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Balancing First Amendment Rights Of Abortion Protestors With The Rights Of Their 'Victims'

BALANCING FIRST AMENDMENT RIGHTS OF ABORTION PROTESTORS WITH THE RIGHTS OF THEIR 'VICTIMS'

On one side of the ongoing abortion debate,[1] some abortion protestors focus on stopping individual abortions and putting what the abortion protestors call "abortuaries"[2] out of business.[3] These abortion protestors claim that they are saving lives, while ultimately working to change the law to end legalized abortion.[4] To achieve both the immediate goal of stopping individual abortions and the ultimate goal of legal change, some abortion protestors' tactics have included blockading abortion clinics[5] and setting up

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1. *See* Isaacson, *The Battle over Abortion; Crusades and Contests Between Those Who Advocate "Choice" and "Life,"* TIME, April 6, 1981, at 20 (describing efforts of Congress and state legislatures to resolve issues surrounding abortion debate). Commenting on the battle over abortion in 1981, Dr. Everett Koop, later United States Surgeon General, stated that nothing like abortion has separated our society since the days of slavery. *Id.* at 20. On one side are the crusaders "for life," who argue on religious and moral grounds that abortion is the murder of an unborn person (the fetus) and, thus, should be outlawed by constitutional amendment. *Id.* On the other side are crusaders "for choice," who contend that abortion is a right that women must have if they are ever to be free to control their own bodies, indeed their own lives. *Id.*

Current media reports on the ongoing abortion debate consistently characterize the debate as a war, describing it as probably the most combustible and emotional issue of the time. *See* Gross, *Pregnancy Centers: Anti-Abortion Role Challenged*, N.Y. Times, Jan. 23, 1987, at 1B, col. 2 (characterizing abortion debate as combustible).

2. *See* National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989) (quoting Randall Terry, National Director and Founder of Operation Rescue, stating that purpose of "rescue" demonstration is to prevent anyone from entering "abortuary" while "rescue" is in progress), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Clinic, 1991 U.S. LEXIS 1147.

3. *See* Sherman, *Old Tactics, New Wars; Courts Deal Blockaders Big Setbacks*, NAT'L L.J., Nov. 13, 1989, at 30 (describing tactics of abortion protestors in ongoing abortion war, including attempts to close down abortion clinics); National Org. for Women v. Operation Rescue, 726 F. Supp. at 1488 (observing that Operation Rescue members share deep commitment to goals of stopping practice of abortion and reversing abortion's legalization).

4. *See* National Org. for Women v. Operation Rescue, 726 F. Supp. at 1488 (observing that Operation Rescue members seek to prevent abortions and to influence society to change abortion laws).

5. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1345-47 (3d Cir.) (affirming application of civil RICO to abortion protestors who had blockaded abortion clinic), *cert. denied*, 110 S. Ct. 261 (1989); New York State Nat'l Org. for Women v. Terry, 732 F. Supp. 388, 393-96 (S.D.N.Y. 1990) (citing defendants for civil contempt for violation of injunction against blockading); National Org. for Women v. Operation Rescue, 726 F. Supp. at 1496-97 (enjoining permanently defendants from trespassing on or blockading area abortion clinics); New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1262-64 (S.D.N.Y.) (granting permanent injunction to prohibit blockading or trespassing), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); National Org. for Women v. Operation Rescue, 726 F. Supp. 300, 304-05 (D.D.C. 1989) (granting preliminary injunction against blockading or trespassing); Roe v. Operation Rescue, 710 F. Supp. 577,

mock abortion clinics.[6] Abortion protestors contend that they engage in the new civil disobedience, employing the tactics of the "1960s liberals" in support of what the abortion protestors claim are traditional American values.[7]

Organized, widespread blockading of clinics began with the founding of Operation Rescue, formed in 1988 to close down abortion providers.[8] To close down abortion clinics and prevent abortion clinic employees or pregnant mothers from entering the clinics, Operation Rescue advocated activities such as trespassing, blocking doors, or "going limp" in response to police officers' orders.[9] As a result of these activities, the anti-abortion

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587-90 (E.D. Pa. 1989) (granting permanent injunction against blockading or trespassing), *aff'd*, 919 F.2d 857 (3d Cir. 1990); Roe v. Operation Rescue, 730 F. Supp. 656, 659-62 (E.D. Pa. 1989) (citing defendants for civil contempt for violating injunction against blockading), *aff'd*, 920 F.2d 213 (3d Cir. 1990); Cousins v. Terry, 721 F. Supp. 426, 432 (N.D.N.Y. 1989) (issuing preliminary injunction against blockading or trespassing); *infra* notes 212-26 and accompanying text (discussing actions of abortion protestors in *Northeast Women's Center v. McMonagle*, including blockading abortion clinic); *2,000 Anti-Abortion Protestors Arrested, Activists Disrupt Clinics in 27 Cities*, Chicago Tribune, Oct. 30, 1988, at 3 (describing first "National Day of Rescue" protests in which members of Operation Rescue engaged in demonstrations and blockades nationwide).

6. *See* Gross, *supra* note 1, at B1, col. 2 (describing activities of mock abortion clinic operating according to Pearson Foundation guidelines); Lewis v. Pearson Foundation, Inc., 908 F.2d 318, 318-20 (8th Cir.) (describing mock abortion clinic's alleged conspiracy to prevent abortion and finding such conspiracy actionable under civil rights conspiracy statute), *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990) (reinstating district court's decision to dismiss complaint against mock abortion clinic for failure to state cause of action under civil rights conspiracy statute); Boes v. Deschu, 768 S.W.2d 205, 206 (Mo. Ct. App. 1989) (describing actions of mock abortion clinic employees who attempted to dissuade plaintiff from obtaining abortion and holding that plaintiff adequately had pleaded prima facie claim for intentional infliction of emotional distress); Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection, 444 N.W.2d 683, 683-84 (N.D. 1989) (affirming permanent injunction against mock abortion clinic to prevent use of deceptive name); Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 179 (N.D.) (modifying and affirming preliminary injunction against mock abortion clinic to prevent use of deceptive name), *cert. denied*, 476 U.S. 1108 (1986); Mother & Unborn Baby Care of North Texas, Inc. v. State, 749 S.W.2d 533, 536-37 (Tex. Ct. App. 1988) (affirming injunction against mock abortion clinic for violating state statute prohibiting deceptive trade practices), *cert. denied*, 109 S. Ct. 2431 (1989).

7. *See* Sherman, *supra* note 3, at 30 (quoting abortion protestors who claim to engage in new civil disobedience).

8. *See* Brozan, *Effectiveness of Abortion Protests Is Debated*, N.Y. Times, May 8, 1988, §1, at 28, col. 1 (describing Operation Rescue's first organized blockading efforts to close down abortion clinics in New York City and predicting many more); Henn & Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251, 253-56 (1990) (describing formation, goals and tactics of Operation Rescue).

9. *See* National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488-90 (E.D. Va. 1989) (citing Operation Rescue literature, which defined "rescue" activities, and enjoining Operation Rescue from blockading and rescue activities at facilities providing legal abortion services), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Clinic, 1991 US LEXIS 1147. In deciding whether to permanently enjoin Operation Rescue, the United States District Court for the Eastern District of Virginia in *National Org. for Women v. Operation Rescue* considered whether blockading activities constituted trespass-

blockaders have been subject to court-ordered injunctions as well as money damages pursuant to the Civil Rights Act[10] and the Racketeer Influenced and Corrupt Organizations Act (RICO).[11]

Similarly committed to preventing abortion, the Pearson Foundation employs an approach that is more subtle than Operation Rescue's. The

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ing, public nuisance, or a civil rights conspiracy to interfere with the right to interstate travel. *Id.* at 1492-95. Evaluating Operation Rescue members' activities, the court relied upon Operation Rescue literature that described Operation Rescue as an unincorporated association whose members oppose abortion and the legalization of abortion and whose principal goals are to stop abortion and to end abortion's legalization primarily through what Operation Rescue calls "rescues." *Id.* at 1487. The court cited Operation Rescue's literature that defined a "rescue" as "*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *Id.* at 1488 (emphasis in original).

The United States District Court for the District of Columbia, in National Org. for Women v. Operation Rescue, 726 F. Supp. 300, 303 (1989), relied on the testimony of a police official who had been in charge of coordinating police response to special demonstrations. The police official claimed that Operation Rescue had refused to inform the police which clinics Operation Rescue would target and actively attempted to mislead the police as to the intended targets. *Id.* The police official further testified that Operation Rescue blockaders would lock arms to form a human barrier to the clinic, would breach police barricades, and usually would not cooperate with the police who would have to carry the blockaders to a police transport vehicle. *Id.* The court concluded that such blockading activities would violate District of Columbia laws proscribing trespassing and public nuisances, and because the First Amendment would not protect such blockading activities, the court issued a preliminary injunction against Operation Rescue. *Id.* at 304-05.

10. Civil Rights Act, 42 U.S.C. § 1985 (1988); *see* National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1497 (E.D. Va. 1989) (issuing permanent injunction pursuant to civil rights conspiracy statute), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Clinic, 1991 US LEXIS 1147; New York Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1262-63 (S.D.N.Y.) (same), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); National Org. for Women v. Operation Rescue, 726 F. Supp. 300, 305 (D.D.C. 1989) (issuing preliminary injunction pursuant to civil rights conspiracy statute); Roe v. Operation Rescue, 710 F. Supp. 577, 589 (E.D. Pa. 1989) (issuing permanent injunction pursuant to civil rights conspiracy statute), *aff'd*, 919 F.2d 857 (3d Cir. 1990); Cousins v. Terry, 721 F. Supp. 426, 432 (N.D.N.Y. 1989) (issuing preliminary injunction pursuant to civil rights conspiracy statute).

11. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988); *see* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348-57 (3d Cir.) (affirming application of civil RICO to action of abortion protestors, allowing damages and attorneys fees pursuant to RICO claim, and finding that clean hands doctrine would not bar injunctive relief pursuant to RICO claim), *cert. denied*, 110 S. Ct. 261 (1989), *on remand* 745 F. Supp. 1082, 1083 (E.D. Pa. 1990) (granting injunctive relief pursuant to successful civil RICO claim); Feminist Women's Health Center v. Roberts, 1989 U.S. Dist. LEXIS 5837, *23, 34-35 (W.D. Wash. 1989) (allowing use of RICO primarily based on predicate offenses of arson and aiding and abetting arson but holding that RICO does not authorize court to grant injunctive relief); *infra* notes 208-43 and accompanying text (discussing application of civil RICO to acts of abortion protestors in *Northeast Women's Center, Inc. v. McMonagle*). *But see* Town of West Hartford v. Operation Rescue, 726 F. Supp. 371, 376-78 (D. Conn. 1989) (finding that while RICO provides private damage remedy, RICO does not authorize court to order private injunctive relief), *vacated on other grounds*, 915 F.2d 92, 104-05 (2d Cir. 1990) (dismissing Town of West Hartford's RICO claim for lack of subject matter jurisdiction and vacating district court's issuance of preliminary injunction pursuant to pendent state law claims).

Pearson Foundation, a St. Louis organization founded in 1969, issued guidelines to assist local groups in setting up anti-abortion counseling centers,[12] also referred to as mock abortion clinics.[13] The foundation provides training sessions, slide shows, pamphlets, discounted video equipment, kits to perform urine tests, and a manual entitled "How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center."[14] The manual urges local operators to use neutral advertising that will not alert women to the fact that the centers do not actually provide abortions.[15] The manual encourages operators to seek listings in the Yellow Pages telephone directory alongside abortion clinics.[16] Primarily facing charges of deceptive advertising,[17] these mock abortion clinics also have been sued for intentional

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12. *See* Gross, *supra* note 1, at B1, col. 2 (describing Pearson Foundation's efforts to establish local anti-abortion counseling centers); Lowery, *Abortion in America. Focus on the City; An Alternative That's Not Always Made Clear*, Newsday, Apr. 25, 1989, at 37 (reporting that some anti-abortion counseling centers operate according to Pearson Foundation guidelines); *Texas Says Center Uses Deception to Stop Abortion*, N.Y. Times, Oct. 5, 1986, §1, at 32, col. 1 (stating that many anti-abortion counseling centers operate according to Pearson Foundation guidelines).

13. *See* Lewis v. Pearson Foundation, Inc., 908 F.2d 318, 320 (referring to anti-abortion counseling center operating according to Pearson Foundation guidelines as mock abortion clinic), *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990) (reinstating district court's decision to dismiss complaint against mock abortion clinic for failure to state a claim under civil rights conspiracy statute).

14. *See* Mother & Unborn Baby Care of North Texas, Inc. v. State, 749 S.W.2d 533, 537 (Tex. Ct. App. 1988) (describing Pearson Foundation manual entitled, "How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center"), *cert. denied*, 109 S. Ct. 2431 (1989); Gross, *supra* note 1, at B1, col. 2 (describing Pearson Foundation's training sessions, slide shows, pamphlets, discounted video equipment, and kits to perform urine tests).

