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## Civil Disobedience and Civil RICO: Anti-Abortionists as Racketeers

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## CIVIL DISOBEDIENCE AND CIVIL RICO: ANTI-ABORTIONISTS AS RACKETEERS

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### I. INTRODUCTION

Since before John Brown led a bloody revolt at Harper's Ferry to free the slaves, society has debated how it should treat protesters who assert their innocence under a higher law. Today, radical anti-abortionists fancy themselves to be modern-day John Browns as they engage in so-called "rescue missions" to save the unborn. Criminal convictions do not deter these protesters, who move from one target and one state to another.<sup>1</sup> However, a 1970 federal law that was originally passed to combat organized crime, the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>2</sup> could be the equivalent of the hangman's noose that silenced Brown. A private plaintiff, for the first time, used the civil provision of RICO to curb a campaign of concerted, illegal "protests" by an organized anti-abortion group in *Northeast Women's Center, Inc. v. McMonagle*.<sup>3</sup>

The *McMonagle* decision represents a breakthrough for abortion clinics besieged by debilitating, illegal protest, often by organized

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1. N.Y. Times, Sept. 21, 1989, § 2, at 1, col. 2. See also N.Y. State Nat'l Organization for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990) (Defendants, including Operation Rescue, were found in civil contempt for twice ignoring temporary restraining orders barring them from blocking ingress or egress to any abortion clinics).

2. Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968 (1988).

3. 868 F.2d 1342 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989).

and well-financed organizations whose members are impervious to small fines and jail sentences meted out for convictions for common law trespass and nuisance. Civil RICO is intended to eradicate and not just punish its prey.<sup>4</sup> The statute provides for treble damages, the cost of the suit and reasonable attorney's fees.<sup>5</sup>

Even apart from the anti-abortion context, the *McMonagle* decision could have wide ramifications. The decision is believed to be the first time that a federal court of appeals has ever used RICO to cover civil disobedience tactics.<sup>6</sup> The *McMonagle* case raises important questions. Just how far will civil RICO stretch? Does civil RICO pose a threat to anti-nuclear activists, animal rights proponents or radical environmental groups such as Earth First? How about organizations opposed to American policy in El Salvador or students protesting recruiting by the Central Intelligence Agency on campus? These questions are unanswered but it is clear that civil RICO is gaining momentum as a weapon against illegal anti-abortion protest.

On appeal, the United States Supreme Court refused to rule on the merits of *McMonagle* so the decision formally effects only the Third Circuit states of Pennsylvania, Delaware and New Jersey. However, the Court could revisit the matter as appellate courts in other circuits consider civil RICO suits filed against anti-abortion protesters.<sup>7</sup> Federal judges in Connecticut and Washington have ruled that anti-abortionists may be found liable under civil RICO.<sup>8</sup> Rack-

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4. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified in scattered sections of 18 U.S.C.) (statement of findings and purpose).

5. 18 U.S.C. § 1964(c) (1988).

6. N.Y. Times, March 4, 1989, at A1, col. 1.

7. Lewin, *With Thin Staff and Thick Debt, Anti-Abortion Group Faces Struggle*, N.Y. Times, June 11, 1990, at A16, col. 1 (There are more than a dozen pending civil RICO lawsuits across the country).

See also Greenhouse, *Abortion Foes Lose Plea for Hearing on Their Racketeering Law Penalties*, N.Y. Times, October 11, 1989, at A23, col. 1 ("Abortion rights groups have vowed to use the racketeering law aggressively . . . [b]ut those groups are not the only ones interested in that legal strategy. Earlier this year, the town of Brookline, Mass. brought a similar suit against Operation Rescue . . ."); N.Y. Times, March 4, 1989, at A1, col. 1 (Edmond A. Tiryak, the lawyer who represented the clinic in *McMonagle*, estimates there are about ten other civil RICO suits pending against abortion foes. He said none have gone to trial).

8. Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990) (vacating 726 F.

etteering prosecutions are part of a new strategy adopted by the National Organization for Women for countering anti-abortion activities.<sup>9</sup>

Meanwhile, the number of abortion clinic blockades has declined drastically.<sup>10</sup> Operation Rescue, a national anti-abortion group that has spearheaded tens of thousands of arrests during "rescue missions" at abortion clinics since 1986,<sup>11</sup> appears to be on the defensive. The group, which first attracted national attention when it sponsored a blockade of Atlanta abortion clinics during the 1988 Democratic convention, recently closed its Binghamton, New York headquarters, allegedly because of mounting legal fees.<sup>12</sup> Randall Terry, founder of the group, which has 110 chapters,<sup>13</sup> says the

Supp. 371 (D. Conn. 1989)). (In a 2-1 ruling, a panel of the appeals court vacated a preliminary injunction issued on nuisance grounds by the district court upon a motion by the town, prior to the intervention of co-plaintiff, Summit Women's Center. The appeals court also ordered dismissal of the town's complaint, contending the town failed to properly raise legitimate claims under civil RICO. However, the majority noted that it was not addressing the civil RICO claim of Summit Women's Center.)

See also *Feminist Women's Health Center v. Roberts*, No. C86-161Z (W.D. Wash., May. 5, 1989) (1989 WESTLAW 56017) (The court ruled that liability under civil RICO can be based on various predicate offenses, including rendering criminal assistance, aiding and abetting arson and extortion. However, the Court dismissed a claim for injunctive relief and emotional distress under civil RICO.)

9. N.Y. Times, March 4, 1989, at A1, col. 1.

10. Legal Times, July 9, 1990, at 1 (citing statistics from the National Abortion Federation; abortion clinics were blockaded 18 times during the first six months of 1990, with 440 arrests made, compared to 201 blockades and 12,358 arrests in 1989).

11. See, Lewin, *supra* note 7, at A16, col. 1 (In the last two years, almost 40,000 people have been arrested in Operation Rescue demonstrations).

12. *Rescue Bails Out*, TIME, February 12, 1990, at 29 (Operation Rescue founder Randall Terry blames the closure of the group's headquarters on a \$50,000 lawsuit filed by the National Organization for Women. Critics worry the group is just using another maneuver to avoid paying legal fees. Lawyers for N.O.W. say Terry's assertion is a foe's ploy to "lose its creditors."); *Operation Rescue HQ Closed*, CHRISTIANITY TODAY, March 5, 1990, at 32-33 (Bowed by \$70,000 debt and increasing numbers of court-imposed fines, Operation Rescue closed the doors of its Binghamton, N.Y. headquarters.); Lewin, *supra* note 7, at A16, col. 1 (Federal marshals seized Operation Rescue's payroll accounts; the staff at Operation Rescue's Binghamton, N.Y. offices shrank from 23 to 3 employees).

But cf. Legal Times, July 9, 1990, at 1 (An attorney for N.O.W. says recent discovery in a federal suit revealed that Operation Rescue took in about \$1.1 million last year and set up shell groups to hide its assets).

