SCHEIDLER V. NOW II: OPERATION RESCUE, PRO-LIFE PROTEST AND THE SUPREME COURT

BY JOHN W. WHITEHEAD*

On Monday, April 22, 2002, the United States Supreme Court agreed to rehear a case that had been before the Court nearly ten years earlier, *Scheidler v. NOW*. *Scheidler* will decide whether pro-abortion groups such as the National Organization for Women ("NOW") and Planned Parenthood can use the federal Racketeer Influenced Corrupt Organizations Act ("RICO") to stop aggressive pro-life protest tactics such as blockading, boycotting and "rescues" and whether broad injunctions against pro-life action groups and their members violate the First Amendment. The Rutherford Institute will file a brief on behalf of the pro-life protesters in the case, arguing – as it has in many cases throughout the country over the years – that the right to speak and protest cannot be given short shrift because the issue is politically unpopular.

A Brief History of Faith Based Protest

Religiously based civil disobedience[1] was the foundation for the nationhood of the United States of America. Although the American founding documents were not strictly "Christian" writings, they reflected principles of Judeo-Christian thought. Those who sought independence from Great Britain did not hesitate to declare to the world their belief in a Creator who cared enough for His creatures to endow them with absolute rights such as "Life, Liberty and the pursuit of Happiness." As G.K. Chesterton remarked in 1922, America is: "[A] nation with the soul of a church . . . the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence."[2]

In addition to Judeo-Christian principles, the American colonists adopted, at least in part, the Lockean view of rights and resistance, a philosophy espoused by the colonial American clergy long before 1776. The American dream always consisted of three fundamental concepts: rights, resistance and optimism as they are undergirded by traditional Judeo-Christian religion.

Thus, though financial in nature, the first organized civil disobedience in the American colonies (the protest against the British Stamp Act) was informed and conducted on the basis of the colonists' understanding of the relationship between government and God-given rights. Later, the American Abolitionist movement continued the tradition by seeking the inalienable rights described

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* Mr. Whitehead is an author, constitutional attorney and serves as president of The Rutherford Institute, which is located in Charlottesville, Virginia.

1 "Civil disobedience" means non-violent acts of opposition offered to a law or other government action through the refusal to comply or obey. It also includes, in some cases, a refusal to act where the law requires an action. Religiously based civil disobedience is civil disobedience engaged in as a personal matter where one's conscience or religious beliefs forbid obedience to a particular law or policy and is the type of civil disobedience which will be considered here.

2 Gilbert K. Chesterton, WHAT I SAW IN AMERICA 11-12 (1922).

in the Declaration of Independence and the United States Constitution for slaves who were, at the time, considered by American law to be personal property. Dr. Martin Luther King, Jr. based his leadership of the African-American Civil Rights movement upon the same Judeo-Christian teachings, as well as those of Mahatma Gandhi and others. Reverend King believed and taught that one has a moral responsibility to disobey unjust laws.

Thus, most contemporary Americans almost intuitively agree that, theoretically at least, any legitimate government must allow protest and civil disobedience. Indeed, civil disobedience permits the release of social pressure that might otherwise be violently expressed. Indeed, religiously based civil disobedience is often the catalyst for significant social or governmental change. In any case, few today would disagree that where there is an authoritarian government, individual citizens must protest against such a government in any way possible. This consensus may be seen in America's support for use of Most Favored Nation status to leverage increased recognition of human rights by other countries and the debate regarding military and humanitarian support for people living under authoritarian regimes, as well as for those civil disobedients who seek to overthrow or at least undermine such regimes.

However, when it comes to applying these venerable principles to modern-day America, the consensus is not so clear. Many contemporary Americans believe that the majority has been granted the authority to determine American law and policy as seems best for the times. While most Americans would likely agree that individual conscience is important to the proper development of a democratic society, many also believe that in such a democratic state, only legal types of political recourse may morally be used because the state is supreme and anarchy will result from selective obedience to the law. These views, while not unknown in the American tradition, did not represent the American consensus until recent times.