15. *See Mother & Unborn Baby Care*, 749 S.W.2d at 542-43 (stating that Pearson Foundation's manual urges use of neutral advertising and finding that such advertising amounts to deceptive advertising). In *Mother & Unborn Baby Care* the Texas Court of Appeals considered whether sufficient evidence to supported the lower court's verdict against the mock abortion clinic for deceptive advertising. *Id.* The Texas Court of Appeals relied upon evidence which showed that a large number of women found the mock abortion clinic's advertisement in the Southwestern Bell Yellow Pages. *Id.* at 536. Believing the clinic to be an abortion clinic, women contacted the clinic to request an abortion. *Id.* The clinic's staff gave evasive answers to women who called to make an appointment for an abortion, leading the women to believe that the clinic was an abortion clinic. *Id.* As a result, many women made appointments with the clinic to obtain abortions. *Id.* The court found that the clinic advertised in the Yellow Pages under the heading "Abortion Information & Services," and "Clinics - Medical," but that in 1986 the Yellow Pages refused to allow the clinic to further advertise under these headings. *Id.* at 537. Instead, the Yellow Pages moved the clinic's advertisement to "Abortion Alternatives"; nevertheless, the advertisement appeared under two columns of "Abortion Services," and was twice the size of the previous advertisements. *Id.* Accordingly, the Texas Court of Appeals concluded that sufficient evidence existed to support the verdict against the mock abortion clinic for deceptive advertising. *Id.* at 543.

16. *Id.* at 536-37.

17. *See* Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection, 444 N.W.2d 683, 686 (N.D. 1989) (affirming injunction against mock abortion clinic to prevent use of deceptive name); Mother & Unborn Baby Care of North Texas, Inc. v. State, 749 S.W.2d 533, 536 (Tex. Ct. App. 1988) (affirming injunction against mock abortion clinic to

infliction of emotional distress[18] and for a civil rights conspiracy against the class of women who have decided to have an abortion.[19]

On the other side of the abortion debate, abortion rights advocates, along with the "victims" of the protestors, counterattack in courthouses, Congress and state legislatures and at the ballot boxes around the country.[20] Primarily through the use of RICO[21] and the Civil Rights Act conspiracy provision,[22] abortion rights advocates and the victims of some of the abortion protestors are fighting legal battles to stop abortion protestors' interference with a woman's exercise of her constitutional right to have an abortion.[23] Other victims of abortion protestors have suffered tortious harm as well as property damage and are fighting legal battles to gain compensation.[24]

Courts, in the middle of the abortion war, must resolve the competing claims of the abortion protestors and their victims, including claims that the actions of some abortion protestors in blockading clinics or operating

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prevent use of deceptive advertising), *cert. denied*, 109 S.Ct. 2431 (1989); Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 183 (N.D.) (affirming injunction against mock abortion clinic to prevent use of deceptive name), *cert. denied*, 476 U.S. 1108 (1986).

18. *See* Boes v. Deschu, 768 S.W.2d 205, 207-09 (Mo. Ct. App. 1989) (finding that plaintiff had stated claim for intentional infliction of emotional distress based on mock abortion clinic's employees' abortion counseling).

19. *See* Lewis v. Pearson Foundation, Inc., 908 F.2d 318, 325 (allowing application of civil rights conspiracy statute to abortion clinic's alleged attempt to deprive plaintiff of constitutional right to have abortion), *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990) (reinstating district court's decision to dismiss complaint against mock abortion clinic for failure to state cause of action under civil rights conspiracy statute); *infra* notes 154-90 and accompanying text (discussing applicability of civil rights conspiracy statute to mock abortion clinic in *Lewis*).

20. *See* Sherman, *supra* note 3, at 30 (describing abortion rights advocates' use of two federal statutes in courts across country to obtain injunctions against abortion protestors); Gest, Baer, & Borger, *The Abortion Furor*, U.S. NEWS & WORLD REP., July 17, 1989, at 18 (reporting that abortion rights advocates oppose restrictive state legislation, propose statutes preserving abortion rights, and campaign for initiatives to amend state constitutions or statutes through direct popular votes); Carlson, *The Battle Over Abortion; A Bitterly Divided Supreme Court Sets the Stage for the Most Corrosive Political Fight Since the Debate Over Viet Nam*, TIME, July 17, 1989, at 62 (describing abortion advocates' intentions to fight battle at ballot box, converting congressional, state-legislative, gubernatorial, and judicial elections into litmus test on abortion); L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 6-7, 147-50, 177-91 (1990) (arguing that participants in abortion debate have distorted national elections to detriment of democratic process and American people by encouraging single-issue campaigning).

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

22. Civil Rights Act, 42 U.S.C. § 1985(3) (1988).

23. *See supra* notes 10, 11, and 18 (listing cases in which abortion rights advocates or victims of abortion protestors have sued abortion protestors under Civil Rights Act, RICO, or state law claims); Sherman, *supra* note 3, at 30 (describing legal battles between abortion protestors and abortion rights advocates along with victims of some abortion protestors).

24. *See* Boes v. Deschu, 768 S.W.2d 205, 207-09 (Mo. Ct. App. 1989) (finding that plaintiff had stated claim for intentional infliction of emotional distress based on mock abortion clinic's employees' abortion counseling); Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1150 (E.D. Pa. 1987) (awarding damages based on loss to property and trespass to women's health care center due to actions of abortion protestors), *aff'd as modified*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

mock abortion clinics go well beyond the anti-abortionists' First Amendment[25] right to express opinions.[26] According to the abortion rights activists and the victims of abortion protestors, when the actions of abortion protestors exceed First Amendment protected activity, civil RICO or the Civil Rights Act provides appropriate remedies[27] for the victims of protestors' actions.[28] Further, some abortion rights activists consider the use of civil RICO or the Civil Rights Act necessary because state law remedies, such as state statutory rights, state common law remedies, and criminal statutes, are weak or ineffective and, consequently, lack the ability to prevent a single group

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25. U. S. CONST. amend. I. The First Amendment provides that "Congress shall make no law abridging the freedom of speech . . . or the right of the people peaceably to assemble."

26. *See* Sherman, *supra* note 3, at 30 (describing tactics of abortion protestors and claims of abortion rights advocates that actions of abortion protestors exceed First Amendment protection).

27. *See* 18 U.S.C. § 1964(c) (1988) (stating RICO's civil remedies). Section 1964(c) allows any person injured in his business or property by reason of a violation of § 1962 to sue and, if successful, recover triple damages and the cost of the suit, including a reasonable attorney's fee. *Id.* While § 1964(a) authorizes district courts of the United States to prevent and restrain violations of § 1962 by issuing appropriate orders, courts have disagreed on whether civil RICO provides injunctive relief to private plaintiffs. *See* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1081-88 (9th Cir. 1986) (holding that civil RICO did not provide private injunctive relief), *cert. denied*, 479 U.S. 1103 (1987); Town of West Hartford v. Operation Rescue, 726 F. Supp. 371, 376-78 (D. Conn. 1989) (same), *vacated*, 915 F.2d 92 (2d Cir. 1990); Miller v. Affiliated Fin. Corp., 600 F. Supp. 987, 994 (N.D. Ill. 1984) (same); Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 84-86 (W.D.N.Y. 1982) (same). *But see*, Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982) (suggesting injunctive relief available either under RICO or general equitable powers), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983); Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1158 (E.D. Pa. 1987) (concluding that clean hands defense barred injunctive relief under successful RICO claim, implicitly recognizing that absent such defense, RICO could provide private injunctive relief), *aff'd as modified*, 868 F.2d 1342, 1353-57 (3d Cir.) (holding that lower court erred in applying unclean hands doctrine and remanding for further consideration of claim for private injunctive relief under successful RICO claim), *cert. denied*, 110 S. Ct. 261 (1989), *on remand*, 745 F. Supp. 1082, 1083 (E.D. Pa. 1990) (granting private injunctive relief pursuant to successful civil RICO claim); Aetna Cas. & Sur. Co. v. Liebowitz, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (stating that Congress did not intend civil RICO provisions to deprive district court of traditional equitable jurisdiction), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984).

42 U.S.C. § 1985(3) expressly provides that the victim of a civil rights conspiracy, as defined in this section, may sue for the recovery of damages caused by the injury or deprivation of rights. Courts have also granted injunctive relief pursuant to this section. *See supra* note 10 (listing cases in which courts have granted injunctive relief pursuant to § 1985(3)).

28. *See* Sherman, *supra* note 3, at 30 (describing abortion rights advocates claim that RICO provides appropriate remedies); Northeast Women's Center, Inc. v. McMonagle, 670 F. Supp. 1300, 1306-10 (allowing application of civil RICO to conduct of abortion protestors and finding no infringement upon First Amendment rights of abortion protestors), *later proceeding*, 665 F. Supp. 1147 (E.D. Pa. 1987), *aff'd as modified*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989); *supra* note 10 (listing cases in which courts have applied injunctions, pursuant to Civil Rights Act conspiracy provision, over abortion protestors' assertions of First Amendment protection).

of persons acting pursuant to an overall plan from engaging in repeated, unlawful acts.[29]

Abortion protestors, however, claim that the application of federal statutes such as civil RICO or the Civil Rights Act to forms of anti-abortion protests impermissibly infringes upon the First Amendment rights of the abortion protestors.[30] Abortion protestors have sought to avoid the application of statutes such as RICO, claiming that their political beliefs motivate their actions and describing their conduct as civil disobedience.[31] Further, abortion protestors, like other civil disobedients, claim that a defense based upon justification should absolve the protestors of any criminal or civil liability for conduct that may exceed First Amendment protection.[32]

To resolve these competing claims, the courts must determine what, if any, significance to give to the status of abortion protestors as civil disobedients[33] and must consider the extent to which the First Amendment protects the conduct of the abortion protestors.[34] Some abortion protestors

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29. *See* Henn & Del Monaco, *supra* note 8, at 267-68, 276-77 (arguing that use of RICO comports with civil rights tradition of protecting exercise of constitutional rights from physical interference and that RICO provides effective way to stop multiple criminal acts of Operation Rescue).

30. *See* Williamson, *Nader Calls DeConcini 'Shameless' on Crime Bill*, San Francisco Chronicle, Nov. 16, 1989, at A18 (detailing criticism of and support for efforts to reform RICO, including American Civil Liberties Union's criticism of use of RICO against anti-abortion protestors because of danger to First Amendment rights of protestors); Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 849-50 (1990) (arguing that use of RICO in ideological disputes is inappropriate and harmful because of chilling effect on First Amendment rights); Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?*, 56 UMKC L. REV. 287, 312 (1988) (arguing that Congress must reform RICO to prevent misapplication and infringement upon First Amendment rights); Note, *Limiting Political Expression By Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 RUTGERS L.J. 201, 225 (1988) [hereinafter, Note, *Political Realm*] (claiming that application of RICO in political realm chills First Amendment rights).

31. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir.) (discussing abortion protestor's description of conduct as civil disobedience and assertion that civil RICO is, therefore, inapplicable), *cert. denied*, 110 S. Ct. 261 (1989).

32. *See id.* at 1350-52 (discussing abortion protestor's assertion of justification defense); United States v. Romano, 849 F.2d 812, 816 n.7 (3d Cir. 1988) (reaffirming irrelevance of justification defense based on intent to save lives when defendant broke into military installation and disabled military equipment); United States v. Malinowski, 472 F.2d 850, 856-57 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973) (holding justification defense unavailable to defendant who falsely claimed excessive exemptions on Internal Revenue Service form to dramatize protest against Vietnam War); Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 82-85 (1989) (arguing that justification defense should be available to civil disobedients as class of criminal defendants who satisfy legal elements of defense).

33. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 206-22 (1978) (suggesting that courts and government must give some significance to claim that those who disobeyed draft laws did so out of conscience).

34. *See McMonagle*, 868 F.2d at 1348-49 (finding that district court sufficiently considered extent to which First Amendment protected abortion protestors' conduct, implicitly recognizing that court must evaluate extent to which First Amendment protects conduct of abortion protestors); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1497 (E.D.

characterize their actions as the new civil disobedience, claiming that if the abortion protestors disobey any laws, such as civil RICO or the Civil Rights Act, the protestors do so out of conscience.[35] Although Congress has statutorily defined racketeering activities[36] and civil rights conspiracies,[37] no statutory definition exists for civil disobedience. The phenomenon of civil disobedience long has been the subject of intellectual interest and discussion, and examples of civil disobedience are found throughout American history.[38] Various writers have relied upon the teachings or writings of the most famous practitioners of civil disobedience, Henry David Thoreau, Mahatma Gandhi and Martin Luther King, Jr., to define the motives, purposes, and elements of action that the term civil disobedience encompasses.[39] While no single definition of civil disobedience commands general agreement,[40] the common features of the various definitions should assist a court in resolving the competing claims of the civilly disobedient abortion protestors and their victims.