See also Houlding, *Operation Rescue Counsel Bailing Out*, CONNECTICUT LAW TRIBUNE, June 11, 1990, at 2. Terry's lawyer seeks to withdraw his representation of Terry because Terry refuses to cooperate with federal court orders directing him to respond to deposition questions in *Operation Rescue*, 726 F. Supp. at 371. Terry faces \$16,000 in fines in an earlier case, *New York State Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), for refusing to answer questions.

13. See TIME, Feb. 12, 1990, at 29.

number of rescues has declined because of the increasing cost of litigation.<sup>14</sup>

## II. CIVIL RICO

### A. *Anti-abortionists and Organized Crime*

RICO is part of the Organized Crime Control Act of 1970<sup>15</sup> and it reflects Congress' concern with organized criminal infiltration of legitimate business. Congress noted that organized crime weakens the stability of the nation's economic system, interferes with free competition, burdens interstate and foreign commerce, threatens domestic security and undermines the general welfare of the nation.<sup>16</sup> The RICO statute was meant to eradicate organized crime in the United States "by strengthening the legal tools and the evidence gathering process, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."<sup>17</sup> But what is organized crime? Congress offered a purposefully loose definition: "[o]rganized crime . . . is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct, and the illegal use of force, fraud and corruption."<sup>18</sup> Organized crime is demonstrated by a wide array of illegal acts, from murder to mail fraud, which are committed by all kinds of defendants.<sup>19</sup>

The spirit of the RICO statute, and subsequent interpretation by the Supreme Court, hold that organized crime is more than just the "mob" and mobsters.<sup>20</sup> RICO is meant to be read broadly.<sup>21</sup> A

14. Lewin, *supra* note 7, at A16, col. 6. *But see* CHRISTIANITY TODAY, March 5, 1990, at 33 (Operation Rescue founder Randall Terry says there are more than 100 rescue groups around the country that will continue blockading abortion clinics despite the closure of the group's headquarters in Binghamton, N.Y.).

15. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified in scattered sections of 18 U.S.C.).

16. *Id.* (statement of findings and purpose).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 579 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

21. *Sedima*, 473 U.S. at 497.

thread running through RICO is Congress' specific admonition that the provisions of the act be "liberally construed to effectuate its remedial purpose."<sup>22</sup> In *Sedima S.P.R.L. v. Imrex Co.*, a landmark case interpreting civil RICO which involved business fraud, the United States Supreme Court said that RICO potentially applies to "any person."<sup>23</sup> In fact, many more civil RICO suits have involved fraud in the sale of securities than claims against organized crime figures.<sup>24</sup> The Court acknowledged in *Sedima* that private civil RICO actions were being brought almost exclusively against "respected" businesses rather than the "archetypal, intimidating mobster."<sup>25</sup> Yet, the Court said, "this defect — if defect it is — is inherent in the statute as written, and its correction must lie with Congress."<sup>26</sup> Therefore, once a party makes out the elements of liability under the RICO statute, the courts are not free to limit the use of RICO.

At least one observer rejects the premise that civil RICO's expansion to business fraud represents a defect.<sup>27</sup> "That Congress was primarily concerned with one evil does not mean that the laws it enacts must be incapable of addressing broader social concerns . . . . Broad application indicates legislative flexibility rather than abuse of statutory scope."<sup>28</sup>

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22. Pub. L. No. 91-452, § 904(a), 84 Stat. 922 (1970) (referring to Title IX of the Organized Crime Control Act of 1970, which includes the RICO statute).

23. 473 U.S. at 495 (In *Sedima*, a Belgian supplier of equipment to aerospace and defense industries brought an action against a New York exporter of aviation parts alleging the exporter sent inflated copies of purchase orders and credit memos thereby receiving reimbursement in excess of costs. The plaintiff included a RICO claim in the suit, alleging as predicate offenses mail fraud and wire fraud. The Supreme Court rejected an appellate court ruling dismissing the RICO claim. The high Court ruled that a criminal conviction is not a prerequisite to a RICO action).

24. *Oversight on Civil RICO Suits: Before the U.S. Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 93-172 (1985) (statement and report of Stephen S. Trott, Asst. Atty. Gen., Criminal Div., Justice Dept.) (From 1970 through 1984, about 500 private civil RICO actions were filed, of which about 230 were reported decisions. About two-thirds of reported private civil RICO suits were predicated on mail fraud, wire fraud, or fraud in the sale of securities. About 7% appeared to be brought against organized crime figures or on the basis of violent or other non-fraudulent conduct common to organized crime, including murder, arson and labor racketeering).

25. *Sedima*, 473 U.S. at 499.

26. *Id.*

27. Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, B.Y.U.L. REV. 55, 73-75 (1986).

28. *Id.* at 74-75 (The authors say it is apparent from the standpoint of structural consistency that Congress contemplated civil suits against otherwise legitimate business. Conduct prohibited by

If civil RICO is appropriate to combat business fraud, where the harm is largely economic, it is even more appropriate in the case of violent, organized anti-abortion protest. After-all, RICO's first mission was to destroy the violent organized crime families. The rescue movement is an organized, widespread activity that, through the use of force, disrupts a legal health service provider industry. Anti-abortion rescuers subvert the country's democratic processes by superimposing their moral and religious viewpoint on society. The rescue movement burdens interstate commerce by creating a climate of fear which makes it more difficult for abortion clinics to provide services and for patients to secure them. The clinic in *McMonagle*, for example, was forced to relocate and to purchase expensive security equipment.<sup>29</sup>

The assault on abortion clinics is analogous to systematic race discrimination that was present in the motel and restaurant industries in the 1960s. The United States Supreme Court observed that race discrimination at a single motel discouraged travel by blacks in the South in violation of the commerce clause of the United States Constitution.<sup>30</sup> Therefore, the Court ruled that motels could be regulated by Congress under the 1964 Civil Rights Act.<sup>31</sup> The discriminatory activities of a small southern cafe, Ollie's Barbecue, were also deemed to have an aggregate impact on interstate commerce.<sup>32</sup> Thus, restaurants were subject to federal regulation.<sup>33</sup> The Northeast Women's Center in *McMonagle* was one target in a wider campaign of what one observer has called domestic terrorism directed to abortion clinics throughout the country.<sup>34</sup>

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the statute does not distinguish between types of enterprises. "Since the statute's criminal sanctions have been applied — largely without controversy — to a wide variety of enterprises, including many legitimate businesses, it is implausible to conclude that Congress intended to exclude such enterprises from RICO's civil scope."

29. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1347 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

30. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); U.S. CONST. art. 1, § 8, col. 3.

31. *Heart of Atlanta Motel*, 379 U.S. 241.

32. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

33. *Id.*

34. Lewin, *supra* note 7, at A16, col. 5.

The anti-abortion rescue movement, which seeks to destroy a health service provider industry, one clinic at a time, falls within Congress' expansive definition of organized crime, even though it was not contemplated by the drafters of RICO.

### *B. The Elements of Civil RICO*

The debate about whether the anti-abortion rescue movement is "organized crime" is more obscure than the concrete question of whether the group falls within the parameters of civil RICO. A violation of civil RICO requires conduct of an enterprise through a pattern of racketeering activity.<sup>35</sup> Congress intended RICO to encourage citizens to serve as private attorneys general to fill prosecutorial gaps and to help the government stem the tide of organized crime.<sup>36</sup> Congress made it easy to get into court under RICO and, by offering the lure of treble damages and attorney's fees, Congress made it worth the while.

