.

266. There are fifty-five Republicans, forty-four Democrats, and one Independent in the current Senate. United States Senate, Party Division in the Senate, 1789-Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Apr. 1, 2006). The current House of Representatives is comprised of 232 Republicans, 202 Democrats, and 1 Independent. United States House of Representatives, Political Divisions of the House of Representatives (1789 to Present), http://clerk.house.gov/histHigh/Congressional_History/partyDiv.html (last visited Apr. 1, 2006). Although stances on choice are not clear-cut between the two parties, recent actions in Congress make clear that protecting abortion rights is not a current priority of the majority of legislators. In fact,

[T]he 108th Congress left a stream of initiatives hostile to women and their reproductive health, and failed to pass any measures strengthening a woman's right to choose. . . . [T]he actions of this Congress were so harmful to choice that the National Right to Life Committee hailed the 108th Congress as the most successful yet for their movement.

National Abortion Federation, 108th Congress Legislative Wrap-up, http://www.prochoice.org/policy/get_informed_active/policy_reports/congress_108th.html (last visited Apr. 4, 2006).

267. See generally National Abortion Federation, State Legislative Report 2004, available at http://www.prochoice.org/pubs_research/publications/downloads/public_policy/state_bill_report_2004.pdf (discussing state anti-choice legislation in 2004); National Abortion Federation, 2004 State Election Wrap-Up, http://www.prochoice.org/policy/get_informed_active/policy_reports/state_election04.html (last visited Apr. 4, 2006) (discussing the composition of state governments vis-à-vis choice).

268. See *supra* Part V.A.

ment of new laws aimed at both targeting organizations and their directors and protecting clinics against economic attacks.

Three states—Maine, Washington, and Oregon—have provided a starting point for advocates in developing such statutes. These states have enacted statutes that provide some protection against economic attacks to abortion clinics by protecting against disruptions to clinic functions.²⁶⁹ As previously noted, Maine and Washington protect the normal functioning of health facilities by prohibiting the disruption of clinics using certain means.²⁷⁰ Meanwhile, Oregon has adopted a more general prohibition on interfering with the service of medical facilities.²⁷¹ This statute goes beyond FACE and protects a clinic against not only force, threats of force, and property destruction, but also against activities designed to impede the functioning of the clinic, thus ensuring its efficient operation. By protecting its ability to operate, the statute protects the clinic's ability to provide services to patients, therefore ensuring to some extent the economic viability of the clinic. Federal and state legislators should consider similar statutes that specifically provide a cause of action against attacks on clinics that are intended to impede operations and close them down without the explicit use of force.

The Oregon statute, however, does not go far enough. Although a similar statute would provide recourse for activities designed to impair the clinic, any new federal or state remedy should also protect clinics against those who orchestrate the attacks: the goal is to protect not merely against the cog, but against the whole machine. Accordingly, like RICO, any new state legislation should prohibit conducting an organization, or conspiring to conduct an organization, through a pattern of activities that are in violation of the new statute or FACE. Such a provision would prohibit organizations like PLAN and directors, like Schiedler, from orchestrating activities targeted at impeding a clinic's ability to offer services.

Unfortunately, unless lawmakers take such action, the *NOW* decisions will impact the ability of women's health centers to protect themselves against violent and coordinated attacks by protestors, thus making access to safe abortions more difficult for American women. Although Congress passed FACE, the statute leaves clinics without protection from certain defendants and types of activities. First, FACE does not cover organizations and their directors if they are not physically present during the protests. In contrast, under RICO suits, courts could require such organizations to pay treble damages if they have engaged in a pattern of racketeering, using evidence of their involvement in the enterprise and not their presence (or lack thereof) at the actual protests to make that decision. Second, antiabortion or-

269. See *supra* notes 206-09 and accompanying text.

270. ME. REV. STAT. ANN. tit. 5, § 4684-B (2002); WASH. REV. CODE ANN. § 9A.50.020 (West 2000).

271. OR. REV. STAT. § 164.365 (2003).

ganizations can continue to wage economic terrorism on reproductive health clinics without facing federal consequences. Antiabortion groups can undertake concerted efforts to close reproductive health clinics that provide abortion services, thus effectively ending a woman's right to choice by eliminating her access to safe and legal abortions. Moreover, because many clinics do not only provide abortion services, but generally also provide gynecologic and obstetric care, the closing of clinics could impact not only those women seeking abortion services, but also those women seeking low-cost medical care.²⁷² Women requiring affordable prenatal care, contraceptives, general gynecological services, and HIV/AIDS testing may find access to these services limited.²⁷³ In order to protect these services, as previously discussed, both state and federal lawmakers should consider enacting legal measures aimed at the activities of organizations and their directors in inciting violent action. These measures should provide a legal remedy specifically targeted at those who seek to prevent access to reproductive health clinics, not by obstructing the entrances, but by permanently closing the doors. Pro-choice advocates, clinic staff, and those seeking abortions should take proactive steps to urge lawmakers to fill the gaps in legal protection left in the wake of the *NOW* decisions.

272. Using two Wisconsin clinics as an example, Planned Parenthood of Wisconsin offers contraception, family planning, annual wellness exams, pregnancy testing and counseling, STI testing, and abortion. Planned Parenthood of Wisconsin, Inc., Plan Today for a Health Future, <http://www.ppw.org/healthcare/medicalservices/plantodayforahealthyfuture.aspx> (last visited Mar. 31, 2006). Similarly, Summit Women's Health in Milwaukee offers abortion services alongside wellness exams (pap smears, breast exams, etc.), contraception, and STI testing. Summit Women's Health Organization, <http://www.gynpages.com/swho> (last visited Mar. 31, 2006).

273. A 1993 Senate report discussed the impact of an abortion clinic closing on the ability of the poor to obtain medical care. S. REP. NO. 103-117, at 5 (1993). When activists burned down the Blue Mountain Clinic in Missoula, Montana, the clinic's patients, seventy percent of whom were primarily Medicare or Medicaid dependent, found themselves without a facility for "a wide range of health care services including prenatal care and delivery, childhood immunizations, diagnosis and treatment of sexually transmitted infection, and contraceptive services, as well as first trimester abortions." *Id.*