Va. 1989) (stating that court cannot curtail First Amendment rights of abortion protestors but that abortion protestors may not use First Amendment as excuse to engage in unlawful conduct, implicitly recognizing that court must evaluate extent to which First Amendment protects such conduct), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Clinic 1991 US LEXIS 1147; New York Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1262-62 (S.D.N.Y. 1989) (stating that court must accomplish purpose of protecting right to choose abortion and obtain medical care without intruding upon abortion protestors' First Amendment rights, implicitly recognizing need to consider extent to which First Amendment protects conduct of abortion protestors), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

35. *See McMonagle*, 868 F.2d at 1348 (discussing abortion protestors' description of conduct as civil disobedience); Sherman, *supra* note 3, at 30 (quoting abortion protestors who characterize own conduct as new civil disobedience).

36. *See* 18 U.S.C. § 1961 (1988) (listing predicate acts that constitute racketeering activity and defining pattern of racketeering activity as occurrence of at least two predicate acts within ten years).

37. *See* 42 U.S.C. §1985(3) (1988) (defining civil rights conspiracy as any act in furtherance of conspiracy to deprive any person or class of persons of equal protection of laws, or of equal privileges and immunities under law, thereby injuring person or property or depriving right or privilege).

38. *See* D. WEBER, CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY, 18 (1978) (chronicling examples of and attempts to define civil disobedience throughout American history). Weber summarizes that the history of American civil disobedience falls into three broad and generally distinct categories. *Id.* The first civil disobedience category is opposition, mainly by individual dissenters in the seventeenth and eighteenth centuries, to legal violations of the principle of religious liberty. *Id.* The second category is disobedience, mainly in the nineteenth and twentieth century, to statutes that seemed to implicate individual citizens in immoral actions. *Id.* The third category is the use of mass civil disobedience as a tactic to achieve social or legal change, primarily in the civil rights movement of the 1950s and 1960s. *Id.* Each of these categories has its own characteristic forms and internal logic. *Id.*

39. *See* L. BUZZARD & P. CAMPBELL, HOLY DISOBEDIENCE: WHEN CHRISTIANS MUST RESIST THE STATE 41-54 (1984) (relying upon teachings of Thoreau, Gandhi, King and other writers to offer general definition of civil disobedience based on common motives, purposes, and elements).

40. *See infra* notes 41-61 and accompanying text (comparing similarities and differences between various definitions of civil disobedience).

One common feature of the various definitions of civil disobedience focuses on the civil disobedient's motive.[41] The civil disobedient's motive in breaking the law may be to protest a law the disobedient believes to be unconstitutional or immoral.[42] The disobedient's motive also may be to accomplish some betterment in the society by refusing to participate in the perpetuation of conditions necessary for the enforcement of some offensive policy.[43] For example, a civil disobedient may break laws that the disobedient considers just in the abstract but unjust in a particular case, or unjust to those not in a position to protest for themselves.[44] Related to the motives of a civil disobedient, the purposes of engaging in civil disobedience vary widely.[45] A civil disobedient may wish to avoid what the disobedient views as doing wrong or to call attention to an injustice.[46] A civil disobedient also may seek to interfere with the operation or implementation of a proposed law, to awaken the public to an evil, to slow or halt the operation of law, to disrupt some structured order to force changes in the social structure, or even to undermine the authority of government officials.[47]

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41. *See infra* note 42-44 (discussing how various writers have described civil disobedient's motive).

42. *See* L. BUZZARD & P. CAMPBELL, *supra* note 39, at 42 (discussing motive of civil disobedient); Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507, 508 (1965) (defining civil disobedience as act of deliberate and open violation of law with intent to protest wrong or accomplish betterment in society); King, *Love, Law, and Civil Disobedience* (1961), in D. WEBER, *supra* note 42, at 212, 215-16 (describing civil disobedient as one who disobeys law based on conscious belief that law is unjust).

43. *See* L. BUZZARD & P. CAMPBELL, *supra* note 39, at 42 (discussing motives of civil disobedient); Keeton, *supra* note 42, at 508 (defining civil disobedience); Thoreau, *Resistance to Civil Government* (1849), in D. WEBER, *supra* note 42, at 84, 87 (arguing that to protest slavery, Abolitionists should withdraw personal and property support from government of Massachusetts, implicitly advocating disobedience to prevent perpetuating conditions necessary to enforce slavery).

44. *See* Thoreau, *supra* note 43, at 87 (arguing against paying tax to Massachusetts government to protest slavery, implicitly advocating disobedience by taxpayers on behalf of slaves because slaves were not in position to protest for themselves); L. BUZZARD & P. CAMPBELL, *supra* note 39, at 42 (discussing motives of civil disobedient); King, *The Trumpet of Conscience* (1968), in D. WEBER, *supra* note 42, at 222, 224-25 (urging all people to march, sit-in, and otherwise protest peacefully to gain civil and economic rights for poor and oppressed who are not in position to protest for themselves).

45. *See* L. CAMPBELL & P. BUZZARD, *supra* note 39, at 42 (listing varied purposes of civil disobedience); P. SINGER, DEMOCRACY AND DISOBEDIENCE 63-104 (1973) (including as purposes for civil disobedience protection of rights of minority against majority in democracy, obtaining publicity to encourage change or influence public opinion, pleading for reconsideration of issue by majority or agenda-setting, and conscientious objection); Phelps, *No Place to Go, No Story to Tell: The Missing Narratives of the Sanctuary Movement*, 48 WASH. & LEE L. REV. 123, 126 (1991) (including as purposes for civil disobedience calling attention to unjust government practice and helping those endangered by government law or practice).

46. *See* L. Buzzard & P. Campbell, *supra* note 39, at 42 (listing purposes of civil disobedience); Phelps, *supra* note 45, at 123, 126 (stating that one purpose of civil disobedience is to call attention to unjust law or government practice).

47. *See* L. BUZZARD & P. CAMPBELL, *supra* note 39, at 42 (listing purposes of civil disobedience).

Elements of law-breaking and conscience are at the core of civil disobedience.[48] The actions of the civil disobedient must be based on some moral belief.[49] According to Henry David Thoreau, in some circumstances obeying the law is worse than disobeying the law,[50] and at no time should one resign one's conscience to a legislator.[51] Furthermore, while civil disobedience may involve breaking a law, civil disobedience is distinct from revolution or anarchy.[52] The civil disobedient must realize the legitimacy of law itself, justifying disobedience by appealing to the incompatibility between the disobedient's political circumstances and moral convictions.[53]

Most contemporary literature on civil disobedience asserts that disobedient action should be nonviolent in nature, although nonviolence is not a universal criteria.[54] Both Ghandi and King insisted that civil disobedience be nonviolent.[55] Nonviolence is a central element of civil disobedience because nonviolence allows the disobedient to act within the prevailing form of government, whereas violent disobedience threatens governmental structure and begins to resemble rebellion.[56] Recent writers, however, reject

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48. *See id.* at 43-44 (stating that elements of law-breaking and conscience are at core of civil disobedience and discussing those elements as embodied in various definitions of civil disobedience).

49. *See id.* at 45-46 (discussing moral belief as element of civil disobedience); Keeton, *supra* note 42, at 508-11 (distinguishing evasion of law, riot or rebellion, and inadvertent violation of law from civil disobedience which is deliberate, open, and conscientious violation of law based on moral belief); Selfe, *Civil Disobedience: A Study in Semantics*, 10 LIVERPOOL L. REV. 149, 163-65 (1988) (concluding that while elements of civil disobedience may vary on case-by-case basis, intent of disobedient to act by or for community is central, implicitly recognizing that such intent is type of moral belief central to definition of civil disobedience).

50. *See* Thoreau, *supra* note 43, at 86 (arguing that to support government would be to support institution of slavery and, therefore, that to obey law would be worse than to disobey law).

51. *See* Thoreau, *Civil Disobedience* (1948), in ON CIVIL DISOBEDIENCE 11-12 (R. Goldwin ed. 1969) (characterizing government not as separate entity but as comprised of individuals responsible first to own consciences, and concluding that at no time should one resign one's conscience to legislators); L. BUZZARD & P. CAMPBELL, *supra* note 39, at 205-35 (describing when one should disobey law to obey one's sense of morality).

52. *See* Keeton, *supra* note 42, at 508-10 (arguing that civil disobedience is not aimed toward overthrow of law and order, but works within framework of legal system to rectify specific wrongs); R. DWORKIN, *supra* note 33, at 206-22 (arguing in context of draft evaders that organized government can and should tolerate some civil disobedience, implicitly recognizing that civil disobedience is not revolution or anarchy).

53. *See* L. BUZZARD & P. CAMPBELL, *supra* note 39, at 46 (discussing elements of civil disobedience, including realization of legitimacy of law itself).

54. *See id.* at 48-50 (discussing nonviolence as general element of civil disobedience while recognizing that some commentators include violent means within definition of civil disobedience); Selfe, *supra* note 49 at 154-59 (examining several interpretations placed upon word "civil," including ones exclusive and inclusive of violence, to understand concept of civil disobedience and aims of practitioners of civil disobedience).

55. *See* Selfe, *supra* note 49, at 157 (stating that both King and Gandhi insisted that civil disobedience be nonviolent); King, *supra* note 42, at 212-13 (arguing against violence because end must be as pure as means).

56. *See* L. BUZZARD & P. CAMPBELL, *supra* note 39, at 49 (discussing nonviolence as central element of civil disobedience because nonviolence is consistent with prevailing form of government while violence resembles rebellion).

categorical elimination of violence from the concept of civil disobedience as a misconception that violence must always be an expression of evil, and nonviolence of good will.[57] David Selfe, a lecturer at Liverpool Polytechnic, attributes the association between civil disobedience and nonviolence to pacifists who have used and developed the theory of civil disobedience.[58] Selfe, however, points out that Thoreau was not an avowed pacifist and may have supported violence in some circumstances.[59] Thoreau stated on one occasion that "the question is not about the weapon, but the spirit in which you use it"[60] and on another that "the degree of violence which one may be compelled to show in one's resistance, undergoes conspicuous change with the times and circumstances."[61]

Calling themselves civil disobedients, some abortion protestors' claims coincide with the motives, purposes, and elements set out as common features in various definitions of civil disobedience.[62] Abortion protestors claim to break the law, as did Martin Luther King, Jr. and his followers, to prevent a greater injustice.[63] Unlike the discrimination that King and his followers sought to eliminate, abortion protestors claim that the injustice which they seek to prevent is murder.[64] More specifically, abortion protestors state that the protestors' purposes are to "end legalized child killing,"[65] to protect unborn human life legally,[66] and to eliminate a "serious moral evil."[67] United States Representative Christopher Smith (R-N.J.) proclaims: "Our ultimate goal is simply to stop the killing, to provide positive alternatives to abortion and to make this country abortion free."[68] Missouri

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57. *See id.* at 50 (stating that recent writers recognize use of violence in civil disobedience in some situations); Keeton, *supra* note 42, at 516-17 (promoting nonviolence as responsible civil disobedience without excluding possibility of violence in circumstances compatible with objective of long-run betterment of society); K. GREENAWALT, CONFLICTS OF LAW AND MORALITY 244-65 (1987) (stating that civil disobedient's violent, illegal acts may be warranted to alleviate more social harm than harm caused by violence).

58. *See* Selfe, *supra* note 49, at 157 (discussing element of violence in context of definition of civil disobedience).

59. *See id.* at 160 (discussing Thoreau's view of necessity of violence).

60. *See id.* (quoting Thoreau on necessity of violence).

61. *See* id. (quoting Thoreau in discussion of element of violence in definition of civil disobedience).

62. *See supra* notes 41-61 and accompanying text (discussing motives, purposes, and elements of general definition of civil disobedience).

63. *See* Sherman, *supra* note 3, at 30 (describing claims of abortion protestors to break law to prevent greater injustice).

64. *See id.* (quoting abortion protestors who claim to break law to prevent murder).

65. *See Ruling Moves Battle to New Arena, Foes Agree*, L.A. Times, July 3, 1989, at A1, col. 3 (reporting that anti-abortion forces praised Supreme Court decision to restrict abortions as beginning to end of legalized child killing).

66. *See* Neuhaus, *After Roe; Abortion Rights*, NAT'L REV., Apr. 7, 1989, at 48 (discussing abortion protestors' position that law must protect without exception unborn human life).

67. *See Campus Life: Fordham; Should a Group That Would Bite the Hand Be Fed?*, N.Y. Times, May 13, 1990, §1, at 31, col. 6 (quoting Catholic teaching and viewpoint of many abortion protestors that abortion is serious moral evil).