This modern schizophrenia regarding civil disobedience is manifest in America's response to the civil disobedience associated with the Vietnam Conflict and the abortion debate. Many involved in the civil disobedience of the Vietnam Conflict era based their actions upon concern with the moral evils of war in general and the deaths and injuries being sustained by those involved in the conflict. At least in the beginning, more Americans subsumed any moral reservations they might have had to the authority of the Nation's government to determine foreign policy.

While still suffering the national convulsions resulting from the dispute about the Vietnam Conflict, Americans were immediately plunged into the abortion debate by the U.S. Supreme Court's decision in *Roe v. Wade*[3] that a right to abortion may be found within the "penumbra" of privacy rights derived from the U.S. Constitution.

As with the Vietnam Conflict, the abortion debate did not remain theoretical. For example, Operation Rescue, a high profile anti-abortion organization and a party in the current Supreme Court appeal, began as an organized anti-abortion movement on November 28, 1987, in a rescue at Cherry Hill, New Jersey. Its leader, Randall Terry, professed that he drew his inspiration for Operation

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[3] 410 U.S. 113 (1973).

Rescue's acts of civil disobedience from the Bible, the study of American history in general, and the life of Martin Luther King, Jr. in particular.[4] Operation Rescue had several stated purposes: First, it sought to save unborn babies from abortion by closing one or more clinics for an extended period. Second, it sought to generate "repentance" by Christians for tolerating abortion on demand. Third, it desired to raise the consciousness of citizens generally to the "holocaust" of abortion. Finally, Operation Rescue was intended to stimulate a discouraged and, thus, flaccid pro-life movement.[5]

Operation Rescue and its members have been involved in numerous civil and criminal proceedings throughout the years.[6] In fact, Operation Rescue and its affiliates have been parties in cases before the United States Supreme Court no less than five times.[7] Attorneys affiliated with The Rutherford Institute have represented Operation Rescue or its members or affiliates in many of these cases.[8]

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[4] *See generally* Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 Wash. & Lee L. Rev. 77 (1991).

[5] *Id.* at 90-91, and sources noted therein.

[6] *See, e.g., NOW, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, 2002 U.S. LEXIS 2843 (S.Ct. No. 01-1119); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *NOW v. Scheidler*, 510 U.S. 249 (1994); *Bray v. Alexandria Women's Health Clinic*, 508 U.S. 263 (1993); *New York v. Operation Rescue*, 273 F.3d 184 (2nd Cir. 2001); *New York State NOW v. Terry*, 159 F.3d 86 (2nd Cir. 1999); *Operation Rescue Nat'l v. United States*, 147 F.3d 68 (1st Cir. 1998); *Palmetto State Medical Center v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *New York v. Operation Rescue*, 80 F.3d 64 (1996); *NOW v. Operation Rescue*, 47 F.3d 667 (4th Cir. 1995); *People by Abrams v. Terry*, 45 F.3d 17 (2nd Cir. 1994); *NOW v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994); Women's Health Care Servs., P.A. v. Operation Rescue*, 24 F.3d 107 10th Cir. 1994); *Nat'l Abortion Fed'n v. Operation Rescue*, 8 F.3d 680 (9th Cir. 1993); *West Hartford v. Operation Rescue*, 991 F.2d 1039 (2nd Cir. 1993); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992); *Lucero v. Operation Rescue*, 41 F.3d 1493 (11th Cir. 1995), *appeal after remand, aff'd*, 100 F.3d 970 (11th Cir. 1996); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1990); *New York State NOW v. Terry*, 886 F.2d 1339 (2nd Cir. 1989); *Planned Parenthood Ass'n v. Operation Rescue*, 50 Cal.App.4th 290, 57 Cal.Rptr.2d 736 (CA 1 1996); *Johnson v. Women's Health Ctr.*, 714 So.2d 580 (Fla. App. 5 1998); *Operation Rescue v. Orlando*, 712 So.2d 449 (Fla. App. 5 1998); *Planned Parenthood v. Blake*, 417 Mass. 467, 631 N.E.2d 985 (1994); *Fargo Women's Health Org. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992); *Lovejoy Specialty Hosp. v. Advocates for Life*, 121 Ore.Ap. 160, 855 P.2d 159 (1993); *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546 (Tex. 1998); *Vermont Women's Health Ctr. v. Operation Rescue*, 159 Vt. 141, 617 A.2d 411 (1992).