RICO contains a broad standing requirement for the plaintiff: any person injured in his business or property by reason of a violation of RICO may sue under the civil RICO section of the statute.<sup>37</sup> The United States Supreme Court has rebuffed judicial attempts to narrow the injury requirement of civil RICO. The Court rejected an attempt by the Second Circuit to characterize racketeering injury as "something different" than the underlying acts required to proceed under civil RICO.<sup>38</sup> The Court held that injury is "the harm caused by the predicate acts sufficiently related to constitute a pattern."<sup>39</sup> In removing judicially imposed restraints on the use of civil RICO, the Court stressed, "RICO is to be read broadly."<sup>40</sup>

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35. *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

36. *Id.*

37. 18 U.S.C. § 1964 (1970).

38. *Sedima*, 473 U.S. at 495-500 (The Court rejected the Second Circuit's requirement that a private RICO plaintiff must show that the defendant was criminally convicted of the predicate acts of racketeering upon which the suit is based and that the plaintiff suffered a "racketeering injury" beyond the direct injury caused by the predicate offenses).

39. *Id.* at 497.

40. *Id.*



RICO prohibits four types of activity: (1) investing income derived from racketeering in an interstate enterprise;<sup>41</sup> (2) acquiring or maintaining an interest in such an enterprise through a pattern of racketeering activity;<sup>42</sup> (3) conducting an enterprise through a pattern of racketeering activity;<sup>43</sup> and (4) conspiring to violate any of the above provisions.<sup>44</sup>

“Racketeering activity” is defined as any act or threat chargeable under enumerated state and federal laws.<sup>45</sup> These offenses, called predicate offenses, include such diverse crimes as murder, extortion, mail and wire fraud, sports bribery, counterfeiting, white slave traffic, bankruptcy fraud, fraud in the sale of securities and felonies involving dangerous drugs.<sup>46</sup> A “pattern of racketeering activity” is demonstrated by the commission of at least two predicate acts of racketeering within 10 years by a party who is linked to an enterprise.<sup>47</sup> An enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union, or group of individuals, who are associated in fact although not necessarily in a legal entity.<sup>48</sup>

The jury found the *McMonagle* defendants engaged in a pattern of extortionate acts under the Hobbs Act, which is a predicate offense under civil RICO.<sup>49</sup> The Hobbs Act prohibits interference with, or conspiracy to interfere with, commerce by threats or violence.<sup>50</sup> The Hobbs Act defines extortion as obtaining property from others by the wrongful use of actual or threatened force, violence or fear or under color of official rights.<sup>51</sup>

The property in question in *McMonagle* was intangible. The jury concluded that the defendants had attempted to extort several prop-

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41. 18 U.S.C. § 1962(a) (1988).

42. *Id.* § 1962(b) (1988).

43. *Id.* § 1962(c) (1988).

44. *Id.* § 1962(d) (1988).

45. *Id.* § 1961 (1988).

46. *Id.*

47. 18 U.S.C. § 1961(5) (1988). *See also Sedima*, 473 U.S. at 496 & note 14.

48. 18 U.S.C. § 1961(4) (1988).

49. *McMonagle*, 868 F.2d at 1350; Hobbs Act, 18 U.S.C. § 1951 (1988).

50. 18 U.S.C. § 1951(a) (1988).

51. *Id.* § 1951(b)(2) (1988).

erty interests, namely the property interest of the center to continue to provide abortion services, the property interest of center employees to continue their employment and the property interest of patients who sought to enter a contractual relationship with the center.<sup>52</sup>

Whether or not the anti-abortion "rescuers" consider themselves to be the equivalent of organized crime figures, their activities fit the scheme established by Congress under civil RICO. Regardless of the pedigree of the individuals associated with the enterprise, if the crimes conducted by the enterprise constitute a pattern of racketeering activity, civil RICO is violated.

### C. *No Economic Motive Required*

The use of civil RICO against otherwise legitimate business in securities fraud cases during the mid-1980s first prompted the outcry that the statute had exceeded its intended scope.<sup>53</sup> During testimony before the United States Senate Committee on the Judiciary in 1985, former Nebraska Senator Roman L. Hruska, who proposed the predecessor to RICO, said, "my bills and their successors were directed at organized crime. They were not intended to be a vehicle to charge legitimate businessmen with organized crime activities."<sup>54</sup> However, others disagree, including Professor G. Robert Blakey, who represented the defendants in the *McMonagle* appeal before the United States Supreme Court. Blakey, who helped draft RICO as a former Senate staffer, has argued that Congress never intended to restrict RICO's application to the mob.<sup>55</sup>

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

53. *Sedima*, 741 F.2d at 500.

54. *Oversight on Civil RICO Suits: Before the U.S. Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 4-93 (1985) (statement of former Nebraska Sen. Roman L. Hruska who introduced a predecessor to RICO to Congress in 1967).

55. Sanders, *Showdown at Gucci Gulch; Designed as a Mob Buster, RICO Has Become a Powerful Catchall*, TIME, Aug. 21, 1989 at 48 (Blakey says, "We don't want one set of rules for people whose collars are blue and whose names end in vowels, and another set for those whose collars are white and have Ivy League diplomas.").

Blakey, according to news accounts, has had inconsistent views on the applicability of civil RICO to anti-abortionists. See, e.g., N.Y. Times, March 12, 1989, § 4, at 4, col. 1 (Blakey says the abortion clinic in *McMonagle* was well within RICO's scope. "From the point of view of the abortion clinic,

The United States Supreme Court in *Sedima* noted that civil RICO "is evolving into something quite different from the original conception of its enactors."<sup>56</sup> The Court attributed the evolution of the statute to the breadth of predicate offenses under RICO and to the failure of Congress and the courts to develop a meaningful concept of "pattern" of racketeering activity.<sup>57</sup> However, the Court declined to perform judicial surgery on RICO or even to concede that such surgery is needed.<sup>58</sup>

Extending civil RICO's application from business people to anti-abortion protesters is perhaps an even more dramatic leap than extending the statute from mobsters to unscrupulous businessmen. Securities fraud, like organized crime, is still motivated by economic gain. What motivates anti-abortion protestors?

The United States Supreme Court, in denying certiorari to *McMonagle* defendants, declined to take up the question of whether economic motivation must be present to hold a defendant liable under civil RICO.<sup>59</sup> In a brief dissent, Justice Byron R. White argued that certiorari should be granted because a question exists as to whether RICO liability can be imposed where neither the "enterprise" nor the "pattern of racketeering activity" has any profit-making element.<sup>60</sup> He noted that a conflict between circuits exists; the Eighth and Second Circuits have required economic motivation in civil RICO cases while the Third Circuit in *McMonagle* did not.<sup>61</sup> Nevertheless, the majority allowed *McMonagle* to stand, effectively

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would it have made any difference whether the person who put the arm on them was named Corleone or O'Neal."); Greenhouse, *supra* note 7, at A23, col. 1 (Blakey argued before the United States Supreme Court in *McMonagle* that RICO was not intended to be used against an organization that did not have a profit motive.).