68. *See Ruling Moves Battle to New Arena, Foes Agree*, L.A. Times, July 3, 1989, at

State Representative Ted House summarized the purpose of abortion protestors: "Let me make it very clear that while the methodology of those within the pro-life movement may differ, the ultimate goal of saving as many lives as possible is exactly the same."[69]

The common features among the various definitions of civil disobedience suggest several alternative ways to resolve the competing interests of the civilly disobedient abortion protestors and their victims.[70] At one extreme, a court could reject any consideration of the civil disobedient's motive[71] as a defense or as a mitigating factor when resolving the competing claims of the disobedient and either a victim in the civil context or the government in the criminal context.[72] Selfe calls this a "legalistic approach."[73] Proponents of a legalistic approach recognize that disobedience to the law may be justified morally, but insist that disobedience cannot be justified legally and that, above all, the law must be enforced.[74] Proponents of a legalistic approach, further, would rename civil disobedience as "criminal" disobedience, arguing that civil disobedience actually *causes* the breakdown of law and order[75] because civil disobedience fosters more general lawlessness.[76]

Apparently engaging in a legalistic approach, one court rejected a defense based on the motive of the abortion protestors as "invalid", calling the defense "'a feeble effort to emasculate basic principles of civil disobedience.'"[77] Professor Ronald Dworkin criticized the legalistic approach, arguing that society will not collapse in the face of disobedience but can endure some disobedience.[78] Dworkin also asserted that because the law

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A1, col. 3. (quoting United States Representative Christopher Smith (R-N.J.) on anti-abortionists' commitment to prohibit abortion).

69. *See* Wolf, *Tough Abortion Bill Introduced*, UPI, Jan. 16, 1990 (quoting Missouri State Representative House regarding introduction of bill to ban abortions for social convenience, arguing that bill would save lives).

70. *See supra* notes 41-61 and accompanying text (discussing common features of various definitions of civil disobedience); *infra* notes 71-103 and accompanying text (discussing alternative ways court consider claims of civil disobedient).

71. *See supra* notes 41-44 and accompanying text (discussing motive of civil disobedient).

72. *See supra* notes 1-24 and accompanying text (discussing competing claims of abortion protestors and the abortion rights activists along with victims of abortion protestors).

73. *See* Selfe, *supra* note 49, at 152 (describing legalistic approach to defining elements of civil disobedience as rejecting consideration of civil disobedient's motive).

74. *See* R. DWORKIN, *supra* note 33, at 206 (explaining position of proponents of legalistic application of laws to civil disobedients).

75. *See* Selfe, *supra* note 49, at 152-53 (describing views of proponents of legalistic approach that civil disobedience causes breakdown of law and order).

76. *See* Keeton, *supra* note 42, at 509-10 (criticizing proponents' of legalistice approach claim that civil disobedience fosters lawlessness and undermines law and order).

77. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1351 (3d Cir.) (quoting United States v. Malinowski, 472 F.2d 850, 856-57 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973)) (rejecting justification defense of abortion protestors, holding that abortion protestors' motives could not constitute legal defense), *cert. denied*, 110 S. Ct. 261 (1989).

78. *See* R. DWORKIN, *supra* note 33, at 206-07 (arguing that prosecutors should not completely exclude considerations of intent of civil disobedient and that society can tolerate some civil disobedience).

typically distinguishes between lawbreakers based on motive, laws should be changed or sentencing procedures adjusted to account for the motive of the civil disobedient.[79]

At the other extreme, a court could allow a justification defense[80] based on the disobedient abortion protestor's motive.[81] Hugo Bedau contends that the actions of the civil disobedient are distinct from those of the criminal precisely because of the intent or motive of each.[82] According to Bedau, the true civil disobedient very rarely, if ever, acts selfishly and without regard for the principles of law and order, whereas such behavior is typical of the criminal mind.[83] Furthermore, Bedau argues that criminals very rarely act justifiably, and even more rarely do criminals act out of conscience.[84] Similarly, J.L. Adams asserts that real crimes are not acts of conscience, whereas the civil disobedient often appeals to a "higher law," a theological sanction, or a broader, humanistic sense of religion.[85] Furthermore, the civil disobedient, unlike the criminal, engages in conduct to bring about change in the law and to correct injustices.[86] Because of the distinctions between

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79. *See id.* at 206, 222 (concluding that society should not prosecute civilly disobedient or that society should change laws or adjust sentencing procedures to account for civil disobedient's intent).

80. *See* United States v. Simpson, 460 F.2d 515, 517-18 (9th Cir. 1972) (explaining justification defense). The *Simpson* court defined the justification doctrine as an acknowledgement that otherwise criminal conduct may be justifiable, and thereby legally excused, when exigent circumstances have induced a defendant to act as he did. *Id.* at 517. Under the justification doctrine, courts may hold as noncriminal, actions taken in self-defense, in defense of property or other persons, or to avert a public disaster or a crime, according to the *Simpson* court. *Id.* In *Simpson* the defendant was convicted of destroying government property, mutilating and destroying records deposited in a government office, and of interfering with the administration of the Selective Service System. *Id.* at 516-17. The conviction resulted from an incident in which the defendant burned some records of the local draft board in an effort to move the United States towards terminating the conflict in Southeast Asia. *Id.* Defendant asserted that his actions were justifiably done to avert criminal acts and to defend property and persons in the war zone. *Id.* at 517. While recognizing that society benefits when one acts to prevent another from intentionally or negligently causing injury to people or property, the *Simpson* court found that the justification doctrine did not apply to defendant's situation. *Id.* at 517-18. The *Simpson* court found that defendant's acts were not reasonable and that no direct causal relationship existed between defendant's action and the avoidance of the harm, an essential element of the justification defense. *Id.* at 518.

81. *See* Apel, *Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction*, 48 WASH. & LEE L. REV. 41, 42 (1991) (explaining that utilitarian rationale for allowing justification defense is that society should grant some discretion to individual to permit individual to act in manner that will promote greater social good and that morality may demand person to behave contrary to law).

82. *See* H. BEDAU, CIVIL DISOBEDIENCE: THEORY AND PRACTICE 18 (1969) (defining civil disobedience and distinguishing civil disobedience from criminal violations of law based on intent of civil disobedient).

83. *Id.*

84. *Id.*

85. *See* Adams, *Civil Disobedience: Its Occasions and Limits*, in POLITICAL AND LEGAL OBLIGATIONS 302 (Pennock & Chapman eds. 1970) (defining civil disobedience).

86. *Id.*

the criminal and the civil disobedient's intent,[87] civil disobedients have asserted defenses based upon justification.[88] Courts and some commentators, however, have not been receptive to the civil disobedients' use of a justification defense and, therefore, either categorically have excluded the availability of the defense for political protestors or have found that a defendant failed to present evidence on each of the specific elements of the defense.[89]

Instead of completely excluding considerations of motive at one extreme[90] or allowing a justification or necessity defense based upon the motive of the civil disobedient at the other extreme,[91] a court could limit its considerations of motive as a mitigating factor. Harrop Freeman suggests that civil disobedience is a recognized procedure for challenging law or policy and obtaining court determination of the validity of a law or policy.[92] Moreover, Freeman suggests that theories of jurisprudence recognize the propriety of nonviolent challenge to law or policy.[93] Freeman argues that even if the act of protest or disobedience is a technical violation of law, the motive or purpose of the disobedient should cause the punishment to be nominal and certainly not more severe.[94] Following Freeman's reasoning,

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87. *See supra* notes 82-86 and accompanying text (discussing difference between criminal's intent and civil disobedient's intent).

88. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1350-52 (3d Cir.) (rejecting justification defense for abortion protestors), *cert. denied*, 110 S. Ct. 261 (1989); United States v. Romano, 849 F.2d 812, 816 n.7 (3d Cir. 1988) (holding irrelevant justification defense based on intent to save lives when defendant broke into military installation and disabled military equipment); United States v. Malinowski, 472 F.2d 850, 855-56, 859-60 (3d Cir.) (holding justification defense unavailable to defendant who falsely claimed excessive exemptions on Internal Revenue Service form to dramatize protest against Vietnam War), *cert. denied*, 411 U.S. 970 (1973); United States v. Simpson, 460 F.2d 515, 517-18 (9th Cir. 1972) (explaining justification defense and finding that defendant failed to meet elements of justification defense).

89. *See supra* note 88 (listing cases in which courts rejected use of justification defense); Apel, *supra* note 81, at 42-43 (arguing that justification or necessity defense should not be available to Operation Rescue regardless of whether defense is generally available to political protestors).

90. *See supra* notes 71-77 and accompanying text (discussing exclusion of consideration of civil disobedient's motive).

91. *See supra* notes 80-89 and accompanying text (discussing justification defense).

92. *See* Freeman, *The Right of Protest and Civil Disobedience*, 41 IND. L.J. 228, 231-32, 235-37 (1965) (defining civil disobedience and discussing role of civil disobedience in challenging law). Freeman defines civil disobedience as follows:

> (1) "Civil" . . . as "against the state, the civil, the civitas[;]" (2) . . . [as] an "intentional" act, a chosen course, not occasioned by accident[;] (3) . . . [as] used for an external purpose (to call attention to injustice, to change conditions)[;] (4) . . . [as] non-violent, *at least in origin*[;] (5) . . . [as] a form of communication . . . within the theory of the First Amendment[;] (6) . . . [as] used by those who are in fact barred from otherwise exerting power[;] (7) . . . [as] either legal or illegal.

Id. at 231-32 (emphasis added).

93. *Id.* at 235, 237-39.

94. *Id.* at 235, 246-47; *see also* R. DWORKIN, *supra* note 33, at 222 (urging accommodation of sentencing procedures to account for motive of civil disobedient).

a court may account for the motive of a civil disobedient in sentencing by offering probation or a suspended or light sentence.[95]

Selfe's definition of civil disobedience suggests an alternative to using motive as a defense[96] or mitigating factor[97] when resolving the competing claims of the civil disobedient and either the victim in the civil context or the government in the criminal context.[98] As Selfe defines civil disobedience, the means a civil disobedient employs may vary from noncriminal, traditional First Amendment protected activity to more violent means such as bombing or arson.[99] In either case, the disobedient's motive remains the same.[100] Selfe's distinction between the disobedient's means and the disobedient's motive or purpose (a "means-end" distinction) does not preclude the condemnation of the illegal means.[101] This distinction shifts the court's focus from the motive of the disobedient to whether the means[102] used by the disobedient were legal or illegal—a distinction that is likely to turn upon whether the First Amendment protects the particular means used by the disobedient or not.[103]

Because neither the Supreme Court's decisions in *Roe v. Wade*[104] or

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95. *But see* Cox, *Abortion Protest: California Judges Are Targeted*, NAT'L L.J., Sept. 24, 1990, at 3, 39 (describing Operation Rescue's claims of judicial abuses in handing down higher sentences to abortion protestors than to other political protestors while judges claim that abortion protestors reject light sentences such as parol or probation).

96. *See supra* notes 80-89 and accompanying text (discussing alternative of using civil disobedient's motive as a defense).

97. *See supra* notes 92-95 and accompanying text (discussing use of civil disobedient's motive as mitigating factor in sentencing).

98. *See supra* notes 25-34 and accompanying text (discussing court's task of resolving competing claims of abortion protestors and abortion rights advocates along with victims of abortion protestors).

99. *See* Selfe, *supra* note 49, at 159-65 (proposing definition of civil disobedience to reflect intent of civil disobedient to act for benefit of community and to include spectrum of means from nonviolent to violent acts); *supra* notes 54-61 and accompanying text (discussing proposition that violence may be included in definition of civil disobedience).

100. *See* Selfe, *supra* note 49, at 163-65 (arguing that intent of civil disobedient is same regardless of means civil disobedient uses).

101. *See id.* at 164-65 (asserting that condemnation of civil disobedient's means should not exclude such means from definition of civil disobedience).

102. *See supra* notes 96-101 and accompanying text (discussing elements of civil disobedience that refer to civil disobedient's "means").

103. *See infra* notes 112-48 and accompanying text (distinguishing First Amendment protected conduct and unprotected conduct).

104. 410 U.S. 113 (1973). In *Roe v. Wade* the Supreme Court considered whether the concept of liberty in the Fourteenth Amendment's Due Process Clause, which protects the right to privacy, protected a woman's decision to terminate a pregnancy. *Id.* at 152-53. The plaintiff in *Roe v. Wade* challenged a state statute that made it a crime to procure an abortion or to attempt one, except for the purpose of saving the mother's life, as unconstitutionally vague and in violation of her right of personal privacy that the First, Fourth, Fifth, Ninth, and Fourteenth Amendments protect. *Id.* at 117-18, 120. While recognizing that a state has a legitimate interest in insuring that abortions are performed using safe procedures and in protecting prenatal life, the Supreme Court reasoned that such state interests did not overcome a woman's right to privacy prior to the viability of the fetus. *Id.* at 150, 160, 163. After

Webster v. Reproductive Health Services[105] nor federal or state legislation has settled the abortion issue legally or popularly,[106] abortion protestors, through various means, including the exercise of First Amendment protected activities, continue to contribute to the "uninhibited, robust, and wide open debate"[107] on the legal, political, and social issues surrounding abortion in the United States. However, the conduct of some abortion protestors at times may be too uninhibited and robust, going beyond First Amendment protected activities and creating "victims" by infringing upon a woman's constitutional right[108] to have an abortion,[109] by inflicting tortious

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finding that the right to privacy included a woman's qualified right to choose an abortion, the Supreme Court formulated what have become known as the *Roe* trimester rules. *Id.* at 164-66. During the first trimester, the Court ruled that the abortion decision was to be left to the medical judgment of the pregnant woman's attending physician. *Id.* at 164. The Court allowed reasonable regulations related to maternal health during the second trimester. *Id.* Further, the Court concluded that, during the stage of pregnancy subsequent to viability, which the Court assumed to be the third trimester, a state could regulate or proscribe abortion to promote its interest in potential life, except where it is necessary to preserve the life or health of the mother. *Id.* at 164-66.