[7] *See NOW, Inc. v. Scheidler ("Scheidler II"), supra; Schenck v. Pro-Choice Network, supra; Madsen v. Women's Health Center, Inc., supra; NOW v. Scheidler ("Scheidler I"), supra; Bray v. Alexandria Women's Health Clinic, supra.*

[8] *See, e.g., NOW, Inc. v. Scheidler ("Scheidler I"), supra; Palmetto State Medical Center*

Abortion Protests and the First Amendment

When deciding whether governmental interests outweigh constitutionally protected rights to protest abortion, the Supreme Court examines the "forum" (*i.e.*, location of the speech) in which the speech is restricted. It then applies varying degrees of protection to the speech, depending upon the forum. This is known as a "forum analysis." The Court has identified at least three types of forums: traditional, designated, and non-traditional.

1. Traditional Forum

   Areas such as public streets and parks fall into the category of a traditional public forum. In such a forum, the state may not ban all communicative activity. If the state does restrict a form of communication based on content, the state must show that its regulation is necessary to serve a compelling state interest (the highest and most difficult standard for the government to meet in court) and that the regulation is narrowly tailored to achieve that interest. In a traditional public forum, the state may also enforce regulations pertaining to time, place, and manner of expression. However, such regulations must be content-neutral and narrowly tailored to serve a significant state interest. Further, the regulation must leave open ample alternative channels of communication.[9]

2. Designated Public Forum

   Areas of public property, such as a school auditorium, which the state has opened to the public for use as a place for expressive activity, fall into the category of a designated public forum. The state is not required to create the forum or keep it open indefinitely. However, once the forum is open, the state may not exclude certain groups from the forum or discriminate against certain individuals based upon the content of their expression unless its restriction is narrowly tailored to serve a compelling state interest. So long as it keeps the forum open, the state may only impose reasonable time, place, and manner restrictions.[10]

3. Non-Traditional Forum

Areas of public property not considered "designated" or "traditional" forums for public communication qualify under the category of non-traditional public forum. The state, in addition

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v. Operation Lifeline, supra; *West Hartford v. Operation Rescue, supra; New York v. Operation Rescue*, 80 F.3d 64, *supra; Lucero v. Operation Rescue, supra*.

[9] *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.,* 460 U.S. 37, 45 (1983); Good News Club v. Milford Central School, 533 U.S. 98, 106 (2001)

[10] *Id.*

to time, place, and manner regulations, may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[11]

4. Abortion Protest Analysis

Under a forum analysis, peaceful abortion protests occurring outside abortion clinics in a traditional or designated public forum, such as on a sidewalk, are subject mainly to content-neutral regulations which are narrowly aimed to achieve a significant state interest. For instance, courts have upheld statutes concerning the following: Prohibiting the use of hand-held amplifiers within 150 feet of a medical facility; prohibiting the obstruction of passage; and disallowing production of noise that substantially interferes with an abortion clinic's operation. These laws have been allowed on the grounds that they are sufficiently content-neutral.[12]

On the other hand, a municipal ordinance which made it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner "annoying to persons passing by" violated the Constitution. This was because the law authorized punishment of constitutionally protected assembly and free speech. The ordinance also was found to be unconstitutionally vague because it subjected the exercise of fundamental rights to unascertainable standards.[13]

Additionally, ordinances and statutes must be narrowly tailored and leave open ample alternative channels of communication. For instance, California and New York courts invalidated a complete ban of all picketing on Saturdays, which was the only day that the medical clinic performed abortions.[14]

New Standards for Evaluating Speech in Abortion Protest Cases

5. Madsen v. Women's Health Care Center

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[11] *Perry* at 46; *Good News Club* at 106-107.

[12] *See Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989); *see also*, *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1989).