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

57. *Id.*

58. *Id.* at 499.

59. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

60. *McMonagle*, 110 S. Ct. at 261 (White, J., dissenting).

61. *Id.* In *United States v. Ivic*, 700 F.2d 51, 58-65 (2d Cir. 1983), the Second Circuit ruled that an enterprise or predicate acts must have financial purpose. In *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1983), *cert. denied*, 109 S. Ct. 511, (1988), the Eighth Circuit ruled that an enterprise must be directed toward an economic goal.

upholding RICO liability despite the absence of economic motivation by the defendants.<sup>62</sup>

The *McMonagle* defendants found a deaf ear when they argued that economic motivation is a necessary element of extortion under the Hobbs Act.<sup>63</sup> The court said that it is a "well established precedent" that lack of economic motive is not a defense to Hobbs Act extortion violations.<sup>64</sup> The court noted that a person may violate the Hobbs Act to benefit another, such as in the case of a defendant who solicited political contributions for another.<sup>65</sup>

In any case, it cannot be assumed that all anti-abortionists lack economic motive. In *McMonagle*, one defendant, Michael McMonagle, earned a salary of \$32,000 a year as the executive director of the Pro-Life Coalition of Southeastern Pennsylvania, which coordinated protests at the center.<sup>66</sup> McMonagle testified that he raised \$120,000 a year for the organization.<sup>67</sup> McMonagle sent out a fund raising letter crediting the loss of the abortion clinic's lease in July 1986 to "the persistent prayers and protests of Pro-Life citizens."<sup>68</sup> The court in *McMonagle* did not decide whether the evidence was sufficient to show economic motivation, having considered the question unnecessary.<sup>69</sup>

A district judge in Washington in an unreported case, *Feminist Women's Health Center v. Roberts*, which involved an arson fire that destroyed an abortion clinic in Everett, Washington, also rejected defendants' claims that RICO was not applicable to activity that was not economically motivated.<sup>70</sup> The *Roberts* court held that the United States Supreme Court had broadly construed civil RICO and that it would not adopt a financial motivation requirement in the absence of controlling precedent.<sup>71</sup>

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62. *McMonagle*, 110 S. Ct. at 261.

63. *McMonagle*, 868 F.2d at 1349; 18 U.S.C. § 1951 (1983).

64. *McMonagle*, 868 F.2d at 1340.

65. *Id.* at 1350.

66. *Id.* at 1349 n.7.

67. *Id.*

68. *Id.* at 1346 n.4.

69. *Id.* at 1349 n.7.

70. *Feminist Women's Health Center v. Roberts*, No. C86-161Z (W.D. Wash., May. 5, 1989) (1989 WESTLAW 56017 at 11).

71. *Id.* at 25.

It may be that most anti-abortionists are motivated by moral or religious beliefs and that most business people and so-called mobsters are not. The absence of an economic motive is a difference without a distinction in the eyes of the courts interpreting civil RICO.

### III. THE CASES

One commentator has flatly rejected the use of civil RICO in the anti-abortion context:<sup>72</sup>

[T]he protesters, although perhaps zealous in the assertion of their beliefs, are not "extortionists" as Congress intended the term to mean. Neither can they reasonably be labeled "racketeers" when the term is defined in the context of RICO's legislative history . . . . Not only are civil RICO's hard-hitting penalties being assessed in garden-variety fraud cases and contract disputes, but they are now being extended to ordinary trespass cases.<sup>73</sup>

But the siege of the Northeast Women's Center in Philadelphia, Pennsylvania and the onslaught at Summit Women's Center at West Hartford, Connecticut, were hardly ordinary trespass, and the protesters were something more than zealous. *McMonagle*, and to a lesser extent *Operation Rescue*, are to date the major cases involving civil RICO and anti-abortionists.

Anti-abortion demonstrators had picketed Northeast Women's Center, Inc., trying to block access and dissuade patients from entering, as often as three days a week for nine years.<sup>74</sup> The center, a Pennsylvania corporation that provides diverse gynecological services, including pregnancy testing and abortions,<sup>75</sup> initially charged 13 defendants with disrupting the center's operations by harassing clients and employees, trespassing and damaging medical equipment.<sup>76</sup> The complaint was later amended to name 42 defendants.<sup>77</sup>

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72. Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators are Racketeers?*, 56 UMKC L. REV., 287 (1988).

73. *Id.* at 309.

74. Greenhouse, *supra* note 7, at 23, col. 1.

75. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1345 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

76. *Id.*

77. *Id.* The center dismissed claims against 11 defendants either before or during the trial. The court gave a directed verdict to four defendants and dismissed claims against one defendant after the trial.

The three week trial focused on four incidents from 1984 to 1986 in which protestors forced their way into the center to conduct sit-ins.<sup>78</sup> The jury held 27 defendants liable under the civil RICO claim and assessed \$887. in damages, the cost of repairing medical equipment broken by protesters.<sup>79</sup> The award was trebled by the court to \$2661.78.<sup>80</sup> In addition, the jury found that three defendants interfered with the center's contracts with its employees but the jury assessed no damages on that claim, finding no proximate loss resulting from the interference.<sup>81</sup> Finally, the jury found 24 defendants liable for trespass and assessed \$42,087.95 in compensatory damages and \$48,000 in punitive damages on the claim.<sup>82</sup> The court awarded the plaintiff \$64,946.11 in attorney's fees and costs.<sup>83</sup>

More than money, the jury gave the abortion clinic hope. Each of the four incidents that were the subject of the trial had led to criminal arrests for a variety of offenses, including defiant trespass, criminal conspiracy and disorderly conduct.<sup>84</sup> The lead attorney for the center said that civil RICO was the first effective means to deal with "committed, day-in and day-out harassment" of the center's clients and staff.<sup>85</sup> The anti-abortion protests were crippling to the center.

On December 8, 1984, approximately 50 protesters burst into the clinic, knocked down center employees, blocked access to rooms and

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78. *McMonagle*, 868 F.2d at 1347.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* (The district court set aside the punitive damage award because the center failed to request punitive damages in a timely manner).

83. *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 470 (3d Cir. 1989), *cert. denied sub nom.*, *Walton v. Northeast Women's Center*, 110 S. Ct. 1788 (1990).