105. 109 S. Ct. 3040 (1989). In *Webster v. Reproductive Health Services*, the Supreme Court considered the constitutional validity of a state regulation of abortion, which included provisions prohibiting the use of public facilities and employees to perform abortions not necessary to save the mother's life, and a preamble which stated that life begins at conception. *Id.* at 3046-49. Public health care professionals claimed that the state statute violated the Constitution and the Supreme Court's *Roe v. Wade* decision. *Id.* at 3047-48. The *Webster* court declined to pass on the constitutionality of the statute's preamble because the case presented no concrete facts to which the Court could apply the statute. *Id.* at 3049-51. Reasoning that the state placed no governmental obstacle in the way of a woman who chose to terminate her pregnancy, the Court ruled that the provisions prohibiting the use of public facilities and employees to perform or assist abortions not necessary to save the mother's life did not contravene the Supreme Court's abortion decisions. *Id.* at 3050-53. Instead, under the state statute, a pregnant woman retained the same options as if the state had chosen not to operate any public hospitals at all, according to the *Webster* court. *Id.* While the *Webster* decision could be harmonized with the Court's decision in *Roe v. Wade*, which was based upon the concept of viability as was the statute at issue in *Webster*, some members of the Court, in dictum, questioned the trimester and viability framework of *Roe*. *Id.* at 3056-57. Dissenters argued that the majority was implicitly inviting stricter state regulation of abortion that would lead to the eventual overruling of *Roe*. *Id.* at 3067.

106. *See supra* notes 104 & 105 (discussing *Roe v. Wade* and *Webster*); *supra* notes 1-24 and accompanying text (discussing ongoing abortion war); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1494 (E.D. Va. 1989) (asserting that *Webster* suggests that law concerning putative abortion right is in state of flux), *aff'd*, 914 F.2d 582 (4th Cir. 1990).

107. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (holding that First Amendment insures "uninhibited, robust, and wide open debate").

108. *See supra* notes 104 & 105 (discussing woman's privacy right to choose abortion as set out in *Roe v. Wade* despite doubt cast upon decision by *Webster*).

109. *See* Lewis v. Pearson Foundation, Inc., 908 F.2d 318, 318-20 (alleging civil rights conspiracy against mock abortion clinic for attempt to deny plaintiff's constitutional right to have abortion), *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990) (reinstating district court's decision to dismiss complaint for failure to state cause of action under civil rights conspiracy statute); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1493-

injury,[110] or by infringing upon the property rights of others.[111]

The Supreme Court has distinguished First Amendment rights as preferred freedoms[112] and has noted that the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.[113] First Amendment rights retain a primacy in American jurisprudence because those rights allow for informed public discourse, the foundation of a democracy[114] that is committed to the principle that debate on public issues should be uninhibited, robust and wide open.[115] Justice Brandeis asserted that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[116]

The Supreme Court has construed the protection of the First Amendment as a guaranty of the right of every citizen to reach the minds of willing listeners,[117] assuring the unfettered interchange of ideas for bringing

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94 (E.D. Va. 1989) (denying relief under civil rights conspiracy statute for infringement on right to obtain abortion), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Clinic, 1991 US LEXIS 1147.

110. *See* Boes v. Deschu, 768 S.W.2d 205, 207-09 (Mo. Ct. App. 1989) (finding that plaintiff had stated claim for intentional infliction of emotional distress based on mock abortion clinic employees' abortion counseling).

111. *See* Northeast Women's Center v. McMonagle, 868 F.2d 1342, 1348-50 (3d Cir.) (allowing use of civil RICO as cause of action for claim based on trespass and damage to property), *cert. denied*, 110 S. Ct. 261 (1989).

112. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (invalidating municipal ordinance that, as construed and applied, unconstitutionally required Jehovah's Witnesses to pay license tax as condition to sale of religious literature and violated preferred freedoms of First Amendment); Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (invalidating Texas statute that required labor organizers to register with state official before soliciting memberships in labor unions because statute, as applied, violated preferred freedoms of First Amendment).

113. *See* Elrod v. Burns, 427 U.S. 347, 373-74 (1976) (finding irreparable injury for violation of First Amendment rights of Republican employees of sheriff's office who were threatened with discharge because they were not affiliated with Democratic Party).

114. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) (holding unconstitutional statute that criminalizes publishing editorial on election day because such statute violates First Amendment, which protects public discourse as foundation of democracy); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 797 (5th Cir. 1989) (denying preliminary injunction against abortion protestors and holding that First Amendment rights of protestors outweighed privacy rights of women seeking abortion).

115. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (reversing state court's rule of law in libel action as deficient for failure to provide safeguards for freedom of speech and press necessary to insure uninhibited, robust, and wide-open debate).

116. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

117. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) (recognizing First Amendment right to reach minds of willing listeners, but holding that state rule which confined distribution, sales, and solicitation activities at state fair to fixed location was permissible restriction on place and manner of communication).

In addition to protecting the right to reach the minds of *willing* listeners, the Supreme Court has stated that an *unwilling* listener may be required to tolerate offensive expression in public. *See* Cohen v. California, 403 U.S. 15, 21-22 (1971). In *Cohen* the Supreme Court considered whether a state statute that prohibited maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct violated the First Amendment as applied to a defendant who was convicted for wearing a jacket, which bore the words

about political and social changes.[118] To give vitality to First Amendment freedoms, courts have applied a narrowed presumption of constitutionality to statutes that infringe upon free speech, have strictly construed statutes to avoid limiting fundamental freedoms, have restricted prior restraint and subsequent punishment, have limited speech only when it presents a "clear and present danger," have relaxed general requirements of standing to sue, and generally have set higher standards of procedural due process.[119] The policy behind the First Amendment guarantees may coincide with the civil disobedient's motives, or purposes, or with the elements of civil disobedience.[120]

While the Supreme Court has stated that the government may not restrict expression because of its message, ideas, subject matter, or content,[121] the Court, nevertheless, has upheld laws imposing content based restrictions on speech.[122] The Court has upheld content based restriction on speech by excluding certain categories of speech from First Amendment protection, such as obscenity,[123] fighting

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"Fuck the Draft," in the corridor of a courthouse. *Id.* at 15-16. The defendant in *Cohen* testified that he wore the jacket knowing that words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft. *Id.* at 16. The trial court found that defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit, or threaten to commit any act of violence. *Id.* at 16-17. The Supreme Court observed that the speech involved did not constitute obscenity or fighting words but that defendant's conviction rested upon defendant's exercise of freedom of speech. *Id.* at 20. Further, the Supreme Court stated that the mere presumed presence of unwilling listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. *Id* at 21. According to the Court, the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. *Id.* Accordingly, the Supreme Court stated that state law cannot excise as offensive conduct one particular scurrilous epithet from public discourse and reversed defendant's conviction. *Id.* at 22-23.

118. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (stating that First Amendment protected right to unfettered interchange of ideas for bringing about political and social change); Roth v. United States, 354 U.S. 476, 484 (1957) (same).

119. *See* Note, *Political Realm*, *supra* note 30, at 220 (discussing methods courts have applied to protect First Amendment rights and arguing that such methods should be used to prevent application of civil RICO to political protestors).

120. *See supra* notes 41-44 and accompanying text (discussing civil disobedient's motives); *supra* notes 45-47 and accompanying text (discussing civil disobedient's purpose); *supra* notes 48-61 and accompanying text (discussing elements of civil disobedience).

121. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (stating that First Amendment forbids government from restricting expression because of message, ideas, or subject matter or content).

122. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (upholding state statute that prohibited public utterance based on offensive, derisive, or annoying content of utterance).

123. *See* Miller v. California, 413 U.S. 15, 23-24 (1973) (defining obscenity as materials which, taken as whole, appeal to prurient interest in sex, portray sexual conduct in patently offensive way, and do not have serious literary, artistic, political, or scientific value, and excluding obscenity from First Amendment protection); Roth v. United States, 354 U.S. 476, 481-85 (1957) (holding that obscenity is not protected speech within First Amendment because obscenity is utterly without redeeming social importance).

words,[124] and false speech.[125] The Court also has employed a balancing test in the form of strict scrutiny to determine if the law under review is narrowly tailored to meet some overriding or compelling governmental interest,[126] embodied, for example, in the doctrines of overbreadth[127] or clear and present danger.[128] A law not facially violative of the First Amendment may still unconstitutionally infringe upon one's First Amendment rights as applied in a particular case.[129] To determine the constitutionality of a law as applied, the Supreme Court has balanced the state's interests in protecting the health, safety, and welfare of its citizens with the First Amendment rights of the speaker to determine if the regulation is reasonable.[130] Applying this balancing test, the Court traditionally upholds content neutral regulations of time, place, and manner of public protest if designed to promote valid governmental interests.[131]

Another factor in a court's balancing of competing interests is the doctrine of chilling effect on First Amendment rights. The chilling effect doctrine is premised upon the recognition that the legal process is surrounded by uncertainty and that because of this uncertainty, errors may result, such as the wrongful conviction of the innocent or the wrongful acquittal of the guilty.[132] Further, the potential for error necessitates a determination of which type of error is more harmful.[133] In the context of First Amendment

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124. *See Chaplinsky*, 315 U.S. at 571 (upholding conviction of defendant under statute that prohibited words having direct tendency to cause person addressed to act violently).

125. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-73 (1976) (finding that First Amendment protected truthful commercial speech but has never protected untruthful speech).

126. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978) (finding state law that prohibited publication of information about judicial misconduct proceedings unconstitutional because state's interest in protecting reputation of judges, or in maintaining institutional integrity of courts, was insufficient to overcome burden on First Amendment rights).

127. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 70-71 (1981) (invoking overbreadth doctrine to invalidate criminal penalties for violation of ordinance that prohibited all live entertainment because overbroad laws unconstitutionally deter protected activities).

128. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (striking down state statute that forbade advocacy of force or violation of law, except where such advocacy is directed to incite or produce imminent lawless action and is likely to incite or produce such action).

129. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (reversing conviction of speaker in large auditorium for violating breach of peace ordinance because, as applied, ordinance unconstitutionally infringed upon First Amendment rights).

130. *See* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (upholding local ordinance that prohibited noise or diversion on public or private grounds adjacent to school building as valid time, place, or manner restriction because ordinance was content neutral and necessary to further significant governmental interest in education).

131. *See id.* (same).

132. *See* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 687-88 (1978) (stating that doctrine of chilling effect recognizes uncertainty and potential for error within legal system and allocates that risk and uncertainty away from potential infringement upon exercise of First Amendment rights).

133. *See id.* at 688 (same).

analysis, the doctrine of chilling effect mandates the formulation of legal rules that reflect a preference for errors made in favor of free speech.[134] The degree of chilling depends upon the probability of an erroneous verdict and the magnitude of harm such a verdict might produce.[135] The magnitude of harm relates closely to the harshness of the penalty, stigma or injury to reputation, and litigation costs.[136] The chilling effect doctrine reflects the view that the harm caused by the chilling of free speech is comparatively greater than the harm that results from the chilling of other activities involved.[137] Accordingly, the chilling effect doctrine mandates that courts formulate legal rules to allocate the risk of error away from the preferred value of free speech to minimize the occurrence of the most harmful errors.[138]

Specifically in regard to abortion protestors, courts have found that attempts to persuade another to action clearly are within the scope of the First Amendment.[139] Similarly, the First Amendment protects the right of any political protestor to engage in peaceful picketing, leafletting, and demonstrating.[140] The First Amendment will protect expression designed to have an offensive or coercive effect as long as the manner of expression remains peaceful.[141] Courts have not questioned the rights of abortion

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134. *See id.* (same).

135. *See id.* at 695 (explaining that chilling effect doctrine looks to probability of erroneous verdict and magnitude of harm).

136. *See id.* at 697 (stating that magnitude of harm relates to harshness of penalty, stigma or injury to reputation, and litigation costs); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 266 (1982) (calculating chilling effect of law as magnitude of punishment multiplied by probability of punishment).

137. *See* Schauer, *supra* note 132, at 708 (concluding that harm caused by chilling of free speech is greater than harm that results from chilling other activities involved).

138. *See id.* at 705 (concluding that to avoid chilling effect on First Amendment rights, courts must formulate rules to reduce risk of infringing on right of free exercise); Califa, *supra* note 30, at 833 (asserting that legal rules must reflect preference for free speech).

139. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1349 (3d Cir.) (approving district court's instruction to jury that abortion protestors have constitutional right to attempt to persuade abortion clinic to stop performing abortions, to persuade employees to stop working at clinic, and to persuade patients not to have abortions at clinic), *cert. denied*, 110 S. Ct. 261 (1989); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488, 1497-98 (E.D. Va. 1989) (restricting scope of injunction to prevent interference with abortion protestor's right to attempt to persuade women not to have abortions).

140. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (refusing prior restraint of peaceful distribution of literature, which criticized "blockbusting" and "panic peddling" activities of real estate broker, on public property); Thornhill v. Alabama, 310 U.S. 88, 105-06 (1940) (striking down statute that made it unlawful to picket in public place as facially violative of First Amendment).

141. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982) (extending First Amendment protection to peaceful civil rights boycott which was intended to have coercive effect); Street v. New York, 394 U.S. 576, 592 (1969) (stating that peaceful public expression of ideas may not be prohibited merely because ideas are themselves offensive to some); National Org. for Women v. Operation Rescue, 726 F. Supp. 1342, 1497 (E.D. Va. 1989) (stating that abortion protestors' First Amendment right to express views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of abortion protestors on

protestors to form organizations to promote the anti-abortion cause, to picket and make speeches outside of abortion clinics,[142] and to engage in sidewalk counseling.[143]

Courts, however, have found that the First Amendment plainly does not protect some actions, regardless of the expressive political content of those acts. For example, trespass is not constitutionally protected although it can be a powerful expressive vehicle.[144] Similarly, the First Amendment does not protect bombing, arson, or other acts of violence.[145] When addressing the abortion protests, courts have ruled that the blockading of clinics is unlawful activity that is not entitled to First Amendment protection.[146] Likewise, courts have refused to extend First Amendment protection to the deceptive advertisements of mock abortion clinics[147] or to speech of

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issue of abortion), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Clinic, 1991 US LEXIS 1147.

142. *See* New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1262-63 (S.D.N.Y. 1989) (crafting injunction to prevent trespass or blockading activity without intruding upon abortion protestors' First Amendment rights to picket and express views); *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1159-60 (E.D. Pa. 1987) (crafting injunction to prevent trespass or blockading activity without infringing upon right to protest on public sidewalk near abortion clinic or to attempt to communicate with people entering or leaving clinic), *aff'd as modified*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

143. *See* New York Nat'l Org. for Women v. Terry, 732 F. Supp 388, 397 (S.D.N.Y. 1990) (permitting "sidewalk counseling" if counseling is reasonably quiet and nonthreatening); Roe v. Operation Rescue, 710 F. Supp. 577, 589-90 (E.D. Pa. 1989) (allowing and defining "sidewalk counseling" as reasonably quiet conversation of nonthreatening nature conducted by not more than two people for each person counseled and stipulating that no one is required to accept or listen to "sidewalk counseling" and may walk away without harassment), *aff'd*, 919 F.2d 857 (3d Cir. 1990).

144. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 (1972) (explaining that right to exclude others is fundamental element of private property ownership and that First Amendment does not create right to trespass by distributing bills in interior of privately owned mall); Armes v. City of Philadelphia, 706 F. Supp. 1156, 1165 n.7 (E.D. Pa. 1989) (holding that anti-abortion protestors do not have right to express views on private grounds of medical clinics); *supra* note 10 (listing cases in which injunctions were issued against abortion protestors to prevent trespass on private property of clinics that provide abortions).

145. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 895 (1982) (concluding that First Amendment would not protect conduct involving force, violence, or threats); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (stating that demonstrations which turn violent lose First Amendment protection).

146. *See supra* note 5 (listing cases in which courts have prohibited blockading of abortion clinics).

147. *See* Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection, 444 N.W.2d 683, 683-84 (N.D. 1989) (affirming permanent injunction against mock abortion clinic to prevent use of deceptive name); Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 179 (N.D.) (modifying and affirming preliminary injunction against mock abortion clinic to prevent use of deceptive name), *cert. denied*, 476 U.S. 1108 (1986); Mother & Unborn Baby Care of North Texas, Inc. v. State, 749 S.W.2d 533, 536-37 (Tex. Ct. App. 1988) (affirming injunction against mock abortion clinic for violating state deceptive trade practices statute), *cert. denied*, 109 S. Ct. 2431 (1989).

mock abortion clinic employees that rises to the level of intentional infliction of emotional distress.[148]

To resolve the competing interests of the abortion protestors and their victims, courts may issue injunctions pursuant to content neutral time, place, and manner restrictions, such as trespass laws, to prevent abortion protestors from trespassing on private property[149] and, subsequently, fine protestors who violate the injunction.[150] Furthermore, a judge may jail or fine an abortion protestor for disorderly conduct, resisting arrest, assault and battery, or other criminal offenses even though the conduct occurred during a protest because the state's interest in maintaining order or protecting the health, safety, and welfare of its citizens may override the protestor's First Amendment rights.[151]

While legislatures have enacted criminal laws for the general protection of the health, safety, and welfare of society and, thereby, have determined the extent to which society must generally tolerate a political protestor's exercise of First Amendment rights, the question remains to what extent an individual must tolerate a political protestor's exercise of First Amendment rights.[152] Abortion rights advocates and victims of abortion protestors have used both the Civil Rights Act and civil RICO in an attempt to establish this balance of rights between individuals.[153]

Although later vacated by the Eighth Circuit en banc,[154] the panel opinion in *Lewis v. Pearson*[155] illustrates that the applicability of the Civil Rights Act to balance the competing interests of individuals depends upon the underlying constitutional rights asserted through the statute.[156] While

148. *See* Boes v. Deschu, 768 S.W.2d 205, 207-09 (Mo. Ct. App. 1989) (finding that First Amendment would not protect speech of mock abortion clinic employees that rose to level of intentional infliction of emotional distress).

149. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 (1972) (holding that First Amendment does not create right to trespass on interior of privately owned mall for purpose of distributing handbills); *but cf.* Brion, *The Shopping Mall: Signs of Power*, in LAW AND SEMIOTICS 65, 65-108 (Kevelson Vol. 1, 1987) (discussing series of property versus free expression shopping mall cases and evaluating alternative ways to balance these competing rights independent of strict public versus private property distinctions).

150. *See supra* note 6 (listing cases in which courts have issued injunction to prohibit abortion protestors from picketing on abortion clinic's property and subsequently fined protestors for violating injunction).

151. *See supra* notes 112-51 and accompanying text (discussing First Amendment protected and unprotected conduct and court's use of balancing test to weigh First Amendment rights against government interest).

152. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (recognizing that government may prohibit intrusion of unwelcome views into privacy of home, but may not ban same unwelcome views from public dialogue which may have effect of subjecting unwilling listeners to objectionable speech).

153. *See supra* notes 10-11 and accompanying text (listing cases in which courts allowed prosecution of abortion protestors under civil RICO or the Civil Rights Act).

154. Lewis v. Pearson Foundation, Inc., 917 F.2d 1077 (8th Cir. 1990).

155. 908 F.2d 318, *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990).

156. *See* Lewis v. Pearson Foundation, Inc., 908 F.2d 318, 321 (assessing applicability of civil rights conspiracy statute by evaluating nature of privacy right Lewis asserted), *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990).

the three member panel of the United States Court of Appeals for the Eighth Circuit (panel) held that the alleged conspiracy to prevent abortion was actionable under the civil rights conspiracy statute without a showing of state action,[157] an equally divided Eighth Circuit sitting en banc voted to dismiss the complaint without discussing the state action issue.[158]

The complaint arose when Warna Lewis sued the AAA Problem Pregnancy Center (AAA Center), an anti-abortion counseling center or mock abortion clinic, under 42 U.S.C. section 1985(3),[159] alleging that the operators of the AAA Center conspired to deprive her of the equal protection of the laws and of her equal privileges and immunities under the laws.[160] Lewis claimed that the operators violated her constitutionally granted rights of privacy, autonomy, personhood, and liberty in exercising a choice whether to continue or discontinue a pregnancy.[161] Lewis claimed that an invidiously discriminatory animus toward a class of women who had decided to have an abortion motivated the operators' conspiracy to deny Lewis her constitutional rights.[162] Lewis asserted that her injuries included mental distress, torment, anguish, morbid recall, sadness, embarrassment, humiliation, and anger.[163] Lewis's lawsuit against the AAA Center sought actual damages of $150,000 and punitive damages of $10 million.[164]

Lewis' complaint alleged that Lewis had decided to have an abortion.[165] Lewis claimed that she looked in the Southwestern Bell Yellow Pages directory under "Abortion Information and Services" and found an advertisement for the AAA Center in St. Louis, Missouri, which she then contacted.[166] In reply to Lewis's telephone call, a staff member at the AAA Center allegedly stated that the AAA Center would "help her all [it] could," and invited Lewis to come in to take a free pregnancy test.[167]

According to Lewis' complaint, when Lewis arrived for her scheduled appointment a staff member asked Lewis to produce a urine sample for the pregnancy test and then ushered Lewis into a room where Lewis viewed a slide presentation.[168] Lewis alleged that the slide presentation depicted scenes that illustrated the abortion process and included pictures of dismembered

157. *Lewis*, 908 F.2d at 325, *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990).

158. *See* Lewis v. Pearson Foundation, Inc., 917 F.2d 1077, 1077 (8th Cir. 1990) (summarily affirming district court's dismissal).

159. 42 U.S.C. § 1985(3) (1988) Section 1985(3) defines a civil rights conspiracy as any act in furtherance of conspiracy to deprive any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the law, thereby injuring such person or property or depriving person of any right or privilege.

160. *Lewis*, 908 F.2d at 320.

161. *Id.* at 319.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

fetuses and of abortionists using crude-appearing instruments.[169] The slide show also contained intermittent family scenes.[170] Although the slide presentation distressed Lewis, Lewis still desired to have an abortion.[171] An employee of the AAA Center allegedly handed Lewis a note indicating that she had a hospital appointment to have the abortion two days later.[172] Lewis claimed that when she arrived for the appointment, she discovered that the hospital was a Roman Catholic institution whose doctors did not perform abortions.[173] She obtained an abortion elsewhere one week later.[174] One month later an employee of the AAA Center allegedly called Lewis to find out when the baby was due and to check whether "everything was alright."[175]

The United States District Court for the Eastern District of Missouri held that Lewis had failed to state a claim under section 1985(3) because the alleged actions of the operators of the AAA Center did not support the class based, invidiously discriminatory animus against which Congress intended section 1985(3) to protect.[176] The trial court based this conclusion on Lewis's own allegation that the operators and employees of the AAA Center acted out of moral-religious beliefs rather than a discriminatory animus.[177] The trial court also held that the class of plaintiffs that Lewis identified lacked a common unifying characteristic to distinguish the class from the rest of the population.[178] The trial court did not consider whether section 1985(3) required state action to assert privacy and liberty claims based upon the Fourteenth Amendment.[179] Moreover, because the trial court

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169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Lewis v. Pearson Foundation, Inc., No. 87-894 C (2), 10 (E.D. Mo. Jan. 15, 1988), *rev'd*, 908 F.2d 318, *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990).
177. *Id.* at 9-10.
178. *See id.* at 7-10. In *Lewis* the trial court relied upon Roe v. Abortion Abolition Society, 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987), to conclude that the conspiracy that Lewis alleged was not directed at a class protected by section 42 U.S.C. § 1985(3) (1988). *Id.* The plaintiffs in *Abortion Abolition Society* were two anonymous patients, two doctors who provided abortions, a clinic that provided abortion services, members of the clinic staff, and an organization that provided escort services to the clinic. *Abortion Abolition Society*, 811 F.2d at 932. The *Abortion Abolition Society* plaintiffs alleged that defendants had entered into a religiously motivated conspiracy to deny plaintiffs their rights of education, freedom of choice, privacy, and travel. *Id.* The *Roe* court refused § 1985(3) protection to the class described as "persons who do not share defendants' religious beliefs about abortion," and stated that the protected class must be defined by the characteristics of those at whom the conspiracy is aimed, not by the beliefs of the conspirators. *Id.* at 935.
179. *See id.* at 10.

The Supreme Court has construed § 1985(3) to require allegation and proof of four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person

held that Lewis had failed to state a claim, the trial court did not need to consider any potential infringement upon the First Amendment rights of the AAA Center.