[13] *See Coates v. Cincinnati*, 402 U.S. 611 (1971); *Chicago v. Morales*, 527 U.S. 41 (1999) (city's Gang Congregation Ordinance requiring dispersal of "gang members" on sidewalks on order from police struck down as violation of due process).

[14] *See Chico Feminist Women's Health Ctr. v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (3rd Dist.); *see also*, *Parkmed Co. v Pro-Life Counseling, Inc.,* 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dep't. 1982).

In 1994, the Supreme Court in *Madsen v. Women's Health Care Center*[15] adopted a new and separate standard for abortion-related injunction cases. The Court held that a combination of government interests sufficiently justified an injunction which prohibited abortion protesters from gathering within thirty-six feet of abortion clinic entrances and driveways and also restricted excessive noisemaking.[16] The protesters had argued that the injunction was content-based and, therefore, should have been subject to a compelling state interest test and heightened scrutiny. Although the Court asserted that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," it held that a standard slightly higher than intermediate scrutiny should apply to injunctions in abortion cases.[17] In so doing, the Court applied a lesser standard to evaluate the appropriateness of the injunction than the compelling interest/strict scrutiny test, which demands the highest level of justification by the government and is typically applied to speech in non-abortion protests. The Court decided that content-neutral injunctions regulating abortion protests are constitutional if the "restrictions burden no more speech than necessary to serve a significant government interest."[18] In addition, the Court held that the injunction was permissible because it targeted the demonstrators' conduct, rather than the content of their speech.[19]

6. Schenck v. Pro-Choice Network of Western New York

In 1997, the Supreme Court further elaborated on its *Madsen* decision in *Schenck v. Pro-Choice Network of Western New York*.[20] There, the Court reviewed an injunction which banned demonstrating within fifteen feet from clinic doorways, parking lot entrances, driveways, and driveway entrances ("fixed buffer zones"). The injunction also prevented demonstrations within fifteen feet of any person or vehicle seeking access to and from such facilities ("floating buffer zones").[21] Under the injunction, the protesters were allowed to have two people approach and

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15 114 S.Ct. 2516 (1994).

16 *Id*. at 2516.

17 *Id*. at 2524-2525.

18 *Id.* at 2525.

19 *Id*. at 2524.

20 117 S.Ct. 855 (1997).

21 *Id.* at 861.

"counsel" individuals seeking access to the clinics. However, if the person seeking access indicated that she did not wish to be counseled, the protesters/counselors would be required to: (1) "Cease and desist"; (2) retreat fifteen feet from the individual; and (3) remain outside the boundaries of the buffer zone.

The Court applied the *Madsen* test for content neutral regulation of speech: "Whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[22] The Court found similar significant government interests in *Schenck* as in *Madsen.* These interests included: protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the flow of traffic on streets and sidewalks, and protecting property rights.[23]

On the one hand, the Court upheld the fixed buffer zone provisions of the injunction, stating that keeping the protesters away from clinic entrances was the only way to ensure access to the clinics.[24] On the other hand, the Court struck down the floating buffer zones around persons and vehicles because they burdened free speech more than necessary. It said that by forcing protesters to stay fifteen feet away from persons or vehicles, the injunction makes it practically impossible for protesters to exercise their free speech rights in a safe and orderly fashion.[25]

While recognizing that "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks," the Court also limited that protection.[26] It asserted that "a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."[27] The Court defined "abusive conduct" as physically abusive conduct, harassment of the police which hampers law enforcement, and the tendency of peaceful conversations to escalate into aggressive and sometimes violent conduct.[28]

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22 *Id.* at 864.

23 *Id.* at 866.

24 *Id.* at 869.

25 *Id.* at 867-68.

26 *Id.* at 867.