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

85. NAT'L LAW JOURNAL, March 20, 1989, at 28 (quoting Edmond A. Tiryak). However, the defendants' protests continued, though on a much smaller scale. See *Northeast Women's Center, Inc. v. McMonagle*, 745 F. Supp. 1082, (E.D. Pa. 1990) (The court issued a permanent injunction barring the defendants from entering the premises of the Northeast Women's Center, Inc. and limiting outside protests). See also *Northeast Women's Center, Inc. v. McMonagle*, No. 85-4845 (E.D. Pa. Oct. 4, 1990) (1990 WESTLAW 152147) (finding three defendants in contempt of court for disobeying a permanent injunction by picketing the home of a staff physician for the center). According to the court, defendant Michael McMonagle, upon learning of the existence of the injunction, conducted a television interview in which he vowed to picket the physician's home. Later that day, the defendants defied the court order by carrying signs in front of the physician's home which stated, among other things, "Unborn babies are killed by Ken Lakoff." It was the plaintiff's tenth motion for civil contempt.

threw medical supplies on the floor.<sup>86</sup> One employee, who was injured while trying to stop protesters from entering a patient treatment room, quit her job.<sup>87</sup> Afterwards, the center hired security guards for the first time.<sup>88</sup>

On August 10, 1985, a dozen of the defendants forced their way into the center and injured an employee.<sup>89</sup> The "rescuers" locked themselves in an operating room and damaged, disassembled and stole medical equipment.<sup>90</sup>

Two months later, on October 19, 1985, the "rescuers," including 24 defendants, again attempted to enter the center. They succeeded, knocking a center employee down as they rushed through the doors.<sup>91</sup>

The fourth "trespass" occurred on May 23, 1986 and was videotaped.<sup>92</sup> The tape showed some protesters standing in front of patients and castigating them.<sup>93</sup> A prosecutor at the scene called the rescuers' activity a "frenzy" and said that he delayed leaving the building because of fear for his physical safety.<sup>94</sup> The videotape captured protesters stating, "I bet you ten to one this place doesn't last six months" and "[t]his place is going to be shut down."<sup>95</sup> The police, who were forced to physically remove the trespassers, arrested 26 persons.<sup>96</sup>

Besides invading the center, protesters subjected three employees to repeated picketing at their homes; two of the employees quit their jobs.<sup>97</sup>

After years under siege, the center lost its lease in July, 1986.<sup>98</sup> The center moved to a new location where it installed a sophisticated

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86. *McMonagle*, 868 F.2d at 1345.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1346.

93. *Id.* at 1345-46.

94. *Id.* at 1346.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

security system.<sup>99</sup> A month later, the protesters were back, attempting to enter the newly-relocated center.<sup>100</sup> This time they were thwarted by the new security equipment.<sup>101</sup>

The trial court observed that the protesters lacked remorse or regret for their actions and that there was no evidence that their unlawful protest would cease.<sup>102</sup>

The sheer number of protesters who participated in the two mass protests that were the subject of the *Operation Rescue* suit make the *McMonagle* protests almost pale in comparison. Hundreds of highly organized protesters converged on the West Hartford women's center. Large numbers of arrests resulted: 61 on April 1 and 261 on June 17.<sup>103</sup>

The *Operation Rescue* suit was initially filed by the town of West Hartford, which was forced to respond to the protests with police and emergency service personnel.<sup>104</sup> The Summit Women's Center later intervened as a co-plaintiff.<sup>105</sup> The plaintiffs filed claims under civil RICO, Connecticut statutory law, common law of nuisance, conspiracy and negligence.<sup>106</sup> The Second Circuit Court of Appeals, in a 2-1 opinion, subsequently ordered dismissal of the town's complaint for lack of subject matter jurisdiction.<sup>107</sup> The defendants in

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99. *Id.*

100. *Id.* at 1347.

101. *Id.* at 1350.

102. *Id.* at 1353.

103. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, (2d Cir. 1990) (vacating 726 F. Supp. 371 (D. Conn. 1989)).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 104. The town charged that *Operation Rescue* attempted to extort the town's ability to protect Summit Women's Center in violation of the Hobbs Act (18 U.S.C. § 1951), which is a predicate offense under civil RICO. The appeals court panel ruled that extortion under the Hobbs Act requires the obtaining of "property" and that "property" cannot be construed to encompass altered official conduct. In fact, the court contended that the town's claim that it was the victim of extortion was a "bizarre" construction of the Hobbs Act which "affronts common sense, much less the rule of lenity." *Id.* at 102. A dissenting opinion by Judge Kearse argued that the town's monetary expenditures, including \$42,000 in overtime costs, was "property" within the meaning of the Hobbs Act and certainly sufficed to meet the minimal requirements of federal jurisdiction. He compared the town's extortion claim to an allegation that it was forced to hire an extra employee or had incurred extra expense to build or operate a municipal building as a result of bid-rigging by suppliers. *Id.* at



the case include Operation Rescue and its founder, Randall Terry, who was not present at either demonstration, two other anti-abortion groups, a group called Faithful and True Roman Catholics, 11 individuals, a business owned by a defendant, and unenumerated John and Jane Does.<sup>108</sup> The district court issued a preliminary injunction based upon the probability of the plaintiff's success on the public nuisance claim.<sup>109</sup>

In *Operation Rescue*, rescuers posed as patients to gain entry to the third floor offices of the women's center, which provides gynecological services and abortions.<sup>110</sup> They opened the door for others.<sup>111</sup>

On April 1, 1990, 75 to 80 rescuers occupied the center from 7:45 a.m. to 6 p.m.; the last rescuer was removed by police on a stretcher.<sup>112</sup> Patients with appointments had to "run a gauntlet" of rescuers to enter the clinic and treatment rooms.<sup>113</sup>

An employee tried unsuccessfully to prevent the entry of the rescuers on June 17, 1989; they pushed past the employee.<sup>114</sup> More than 200 rescuers occupied the center from 7:30 a.m. until 7 p.m.<sup>115</sup> The center was unable to treat any patients that day.<sup>116</sup> A receptionist suffered an anxiety attack and four employees quit citing fear of the protests.<sup>117</sup>

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105 (Kearse, J., dissenting). The majority referred to the Second Circuit's earlier unsuccessful attempt to limit civil RICO in the landmark case of *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 579 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985), "We made clear that we will, of course, enforce the (civil RICO) statute as written by Congress . . . That does not imply, however, any disposition on the part of this court to countenance fanciful invocations of the draconian RICO weapon in civil litigation." *Operation Rescue*, 915 F.2d at 104. In *Sedima*, the Second Circuit attempted unsuccessfully to narrow civil RICO's application in cases involving business fraud. In dismissing the town's complaint, the majority noted that it was not addressing the civil RICO claim of the town's co-plaintiff, Summit Women's Center. *Operation Rescue*, 915 F.2d at 104.

108. *Id.*, 726 F. Supp. at 371.

109. *Id.*

110. *Id.* at 373-74.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

On both occasions, rescuers ignored orders by police to leave the building.<sup>118</sup> Door locks were forced, including some by police and firefighters, and equipment was damaged.<sup>119</sup> Elevators in the building were disabled and fire exits blocked.<sup>120</sup> Other offices in the building, including medical and dental offices, were obstructed and patients unrelated to the center were unable to obtain necessary treatment.<sup>121</sup>

Forty of West Hartford's 125 police officers, as well as ambulances and paramedics were stationed at the scene for each protest.<sup>122</sup> The court said the response time of the town's emergency ambulance service declined substantially.<sup>123</sup> The fire department was called to free five rescuers who had locked themselves together inside the center.<sup>124</sup>

One or more persons presented themselves to police at each protest and identified themselves as "negotiators" empowered to speak for the arrestees.<sup>125</sup> On April 1, a person identified as "Bill" reminded rescuers who had been arrested of their commitment to refuse to identify themselves.<sup>126</sup> He urged them to remain in police custody.<sup>127</sup> A number of the rescuers wore the name or emblem of the group, Operation Rescue, and one of the defendants was seen organizing a similar protest in Massachusetts.<sup>128</sup> The district court observed that the group comprised a "substantial association . . . loose and not formed."<sup>129</sup>

Trespass occurs when one intentionally enters onto the land of another.<sup>130</sup> That was just the beginning for the protesters in

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 379 (The ambulance service is required by contract to be within five minutes of the site of 80% of emergency calls. From June 17-19, while an ambulance and crew were stationed at the center, response time exceeded five minutes in about 50% of emergency calls.).