On an appeal from the trial court's dismissal of the complaint, the Eighth Circuit panel considered whether a private party's alleged conspiracy to prevent an abortion was actionable under the civil rights conspiracy statute absent a showing of state action.[180] The panel also considered whether the civil rights conspiracy statute protected the class of women seeking an abortion and, thus, whether an alleged conspiracy by operators of a claimed mock abortion clinic to prevent an abortion involved class based discriminatory animus.[181]

Because section 1985(3) on its face omits any requirement of state action[182] and provides no substantive rights directly,[183] the panel focused upon the underlying constitutional rights that Lewis asserted through the statute.[184] The panel cited *Roe v. Wade*[185] for the proposition that the Fourteenth Amendment's protection of liberty through the due process clause includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life as well as the freedom of a woman to decide whether to terminate a pregnancy.[186] Concluding that no Supreme Court or appellate court decisions have limited protection of privacy rights to protection against only official conduct, the panel declined to require state action.[187]

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is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *See* Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971) (enumerating four elements required for § 1985(3) claim). In *Griffin* the Supreme Court reversed an earlier interpretation of § 1985(3) set out in Collins v. Hardyman, 341 U.S. 651 (1951), which had required proof of state action in the conspiracy in order to recover under the statute. *Griffin*, 403 U.S. at 102-03. However, the district court in *Lewis* concluded that section 1985(3) "should not be read expansively and that the intent of the statute derived from the legislative history should be considered in determining whether a conspiracy is motivated by class-based animus." *Lewis*, No. 87-894 C (2), at 7.

180. Lewis v. Pearson Foundation, Inc., 908 F.2d at 320-24.

181. *See id.* at 324-26 (finding sufficient facts alleged to show existence of class-based discriminatory animus against class of women seeking abortions).

182. *See id.* at 320-21 (*citing* Griffin v. Breckenridge, 403 U.S. 88 (1971), for proposition that § 1985(3) omits requirement of state action).

183. *See id.* at 321 (*citing* Great American Federal Savings & Loan Assn. v. Novotny, 442 U.S. 366 (1979), for proposition that § 1985(3) does not provide direct substantive rights).

184. *Lewis*, 908 F.2d at 321.

185. 410 U.S. 113 (1973); *see supra* note 104 (discussing *Roe v. Wade*).

186. Lewis v. Pearson, 908 F.2d 318 at 321-22.

187. *Id.* at 322. Even though the Eighth Circuit panel in *Lewis* concluded that no state action was necessary to apply § 1985(3), the panel alternatively decided that Lewis' complaint, by alleging that the Missouri Attorney General actively encouraged and participated in the conspiracy, adequately pleaded state action. *Id.* at 322-23. Lewis alleged that the Attorney General refused to employ the available state statutory and common law remedies to prevent the AAA Center's deceptive advertising practices. *Id.* Further, Lewis alleged that the Attorney General's pronouncement that the AAA Center's advertising did not constitute misrepresentation actively encouraged the AAA Center's conspiracy. *Id.* Moreover, Lewis alleged that the

Next, the panel found that women were a protected class for the purposes of section 1985(3) and that conspiracies directed against women inherently are invidious and repugnant to the notion of equal rights for all citizens.[188] In reaching this conclusion, the panel observed that most courts have not limited the protection of section 1985(3) to racial bias conspiracies but have extended protection to other classes involving discrimination based on religion, ideology, or the exercise of a fundamental right.[189] On the Eighth Circuit's rehearing en banc, an equally divided court voted to affirm the trial court's dismissal of the complaint without discussing the state action issue.[190]

While a lack of uniformity among courts may exist on the issue of whether section 1985(3) protects the class of women seeking abortions from abortion protestors' conspiracies to deprive such women constitutional rights,[191] the majority of courts have concluded that a gender based animus satisfies the conspiracy requirement of section 1985(3).[192] Abortion rights advocates have successfully prosecuted abortion protestors under section 1985(3) for private interference with the right to interstate travel.[193] However,

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Attorney General took these actions solely because of the highly charged controversy surrounding legalized abortion and because the Attorney General either personally concurred with the AAA Center's activities or desired not to displease the pro-life constituency. *Id.* at 322.

188. *Id.* at 325.

189. *Id.* at 324. The Eighth Circuit panel in *Lewis* recognized that the Eighth Circuit had applied § 1985(3) to protect members of a religious group from private interference in Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971), and to protect the right to vote in Indian tribal elections against interference from private conspiracies in Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). *Id.*

190. Lewis v. Pearson Foundation, Inc., 917 F.2d 1077 (8th Cir. 1990) (en banc), *vacating*, 908 F.2d 318 (8th Cir. 1990).

191. *See* National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1492-93 (E.D. Va. 1989) (concluding that conspiracy to deprive women seeking abortions of rights guaranteed by law is actionable under § 1985(3)), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Clinic, 1991 US LEXIS 1147. *But see* Roe v. Abortion Abolition Soc'y, 811 F.2d 931, 934-37 (5th Cir.) (holding that patients, doctors, and abortion clinics and staffs do not form a protected class under §1985(3)), *cert. denied*, 484 U.S. 848 (1987); National Abortion Fed. v. Operation Rescue, 721 F. Supp. 1168, 1170-72 (C.D. Ca. 1989) (same).

192. *See* Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (extending § 1985(3) to conspiracies to discriminate against persons based on sex); National Org. for Women v. Operation Rescue, 726 F. Supp. at 1492-93 (concluding that conspiracy to deprive women seeking abortions of constitutional rights is actionable under § 1985(3)); Roe v. Operation Rescue, 710 F. Supp. 577, 581 (E.D. Pa. 1989) (holding that § 1985(3) covers women seeking abortions), *aff'd*, 919 F.2d 857 (3d Cir. 1990); New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y.) (same), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); Portland Feminist Women's Health Center v. Advocates for Life, Inc., 712 F. Supp. 165, 169 (D. Or.) (holding that § 1985(3) covers women seeking abortions), *aff'd as modified*, 859 F.2d 681 (9th Cir. 1988).

193. *See National Org. for Women*, 726 F. Supp. at 1492-93 (finding that plaintiffs had established elements of section 1985(3) claim based on conspiracy to interfere with right to interstate travel); Cousins v. Terry, 721 F. Supp. 426, 429-30 (N.D.N.Y. 1989) (same); Roe v. Operation Rescue, 710 F. Supp. at 581-82 (same); *New York Nat'l Org. for Women*, 704 F. Supp. at 1259-60 (same).

as the Eighth Circuit's en banc ruling in *Lewis* illustrates, courts are reluctant to declare that section 1985(3) protects women seeking abortions from abortion protestors' private interference with the right to have an abortion.[194] While abortion rights advocates assert that the putative right to an abortion is of such a fundamental character that section 1985(3) protects the right to an abortion as against all interference, not just governmental interference,[195] one court called such a claim problematic.[196] That court cited *Webster v. Reproductive Health Services*[197] for the proposition that the law concerning a putative abortion right is in a state of flux and concluded that to venture into this "thicket" would be imprudent.[198] Resolving the question of whether section 1985(3) protects women from abortion protestors' private interference with the right to have an abortion may too closely resemble the ongoing legal and popular debate regarding the extent to which the Constitution protects the right to have an abortion, an issue the Supreme Court has yet to resolve.[199]

While the Civil Rights Act may or may not apply to conflicts of constitutional rights between individuals,[200] courts still must resolve the conflict of rights between individuals when a constitutional right of the victim is not at stake. To balance the First Amendment rights of the political protestor and the rights of their victims in civil cases, courts not only must articulate applicable constitutional principles but also must review the evidence to ensure that the court properly applies those principles.[201] Because the First Amendment protects freedom of expression from both direct attack as well as from more subtle interference,[202] the First Amendment imposes

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194. *See* Lewis v. Pearson Foundation, Inc., 917 F.2d 1077 (8th Cir. 1990) (dismissing § 1985(3) claim and refusing to adopt position of majority of courts that § 1985(3) protects women seeking abortions); *National Org. for Women* 726 F. Supp. at 1492-94 (allowing § 1985(3) claim for interference with right to interstate travel but not as to interference with right to abortion).

195. *See* National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1494 (E.D. Va. 1989) (evaluating abortion rights advocates' claim that § 1985(3) protects right to abortion from private as well as governmental interference), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Clinic, 1991 US LEXIS.

196. *See id.* (calling claim that § 1985(3) protects right to abortion from private interference problematic).

197. 109 S. Ct. 3040 (1989); *see supra* note 105 (discussing *Webster* decision).

198. *National Org. for Women*, 726 F. Supp. at 1494.

199. *See id.* (implicitly suggesting that because *Webster* raised doubts as to status of constitutional right to abortion, evaluating civil rights conspiracy claim based on private interference with right to abortion would be imprudent); *supra* note 105 (discussing status of abortion right after *Webster*).

200. *See* Lewis v. Pearson Foundation, Inc., 908 F.2d 318, 320-21 (stating that Civil Rights Act does not require state action on its face), *vacated on reh'g en banc*, 917 F.2d 1077 (8th Cir. 1990).

201. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915-16 n.50 (1981) (finding that First Amendment requires court to scrutinize evidence to insure that court properly applies First Amendment principles).

202. *See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544 (1963)

a special obligation on courts to examine critically the basis on which a plaintiff seeks to impose liability.[203] First, a court must distinguish First Amendment protected conduct from unprotected conduct to insure that the plaintiff seeks to impose liability only for conduct that the First Amendment does not protect and insist on use of the most precisely tailored causes of action.[204] The court's role in protecting First Amendment rights focuses the court's attention on the political protestor's means and not the political protestor's end[205] and thereby protects robust debate[206] from government interference and from the chilling effect of imposing civil liability unlimited by First Amendment considerations.[207]

Asserting that only nonpeaceful activity, which falls outside the parameters of protected conduct, may form the basis of a RICO claim for extortion, the United States District Court for the Eastern District of Pennsylvania in *Northeast Women's Center, Inc. v. McMonagle*,[208] on a motion for a directed verdict, distinguished the First Amendment protected conduct from the unprotected conduct and insured that plaintiffs presented enough evidence to allow a jury to impose liability under the RICO cause of action only upon unprotected conduct.[209] On appeal, the United States Court of Appeals for the Third Circuit concluded that, at the end of the trial, the district court also adequately instructed the jury with respect to the scope of the protections of the First Amendment.[210] In *McMonagle* the

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(finding contempt conviction for refusal to divulge contents of membership records to legislature to be subtle interference with First Amendment rights); Bates v. Little Rock, 361 U.S. 516, 523 (1960) (reversing conviction of NAACP members who refused to furnish city official with membership lists because convictions constituted subtle attack on First Amendment rights).

203. *See Claiborne Hardware Co.*, 458 U.S. at 915 (stating that First Amendment requires courts to examine basis on which plaintiff seeks to impose liability).

204. *See id.* at 915-16 (1981) (holding that First Amendment protected conduct of members of NAACP and prevented imposition of civil liability); Mayton, *supra* note 136, at 266 (discussing court's role in adequately protecting First Amendment rights).

205. *See supra* notes 96-103 and accompanying text (discussing distinction between means and end of civil disobedient).

206. *See* New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (holding that First Amendment provides for uninhibited, robust, and wide open debate on public issues).

207. *See supra* notes 132-38 and accompanying text (discussing doctrine of chilling effect on First Amendment rights).

208. 670 F. Supp. 1300, 1308 (E.D. Pa. 1987).

209. *Id.* at 1306-10.

210. *McMonagle*, 868 F.2d 1342, 1348-49 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989). Several district court rulings in the *McMonagle* case preceded the Third Circuit's ultimate affirmation of the application of civil RICO to the abortion protestors. On a motion to dismiss, the district court in *McMonagle* found that the Center had sufficiently pled facts for the civil RICO claim to withstand the motion to dismiss. *McMonagle*, 624 F. Supp. 736, 738 (E.D. Pa. 1985). After the Center had presented its case at trial, the district court considered the abortion protestors' motion for a directed verdict on the civil RICO claim. *McMonagle*, 670 F. Supp. 1300, 1306-10 (E.D. Pa. 1987). The district court concluded that the Center had alleged sufficient evidence of abortion protestors' conduct that the First Amendment would not protect to support the elements of civil RICO claim. *Id.* at 1310. Following the jury verdict finding the abortion protestors liable under civil RICO, the district court ordered an

Northeast Women's Center (the Center), which provides gynecological services including pregnancy testing and abortions, sued abortion protestors for causing property and business damage to the Center through a pattern of robbery and extortion, crimes which RICO[211] includes in its definition of racketeering activities.[212]

According to the Center's complaint, the abortion protestors created an atmosphere of fear among the patients and employees to induce the Center to part with its intangible property interest in continuing to provide abortions.[213] Further, the Center claimed that through an atmosphere of fear, the abortion protestors induced employees to part with their property interest in continued employment at the Center and induced the patients to part with their property interest in entering into a contractual relationship with the Center.[214] Ultimately, the Third Circuit in *McMonagle* considered whether the abortion protestors could be liable under RICO for their intimidation and harassment of the Center, which resulted in destruction of the Center's property, and if so, whether the court should issue an injunction and award triple damages and attorneys fees pursuant to civil RICO.[215]

The defendants in *McMonagle* vigorously opposed abortion by repeatedly engaging in activities at the Center to protest the Center's abortion services.[216] The Third Circuit found that the Center presented evidence which showed that the abortion protestors unlawfully entered the Center on four occasions.[217] On two of those occasions, the protestors stormed the Center, knocked down Center employees who tried to prevent protestors' entry, blocked access to the clinic rooms, and damaged some of the Center's medical equipment.[218] On the other two occasions, the protestors conducted

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injunction against trespass and assessed damages. *McMonagle*, 665 F. Supp. 1147, 1163 (E.D. Pa. 1987). On appeal the Third Circuit upheld the application of civil RICO despite the abortion protestors' First Amendment arguments, finding that the district court had given careful and accurate instructions to the jury. *McMonagle*, 868 F.2d 1342, 1348-49 (3d Cir. 1989). The Third Circuit also rejected the availability of the justification defense for the abortion protestors. *Id.* at 1348-57. Further, the Third Circuit did allow expanded injunctive relief pursuant to the successful RICO claim. *Id.* at 1353-56.

211. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1988).

212. *McMonagle*, 624 F. Supp. at 738. The district court in *McMonagle* stated that a defendant may be held liable under RICO for engaging through an enterprise in a "pattern of racketeering activity," as defined in 18 U.S.C. § 1962(c) (1988). *Id.* The court further explained that racketeering activity, as defined in 18 U.S.C. § 1961 (1988), includes robbery and extortion. *Id.*

213. *Id.* at 738-41.

214. *Id.*

215. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348-50. 1353-57 (3d Cir.) (discussing application of RICO, scope of injunction issued, and availability of punitive damages), *cert. denied*, 110 S. Ct. 261 (1989), *later proceeding*, 889 F.2d 466 (3d Cir. 1989) (allowing attorney's fees pursuant to successful civil RICO claim).

216. *See McMonagle*, 868 F.2d at 1345 (reviewing facts and procedural history of *McMonagle* case).

217. *Id.* at 1345-46.

218. *Id.*

sit-down protests in the Center's waiting room, castigated patients, and ignored repeated requests to leave the building.[219] During one of these demonstrations, one protestor stated, "We're going to shut this place down."[220] Other protestors reportedly blocked the doors to the Center.[221]

The Third Circuit found that the Center also presented testimony which revealed that on these and other occasions the protestors were observed taking photographs of patients, chanting through bullhorns, blocking building entrances, and pounding on the windows of employees' cars.[222] Videotape evidence revealed demonstrators pushing, shoving, and tugging on patients as the patients attempted to approach the Center, knocking over and crossing police barricades, and preventing cars from entering the Center's parking lot.[223] A protestor is recorded stating, "I bet you ten to one this place doesn't last six months."[224] Another added, "This place is going to be shut down."[225] One of the Center's doctors testified that the patients and employees within the Center could hear the sound of chanting, amplified by bullhorns, even within the Center's operating room.[226] Another doctor testified that this noise put patients "under considerably greater stress," especially when going into or coming out of general anesthesia.[227]

Ultimately, the jury found the abortion protestors liable under RICO and awarded compensatory damages, which the district court tripled pursuant to provisions of civil RICO.[228] On appeal to the Third Circuit, the abortion protestors challenged the application of civil RICO arguing that because the protestors had acted in response to their political beliefs, civil RICO should be inapplicable.[229] The Center argued, as it did throughout the trial, that it was not challenging the abortion protestors' right to make public the protestor's opposition to abortion, but that the activities of the abortion protestors went beyond the constitutional right of free speech.[230] The Third Circuit upheld the RICO conviction, stating that "[d]efendants' description of their conduct as 'civil disobedience' does not thereby immunize [the defendants' conduct] from statutes proscribing the very acts the jury found [d]efendants committed."[231]

The Third Circuit admitted that it would have grave concerns were these or any other defendants held liable under civil RICO for engaging in

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219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1150 (E.D. Pa. 1987), *aff'd as modified*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).
229. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348-50 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).
230. *Id.* at 1345.
231. *Id.* at 1348.

the expression of dissenting political opinions in a manner protected under the First Amendment.[232] However, the Third Circuit found that the district court carefully instructed the jury with respect to the scope of the protections of the First Amendment.[233] The district court instructed the jury that the First Amendment guaranteed the defendants the right to express their views, to attempt to persuade the Center to stop performing abortions, and to persuade the Center's employees to stop working there.[234] The Third Circuit further noted that the district court instructed the jury that the First Amendment protected the defendants right to persuade the Center's patients not to have abortions at the Center, even if the protests may have been coercive or offensive.[235] However, the district court stated that the First Amendment did not offer a sanctuary for violators.[236] The Third Circuit reasoned that the jury's award of damages under RICO established that the jury found that the defendant abortion protestors' actions went beyond mere dissent and publication of their political views.[237] Finding no First Amendment problems, the court concluded that RICO was applicable to the actions of the abortion protestors.[238] The court asserted that a court is not free to read additional limits into RICO once a plaintiff has established the elements required for a finding of liability under the statute's explicit provisions.[239]

Although a court may not be free to read additional limits into RICO, the *McMonagle* district court insured that the jury could base a finding of liability under RICO only upon elements of unprotected conduct[240] then allowed the jury to perform the ultimate balancing of rights.[241] The district court concluded that a jury could find that the abortion protestors, through unauthorized entries into the Center, placed Center employees and patients in fear, thereby extorting the intangible property interests of the Center, the Center's employees, and the Center's patients.[242] Furthermore, the district court found that the Center presented evidence which allowed the jury to

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232. *Id.*
233. *Id.* at 1348-49.
234. *Id.* at 1349.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 1348.
239. *Id.*
240. *See* Northeast Women's Center, Inc. v. McMonagle, 670 F. Supp. 1300, 1306-10 (comparing evidence to RICO elements to insure that only unprotected conduct formed basis of RICO claim), *later proceeding*, 665 F. Supp. 1147, 1163 (E.D. Pa. 1987) (ordering injunction of trespass and assessing damages pursuant to jury's finding of liability under civil RICO), *aff'd as modified*, 868 F.2d 1342, 1348-57 (3d Cir.) (upholding application of civil RICO despite abortion protestors' First Amendment arguments, rejecting availability of justification defense for abortion protestors, and finding that court may expand injunctive relief pursuant to successful RICO claim), *cert. denied*, 110 S. Ct. 261 (1989).
241. *See* Northeast Women's Center, Inc. v. McMonagle, 670 F. Supp. at 1306-10 (insuring RICO claim relied upon only unprotected conduct and allowing claim to go to jury).
242. *Id.* at 1306-10.

conclude that the abortion protestors, through the use of physical force, removed property from the Center's offices, thereby committing robbery.[243] Because the jury found the protestors liable under civil RICO, the Third Circuit allowed the civil RICO remedies of triple damages and attorneys fees.[244] Additionally, the Third Circuit determined that, pursuant to the successful civil RICO claim, defendant abortion protestors could be permanently enjoined from entering the Center's premises, blocking its entrances, or inciting any of these activities.[245]

Despite the Third Circuit's claim that the *McMonagle* trial judge was the "epitome" of a careful and restrained jurist who evaluated with impartiality the abortion protestors' claims and First Amendment rights,[246] critics of the application of RICO to abortion protestors contest that the use of RICO chills First Amendment rights.[247] The mere threat of treble damages and of being labeled a racketeer can intimidate defendants into settlement in nonmeritorious suits.[248] The use of RICO against advocacy organizations has a chilling effect on those organizations because individuals may refuse to join the organizations out of fear of being sued under RICO, at the same time chilling the First Amendment rights of present members.[249] Moreover, civil RICO imposes severe penalties that outweigh the nature of the offenses.[250] The opponents of the use of civil RICO against political protestors claim that civil RICO's penal provisions go beyond punishing the particular unlawful means and effectively chill legitimate political protests.[251] However, supporters of the use of civil RICO against abortion protestors

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243. *Id.* at 1308.

244. *See* Northeast Women's Center, Inc. v. McMonagle, 889 F.2d 466, 477 (3d Cir. 1989) (affirming award of attorneys fees and costs).

245. *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1353-56 (3d Cir.) (permitting expanded injunction pursuant to civil RICO claim), *cert. denied*, 110 S. Ct. 261 (1989).

246. Northeast Women's Center, Inc. v. McMonagle, 889 F.2d 466, 477 (3d Cir. 1989).

247. *See* Califa, *supra* note 30, at 833-36 (arguing that using RICO in ideological disputes chills First Amendment rights); Melley, *supra* note 30, at 312 (arguing that Congress must reform RICO to prevent misapplication and infringement upon First Amendment rights); Note, *Political Realm*, *supra* note 30, at 225 (claiming that application of RICO in political realm chills First Amendment rights).

248. Califa, *supra* note 30, at 834; *see also supra* notes 135-37 and accompanying text (discussing how magnitude of harm may chill First Amendment rights).

249. Califa, *supra* note 30, at 834; *see also* Caba, *3d Circuit RICO Ruling Cheers Pro-Choicers*, NAT'L L.J., March 20, 1989, at 28 (quoting attorney for Center in *McMonagle* who claimed that RICO provides first effective way to deal with ongoing, day-in and day-out harassment of clients and staff at Center and that Center chose to "raise the stakes" through use of RICO because RICO allows award of legal expenses, restitution, and punitive damages).

250. *See* Note, *Stretching of Civil RICO*, *supra* note 30, at 312 (arguing that RICO has become tool by which to federalize common law actions and thereby impose very harsh penalties); *Abortion; Rescue Bails Out*, TIME, Feb. 12, 1990, at 29 (reporting on Randall Terry's release from Georgia prison and subsequent dissolution of Operation Rescue allegedly due to $50,000 lawsuit filed by National Organization for Women).

251. *See* Note, *Political Realm*, *supra* note 30, at 224-25 (arguing that application of RICO against political protestors chills First Amendment rights).

assert that civil RICO provides restitution to victims of organized crime and buttresses traditional law enforcement methods that have not been sufficient to halt organized criminality.[252] Two commentators claims that the use of RICO against abortion protestors reflects a civil rights application of RICO that is appropriate when the protestors are private persons.[253]

CONCLUSION

According to one commentator, civil disobedience is a form of communication within the theory of the First Amendment, although the extent to which the First Amendment shields the disobedient's means may depend upon whether the disobedient violated a law where a third person is injured or one where merely the state must tolerate the exercise of First Amendment rights.[254] Through criminal laws, legislatures balance the First Amendment rights of civilly disobedient protestors and the rights of their victims[255] while courts have often required the state to adjust itself to the citizen's conscience and First Amendment rights.[256] The criminal laws, along with traditional First Amendment doctrine define the extent to which society must tolerate the civilly disobedient abortion protestor's exercise of First Amendment rights.[257] The extent to which an individual must tolerate an abortion protestor's exercise of First Amendment rights remains to be determined on a case by case basis. As *Lewis v. Pearson* illustrates, the Civil Rights Act helps to strike that balance between individuals by focusing upon the underlying constitutional right asserted by the victim.[258] In other civil contexts, the nexus between civil disobedience and First Amendment rights provides the guidance for courts to balance the civilly disobedient abortion protestors' claims with the rights of individual victims. By insuring that the cause of action seeks to impose liability only upon conduct that the First Amendment does not protect, courts may balance the First Amendment

252. *See* Note, Northeast Women's Center, Inc. v. McMonagle: *A Message to Political Activists*, 23 AKRON L. REV. 251, 267 (1989) (arguing that civil RICO provides restitution to victims of organized crime where traditional law enforcement methods have not been sufficient); Henn & Del Monaco, *supra* note 8, at 267-68, 276-77 (claiming that state law remedies against abortion protestors are weak or ineffective and that RICO provides effective way to stop multiple criminal acts of abortion protestors).

253. Henn & Del Monaco, *supra* note 8, at 276-77.

254. Freeman, *supra* note 92, at 232, 245.

255. *See supra* notes 121-31 and accompanying text (discussing balance of government interest in protecting health, safety, and welfare against First Amendment rights).

256. *See* West Virginia v. Barnette, 319 U.S. 624, 630 (1943 (emphasizing that sole conflict is between authority and rights of individual); *supra* notes 112-31 (discussing way courts will balance First Amendment rights against state interests); Freeman, *supra* note 92, at 245 (noting courts' distinction of situation where third person is injured and where state is incommoded).

257. *See supra* notes 139-51 (discussing extent to which society must tolerate abortion protestors' exercise of First Amendment rights).

258. *See supra* notes 154-90 and accompanying text (discussing applicability of Civil Rights Act in *Lewis*).

rights of one individual with the rights a plaintiff may assert.[259] While some criticize the use of civil RICO[260] against abortion protestors, claiming that potential RICO liability chills First Amendment rights, the *McMonagle* court insured that only unprotected conduct established a prima facie RICO claim and allowed the jury to perform the ultimate balancing of rights.[261] The *McMonagle* courts' method of analysis, despite agreement or disagreement with the jury's eventual verdict, demonstrates how a court may adequately balance the conflicting First Amendment rights of civilly disobedient abortion protestors with the rights of their individual victims.

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259. *See supra* notes 208-45 and accompanying text (discussing First Amendment analysis and application of civil RICO to abortion protestors in *McMonagle*).

260. *See supra* notes 246-51 and accompanying text (discussing criticism of application of civil RICO in political realm).

261. *See supra* notes 232-43 (discussing *McMonagle* court's evaluation of First Amendment rights).