27 *Id.*

28 *Id.*

7. Hill v. Colorado

The Supreme Court most recently addressed the issue of abortion protests in *Hill v. Colorado.*[29] The Court upheld a Colorado statute that regulated speech-related conduct within one hundred feet of the entrance to any heath care facility.[30] The challenged section of the statute made it unlawful for any person to "knowingly approach within eight feet of another person, without that person's consent, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such person…"[31]

While the statute prohibited speakers from approaching unwilling listeners, it did not require a standing speaker to move away from anyone passing by. It also did not place any restriction on the content of any message that anyone wished to communicate to anyone else, either inside or outside the regulated areas.[32]

The plaintiffs asserted that they often engaged in "sidewalk counseling" near health care centers, which consisted of efforts to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal speech, display of signs, and distribution of literature. They argued that such activities frequently required being within eight feet of other persons and that their fear of prosecution under the new statute caused them to be chilled in the exercise of their fundamental constitutional rights.[33]

The *Hill* case is distinguishable from *Schenck,* which is likely why the statute in *Hill* was upheld. First, *Schenck* involved a judicial decree, which posed a greater risk of censorship and discriminatory application than a general statute like the one found in *Hill*. Second, *Schenck* required a protester either to stop talking or to get off the sidewalk whenever a patient was within fifteen feet. Conversely, the statute in *Hill* had a "knowingly approaches" requirement, which

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29 530 U.S. 703 (2000).

30 *Id*. at 708

31 *Id.*

32 *Id.*

33 *Id*. at 709.

allowed a protester to stand still while a person moving toward or away from a health care facility walked past him or her.[34]

In its analysis, the Court noted that the Colorado statute was content neutral. It stated the following:

> Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.[35]

It said that the statute applied to all demonstrators and counselors, whether or not the demonstrations concerned abortions, and regardless of whether they opposed or supported an individual's abortion decision. The Court held that this statute met the level of neutrality demanded by the Constitution.[36]

Additionally, the Court found that the statute served legitimate governmental interests and that it was narrowly tailored to serve those interests. It ruled that the eight-foot restriction on an unwanted physical approach left ample room to communicate a message through speech. It said that signs, pictures, and voice itself can cross an eight-foot gap with ease and that "demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking entrances) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by."[37] The Court also noted that the eight-foot restriction occurred only within one hundred feet of a health care facility, which was the place where the restriction was most needed.[38]

8. Pre-*Hill* Decisions

Prior to these Supreme Court decisions, the courts consistently ruled that the state could prohibit unlawful protest activities, such as blocking the entrance to the clinics or physically threatening or intimidating persons entering them. Basic street and sidewalk control had been

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[34] *Id*. at 13.

[35] *Id*. at 724.

[36] *Id*. at 725.

[37] *Id.* at 729.

[38] *Id.*

deemed a legitimate governmental interest in limiting picketing by abortion protesters. For example, in one case an injunction prohibiting trespass in a clinic or obstruction of its entrance was found to promote a significant state interest in public safety on streets and sidewalks.[39] In another case where a police barricade kept protesters eight feet from the entrance to an abortion clinic and prevented obstruction of the entrance, the court held that the barricade was reasonable to keep the sidewalk uncongested and to avoid the potential for violence.[40]

The Supreme Court upheld a ban on residential picketing that targeted an individual residence.[41] However, the Court has never held that picketing can be restricted because it targets an individual. For example, nothing prohibits putting an abortionist's name or other identifying information on signs.

The RICO Act: The Ultimate Weapon Against Pro-Life Protests?

Abortion clinics frequently seek to employ the civil liability provisions of the RICO Act[42] as a tool for limiting abortion protests. RICO was passed with broad language and was designed to combat organized crime. The most important part of RICO makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt."[43] A "pattern" of RICO activity occurs if two "predicate acts" are committed within a ten-year span.

In *National Organization of Women v. Scheidler*,[44] the Supreme Court unanimously rejected the argument of several pro-life protesters that RICO could not apply to them because they lacked an economic motivation to constitute an "enterprise" under RICO. The Court as a whole did not address RICO's potential chilling effects upon free speech or associational rights. However, Justice

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39 *See New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339 (1989), *cert. denied,* 495 U.S. 947 (1990).

40 *See Thompson v. Police Dep't. of New York*, 145 Misc. 2d 417, 546 NYS2d 945 (1989).