124. *Id.*

125. *Id.* at 375.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. RESTATEMENT (SECOND) OF TORTS § 158 (1965):

*McMonagle* and *Operation Rescue*. They injured center employees and smashed private property. They denied patients the right to obtain medical services. They set in motion a systematic plan to destroy the operation of a legal health service provider. These "rescuers" were more like a conquering army than mere trespassers.

#### IV. THE NOT SO FINE LINE BETWEEN PROTEST AND TRESPASS

Civil RICO has been applied to so-called legitimate businesses, which has less in common with organized crime than anti-abortion rescuers. Business people, such as junk bond trader Mike Milken, use cunning and finesse. Like the mobsters, the so-called rescuers use force and violence. But the anti-abortionists are different from mobsters in an important respect. They claim their use of force and violence is justified to prevent a worse harm. They invoke the right to freedom of speech under the First Amendment.

The United States Court of Appeals for the Third Circuit recognized in *McMonagle* that the defendants "are not the 'archetypal, intimidating mobster[s]'" that Congress perhaps had in mind when it drafted the RICO statute.<sup>131</sup> However, the court contended the activity of the rescuers was nevertheless encompassed by RICO.<sup>132</sup> "[I]t is difficult to believe that civil RICO was not intended to reach this type of coordinated activity against a private business, especially one that performs lawful indeed constitutionally protected medical services."<sup>133</sup> The district court in *McMonagle* said it would have "grave concerns" if the defendants were held liable under civil RICO for engaging in the expression of dissenting political opinions in a manner protected under the First Amendment.<sup>134</sup> The defendants had

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One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or  
(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

131. *Northeast Women's Center, Inc. v. McMonagle*, 889 F.2d 466, 473 (3d Cir. 1989), cert. denied sub nom., *Walton v. Northeast Women's Center*, 110 S. Ct. 1788 (1990).

132. *Id.*

133. *Id.*

134. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1348 (3d Cir. 1989), cert. denied, 110 S. Ct. 261 (1989).

a First Amendment right to attempt to persuade the Northeast Women's Center to stop performing abortions.<sup>135</sup> The mere fact that some of the defendants or their protests were coercive or offensive did not diminish that right.<sup>136</sup> However, the judge instructed the jury: "[T]he First Amendment does not offer a sanctuary for violators. The same constitution that protects the defendants' right to free speech also protects the center's right to abortion services and the patients' right to receive those services."<sup>137</sup>

The jury concluded that the defendants' actions went "beyond mere dissent and publication of their political view."<sup>138</sup> The jury awarded damages under the civil RICO claim based upon the destruction of center medical equipment during one of the forcible entries into the center.<sup>139</sup>

The *McMonagle* defendants also attempted to raise a defense of justification.<sup>140</sup> However, the court held that the argument represented a "feeble" and "invalid" effort to emasculate basic principles of civil disobedience.<sup>141</sup> The court noted that the law does not recognize abortions as a harm and that the defendants could not have expected the demonstration to be effective as it was only temporary.<sup>142</sup> "[T]he actor wants the best of both worlds; to disobey, yet to be absolved of punishment for disobedience."<sup>143</sup> The court also

135. *Id.* at 1349.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. MODEL PENAL CODE § 3.02 (Official Draft 1962) (Justification Generally: Choice of Evils):

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

See also *id.* § 3.01 ("Justification an Affirmative Defense; Civil Remedies Unaffected . . . . The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct which is available in any civil action.")

141. *McMonagle*, 868 F.2d at 1348.

142. *Id.*

143. *Id.* at 1351.

emphasized that the defendants had numerous legal alternatives to pursue their goal of persuading women not to have abortions, such as marching, preaching door-to-door, distributing literature and contacting residents by telephone.<sup>144</sup> "While defendants may have strong conviction against the wisdom or morality of women making a voluntary decision to obtain an abortion, under our Constitution and laws there is in this country no superior, dominant ruling class of citizens who may escape the consequences of their violent and lawless behavior."<sup>145</sup>

Similarly, the court in *Operation Rescue* rejected the defendants' attempt to raise a free speech defense. The court ruled that the defendants have no First Amendment right "to carry on even pure speech activities on private property against the wishes of the Center and its landlord."<sup>146</sup> Certainly, the *Operation Rescue* court added, the defendants have no right to remain on private premises after being instructed to leave or to block exits and entrances to the building.<sup>147</sup> "[A] bright line is crossed at the threshold of private property. Forcible, unauthorized entry is not protected conduct no matter what its purpose."<sup>148</sup>

The court in *Feminist Women's Health Center v. Roberts* also rejected a claim that civil RICO impinged upon the defendants' Constitutional rights to express their views and to persuade the health center to adopt their views.<sup>149</sup> The court affirmed the legal reasoning in *McMonagle* on the First Amendment issue.<sup>150</sup>

The defendants appear to be unique among the targets of civil RICO in that they claim their actions are protected under the Constitution or justified under a higher law. However, the use of the justification defense is not unique to cases involving civil RICO and

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144. *Id.* at 1352.

145. *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 477 (3rd Cir. 1989), *cert. denied sub nom.*, *Walton v. Northeast Women's Center*, 110 S. Ct. 1788 (1990).

146. *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 383 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990).

147. *Id.*

148. *Id.*

149. *Feminist Women's Health Center v. Roberts*, No. C86-161Z (W.D. Wash., May 5, 1989) (1989 WESTLAW 56017).

150. *Id.*

it is not peculiar to cases involving anti-abortionists. Protesters at nuclear facilities also attempted to raise the defense to no avail.<sup>151</sup> Similarly, the right to free speech under the First Amendment was asserted unsuccessfully by Operation Rescue in cases that did not involve civil RICO.<sup>152</sup>

Whether the actions of the anti-abortionists are justified under a higher law is debatable. There does not appear to be any serious debate on this question among the federal judiciary. Anti-abortion protesters have no right, either under the justification defense or under the First Amendment, to prevent women from patronizing medical clinics. They have no right to prevent medical clinics from operating in compliance with the law. As the Court stated in *Sedima*, the defect if indeed it be a defect is up to Congress to correct.<sup>153</sup>

#### V. INJUNCTIVE RELIEF

Is civil RICO an after the fact salve or does the law entitle the plaintiff to immediate injunctive relief? The latter scenario would widen the scope and power of civil RICO. In addition to the financial incentives and procedural benefits of civil RICO, a plaintiff could invoke the protection of the federal court at an earlier stage. However, the impact of an injunction in the anti-abortion rescue context is unclear. The plaintiffs in *McMonagle* and *Operation Rescue* were able to secure injunctive relief on other grounds.

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151. *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985).

152. *See* *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 683 (9th Cir. 1988) (A federal judge ruled that anti-abortion demonstrators' noise and use of intimidation and threatening acts raised the risk of medical complications and injury to patients at a local abortion clinic. In one instance, the demonstrators blocked an ambulance during a medical emergency. The court said the government has a significant interest in protecting the clinic's ability to provide medical services free from interference that might endanger the health of its patients. Viewed in this light, the court said, a preliminary injunction restricting the anti-abortionists' speech represented a reasonable time, place and manner regulation.). *See also* N.Y. State Nat'l. Organization for Women v. Terry, 886 F.2d 1339, 1363-64. (2d Cir. 1989) (The First Amendment may not be read to protect a person's right to express their views at any time, in any manner, and in any place of their choosing. An injunction prohibiting Operation Rescue from trespass and obstruction at abortion clinics is content neutral. "Here we discern no discrimination against the defendants or their message. The message that abortion is wrong, immoral, and must be stopped is not singled out for unfavorable treatment." Furthermore, the court states, "Blocking access to public and private buildings has never been upheld as a proper method of communication in an orderly society.").

153. *Sedima S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 499 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

The question of whether injunctive relief is available under civil RICO was unresolved by *McMonagle*. The court concluded that it was unnecessary to decide the issue because other grounds afforded the desired injunctive relief.<sup>154</sup> After a detailed analysis of the legislative history of civil RICO, the court in *Operation Rescue* declared that injunctive relief is not available under the statute.<sup>155</sup> The *Operation Rescue* court issued a preliminary injunction against the defendants based on the probability of the plaintiff's success on its public nuisance claim.<sup>156</sup> The court in *Roberts* agreed that civil RICO does not authorize the court to grant injunctive relief.<sup>157</sup>

The *Operation Rescue* court conceded that there is disagreement among courts that have addressed the question of whether injunctive relief is available under civil RICO.<sup>158</sup> However, the court said that a compelling argument was made that injunctive relief is not available in the landmark case *Religious Technology Center v. Wollersheim*.<sup>159</sup>

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154. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989) (The court said that whether injunctive relief is available under civil RICO was a question of first impression for that circuit and an open question in most other courts. It declined to decide the matter because the plaintiff acknowledged that injunctive relief could be granted under its state law claim of interference with contractual relation.).

155. *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989), vacated, 915 F.2d 92 (2d Cir. 1990).

156. *Id.* (The town secured a preliminary injunction on nuisance grounds prior to the intervention of its co-plaintiff, Summit Women's Center. A panel of the Second Circuit Court of Appeals in a 2-1 ruling subsequently vacated the injunction as it pertained to the town. *Operation Rescue*, 915 F.2d 92. However, the ruling did not address the claims of the Summit Women's Center.).

157. *Feminist Women's Health Center v. Roberts*, No. C86-161Z (W.D. Wash. 1989) (1989 WESTLAW 56017).

158. *Operation Rescue*, 726 F. Supp. at 377 (The district court cited seven cases in which courts decided or implied that equitable relief was not available to private plaintiffs under civil RICO. The court cited two cases in which injunctive relief was held to be available under civil RICO. Equitable relief was deemed to be unavailable in: *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1081-88 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984); *Ashland Oil Inc. v. Gleave*, 540 F. Supp. 81, 84-86 (W.D.N.Y. 1982); *Sedima*, 741 F.2d at 489; *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (implying, without deciding, that equitable relief was unavailable to private plaintiffs); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28-29 (2d Cir. 1983) (doubts about the propriety of injunctive relief); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir.), reh'g denied, 847 F.2d 840 (5th Cir. 1988).

Civil RICO was deemed to provide injunctive relief in: *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983), aff'd on other grounds, 730 F.2d 905 (2d Cir. 1984); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), aff'd on reh'g, 710 F.2d 1361 (8th Cir.) (en banc) cert. denied, 464 U.S. 1008 (1983).)

159. *Operation Rescue*, 726 F. Supp. at 378 (citing *Wollersheim*, 796 F.2d at 1087).

In *Wollersheim*, the Ninth Circuit Court of Appeals decided as a matter of first impression for an appellate court that civil RICO did not authorize injunctive relief.<sup>160</sup> The *Wollersheim* case involved a claim brought under civil RICO by the Church of Scientology, which charged that a splinter group had stolen its scriptural materials.<sup>161</sup> The Second Circuit in deciding *Operation Rescue* was persuaded by the reasoning of the Ninth Circuit Court of Appeals that:

1. Under ordinary rules of statutory construction, the express inclusion of an injunctive remedy to the United States in § 1964(b) and a damage remedy to private parties in § 1964(c) implies the exclusion of a private injunctive remedy.<sup>162</sup>

2. The House of Representatives rejected an express authorization of private injunctive relief when debating RICO's private remedy provisions. The proposal was greeted with hostility because it had not been reviewed in committee. It was withdrawn by the author before a vote could be taken.<sup>163</sup>

3. Section 1964(c) is analogous to Section 4 of the Clayton Act<sup>164</sup> which authorizes a private treble damage remedy in antitrust violations in substantially the same language. Section 4 has been held to preclude private injunctive relief.<sup>165</sup> The *Operation Rescue* court, quoting the *Wollersheim* decision, stated that:

[Congress] could have completed the analogy between civil RICO and the antitrust laws by including in civil RICO a private equitable relief remedy like section sixteen of the Clayton Act [expressly authorizing private injunctive remedy]. That it did not do so . . . strongly suggests that Congress did not intend to give private civil RICO plaintiffs access to equitable remedies.<sup>166</sup>

Two proponents of injunctive relief argue that the Ninth Circuit's reasoning in *Wollersheim* is fundamentally flawed and inconsistent

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160. *Wollersheim*, 796 F.2d at 1082.

161. *Id.*

162. *Operation Rescue*, 726 F. Supp. at 378.

163. *Id.*

164. 15 U.S.C. § 15(a) (1982).

165. *Id.*

166. *Operation Rescue*, 726 F. Supp. at 378 (quoting *Wollersheim*, 796 F.2d at 1087).



with the text, legislative history and purpose of RICO.<sup>167</sup> But the proponents say that even a holding that injunctive relief is unavailable under civil RICO does not preclude injunctive relief. "[I]t will only mean that its availability will rest solely on the traditional ancillary powers of federal courts or would become a matter of state law under the doctrine of pendent jurisdiction, at least over claims, if not parties."<sup>168</sup> However, they concede, uncertainty and the hostility to RICO of many district courts may make obtaining injunctive relief under such circumstances difficult if not impossible.<sup>169</sup>

The United States Supreme Court has not ruled on the question of injunctive relief under civil RICO, having declined the opportunity to do so in *Wollersheim*. The Court in *Sedima* held that parallels between antitrust laws and civil RICO in no way constrained its analysis of civil RICO's injury requirement.<sup>170</sup> After reading the legislative history of civil RICO, the Court concluded that lower courts have read "far too much" into the analogy between RICO and anti-trust laws.<sup>171</sup> However, the circuits remain divided on whether civil RICO encompasses injunctive relief and it remains an open question.