41 *See Frisby v. Schultz*, 487 U.S. 474 (1989).

42 18 U.S.C. § 1962(c).

43 18 U.S.C.A. § 1962(c).

44 114 S.Ct. 798 (1994).

Souter recognized in a concurring opinion that RICO had the potential to infringe upon legitimate free speech rights.[45]

As one commentator noted in the aftermath of *Scheidler*, it would appear that "any politically unpopular protest movement with resulting property damage or technical trespass can be elevated to a federal crime."[46] Due to uncertain limits of RICO and constitutional liberties involved, many abortion protesters may be hesitant to protest abortion, out of fear of being tried in a RICO suit. RICO can be particularly intimidating because of the potential assessment of triple damages, the stigma facing racketeering charges, and the possible legal costs that could be involved.[47] Since *Scheidler*, several courts have ruled on the merits of RICO claims against pro-life protesters, with varying results depending on the particular facts of the case.[48]

Scheidler v. NOW II: The Case Before the Court

Scheidler II is an appeal of the jury verdict and appeals court decision upholding the verdict, after the case had been returned to the trial court by the Supreme Court in 1994. The Chicago trial court entered judgment against three pro-life protest leaders for their efforts to demonstrate outside area abortion clinics. The defendants were ordered to pay over eighty-five thousand dollars to two abortion clinics, which was trebled pursuant to RICO. Although the plaintiff clinics neither alleged nor proved that the defendants were personally responsible for the alleged acts of federal and state extortion that formed the predicate offenses necessary to prove a RICO enterprise existed, the court allowed them to link to the defendants various violent acts committed by other anti-abortion protesters who were not parties to the case.[49]

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[45] *Id*. at 806 n.6 (Souter, J., concurring).

[46] Hubbell, *FACEing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protesters*, 21 OHIO N.U. L. REV. 1061, 1067 (1995). *See also* Comment, *Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?*, 21 Ohio N.U. L.Rev. 995 (1995).

[47] 18 U.S.C.A. § 1964(c).

[48] *See, e.g., Palmetto State Med. Ctr. v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997) (no evidence existed to show that Operation Lifeline or any of the individual defendants engaged in any illegal activities on the particular dates alleged by the plaintiff-hospital); *Planned Parenthood v. American Coalition of Life Activists*, 945 F.Supp. 1355 (D.Or. 1996) (plaintiffs adequately stated RICO claims against all defendants but one); *National Org. of Women v. Scheidler*, 1997 WL 610782 (N.D.Ill. 1997) (permitting certain RICO claims to proceed against defendants, while granting judgment for plaintiffs on other RICO claims).

[49] *See* Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 Alb. L.Rev. 853, 888 (1999).

The Seventh Circuit Court of Appeals affirmed the decision.[50] On the key issues that have now been presented to the Supreme Court, the Seventh Circuit ruled in favor of NOW. The appeals court held that violations of the federal extortion law, the Hobbs Act, could establish that there were "predicate acts" of racketeering committed, even though the Hobbs Act requires proof that the accused individuals sought to obtain "property" of another person – clearly not the intent of the pro-life protesters.[51] And the Seventh Circuit cast aside the arguments of the protesters that the First Amendment required more than a mere showing that violent individuals may have been associated with them in the past – a form of "guilt by association."

The protesters appealed to the Supreme Court, which agreed to use the case to decide: (1) Whether private parties such as NOW can obtain an injunctive against pro-life protesters using the civil RICO statute; and (2) whether the anti-extortion provisions of the Hobbs Act can be used to establish acts of racketeering under RICO, although no tangible "property" is involved.

Conclusion

Civil disobedience in the United States has a long and impressive history. A succession of civilly disobedient acts led to the establishment of the very governmental system which has subsequently prosecuted, both selectively and systematically, various movements performing such acts.

It is curious that anyone in the American system of government should in blanket fashion condemn, oppose, or punish (as some courts have in regard to Operation Rescue) valid acts of civil disobedience. Such, it would seem, runs counter to the very ideals upon which the American government was founded.

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

51 267 F.3d at 709.