## VI. CONCLUSION

The most frequent criticism of civil RICO in recent years involves the use of the appellation "racketeer" against so-called legitimate business people who are loathe to be identified with the likes of Al Capone. Critics say that civil RICO complaints are used to harass legitimate businesses and to coerce defendants to make settlements.<sup>172</sup> Defenders of civil RICO say opponents of the statute have a double

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167. Blakey and Cessar, *Equitable Relief Under Civil RICO; Reflections on Religious Technology Center v. Wollersheim; Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 528 (1987). (The authors note RICO's express language requires a "liberal" construction of the statute "to effectuate its remedial purpose.")

168. *Id.* at 558.

169. *Id.* at 559.

170. *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985). The court rejected the Second Circuit's attempt to narrow civil RICO's injury requirements. *Sedima*, 105 S. Ct. at 3280-83.

171. *Id.*

172. N.Y. Times, March 12, 1989, § 4, at 4, col. 1.

standard: they would exempt business people from civil RICO's grasp but do not object to prosecutions against traditional organized crime figures.<sup>173</sup> In any event, the concern over the taint of the label "racketeer" loses validity in the anti-abortion context. Individuals who enthusiastically, repeatedly and publicly invite arrest arguably should be less sensitive about the label "racketeer." Finally, the term "racketeer" is only a word that describes specific types of activities that are illegal.

The real issue in the furor over civil RICO is the harshness of the statute. But this harshness must be considered in context. Since 1977, extremists in the United States have bombed or set fire to 117 abortion clinics and threatened 250 others.<sup>174</sup> Some 224 clinics were vandalized.<sup>175</sup>

In the past two years, courts have enjoined "rescues" in numerous localities, including New York, Pennsylvania, Washington, Connecticut, California and Washington, D.C.<sup>176</sup> "Rescuers" in several of these areas, including the District of Columbia, Maryland and New York, flaunted the federal injunctions.<sup>177</sup>

Meanwhile, women were turned away from medical centers offering abortion services, presumably even women who were victims of medical emergencies, rape or incest. Demonstrators bumped, grabbed and pushed persons seeking to enter the centers, sometimes screaming and yelling inches from their faces.<sup>178</sup> Terrified pregnant teenagers were pelted with plastic replicas of fetuses.<sup>179</sup> "For many women and teenage girls, Operation Rescue's blockades have turned

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173. *Id.* (Michael Waldman, legislative director of the Public Citizen's Congress Watch, a Washington group affiliated with Ralph Nader, said, "Most people who support reform take the position that it should be used against mobsters but not against criminals who wear pinstriped suits instead of fedoras. But white-collar crime, like organized crime, leaches hundreds of billions out of the economy each year.").

174. L. TRIBE, *ABORTION: THE CLASS OF ABSOLUTES* 172 (1990).

175. *Id.*

176. *Nat'l Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1490 (E.D. Va. 1989).

177. *See id.* at 1490; *N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989).

178. *Portland Feminist Women's Health Center*, 859 F.2d at 683.

179. L. TRIBE, *supra* note 174, at 172.

the experience of seeking an abortion into a nightmare of jeering demonstrators, a spectacle that in turn attracts the added horror of media coverage of this intensely personal decision."<sup>180</sup> Clinic employees were intimidated and assaulted by these so-called "rescuers." Towns and cities were forced to expend scarce resources on police, fire and medical services to cope with repeated mass protests. Thousands of Operation Rescue members clogged local courts and jails at public expense and refused to give their names or to pay court-imposed fines, including founder Terry, who spent four months in a Georgia prison until an anonymous donor paid Terry's \$500 fine.<sup>181</sup>

In short, civil RICO is helping to end a campaign of violent, organized crime that has persisted virtually unchecked for several years at enormous cost to society and to individuals seeking to exercise their legal right to have an abortion.

The long-term significance of the *McMonagle* decision rests on the extent to which Operation Rescue's activities can truly be called civil disobedience. Operation Rescue's tactics are vaguely reminiscent of the civil rights movement. Indeed, the rescuers cloak themselves in the rhetoric of the civil rights movement.<sup>182</sup> However, opponents say the aim of Operation Rescue is to take away the civil rights of women.<sup>183</sup> Regardless of their motive, the tactics of the so-called rescuers are violent, illegal and hurtful. As the *McMonagle* court observed, defendants are not immunized from the law merely by labeling their conduct civil disobedience.<sup>184</sup>

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180. *Id.*

181. Lewin, *supra* note 7, at A16, col. 1.

182. THE NAT'L LAW JOURNAL, Nov. 13, 1989, at 30 (Terry says "blockaders" break the law for the same reasons as the Rev. Martin Luther King and his followers. Abortion rights advocates respond that anti-abortion activists have no more right to block abortion clinics than Louisiana Governor Ross Barnett had to stand in the doorway of the University of Mississippi to block James Meredith).

183. L. TRIBE, *supra* note 174, at 238 (Tribe says Operation Rescue founder Randall Terry's avowed goal is to put the genie of equality for women back in the bottle. "Whether in the name of traditional sex roles or in the name of a traditional sexual morality, much opposition to abortion seems really to be about the control of women . . . the depth of the division between the pro-choice and pro-life tendencies appears to reflect not simply different perspectives on the value of fetal life but different orientations toward matters of tradition, change, sex, and power.'").

184. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

Yet, the harsh effects of RICO do give even the most ardent critic of Operation Rescue pause. After all, arguably Operation Rescue is the John Brown of the anti-abortion movement. The group has dramatized the abortion issue in an unprecedented way. However, one wonders if the damage caused by the group was really necessary in light of the changing constituency of the United States Supreme Court. Also, a criminal act may vividly focus attention on an issue without legitimizing the act in question. Still, there is a danger that the *McMonagle* decision will chill other protest groups. That seems unlikely, however. Civil RICO requires an enterprise engaging in a pattern of racketeering. It requires organized criminal behavior. Such action is not the usual behavior of protest and such behavior does little to advance the trade of ideas in the competition of the marketplace.<sup>185</sup> Besides, if the *McMonagle* case does chill legitimate civil disobedience, a simple remedy might be to add language to the statute requiring that a plaintiff must prove his or her case by clear and convincing evidence as opposed to the usual standard for recovery in civil cases proof by a preponderance of the evidence.<sup>186</sup> Certainly, that test would be met in the *McMonagle* case.

Ultimately true civil disobedience requires a protester to be willing to pay the price for his or her beliefs. No one should expect to break the law with impunity. Civil RICO upped the ante on the price required of members of Operation Rescue. It is still a pittance compared to the price paid by John Brown.

*Patricia G. Barnes*

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185. See *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

186. *Oversight on Civil RICO Suits: Before the U.S. Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 93-172 (1985) (statement and report of Stephen S. Trott, Asst. Atty. Gen., Criminal Div., Justice Dept.). See also Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970*, 53 TEX. L. REV. 1055, 1064 (1975).

