DEFINING THE SCOPE OF EXTORTION LIABILITY AFTER *SCHEIDLER V. NOW*

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INTRODUCTION

The Hobbs Act, codified at 18 U.S.C. § 1951, prohibits actual or attempted extortion affecting interstate or foreign commerce.[1] As used in this section, Congress defines the term "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[2] Although the Hobbs Act was enacted to combat racketeering in labor-management disputes,[3] the statute is also frequently used in connection with cases involving public corruption, commercial disputes, and corruption directed at members of labor unions.[4]

With the expansion of the types of subject matter litigated under the Hobbs Act came a controversial abortion case filed in 1986 by the National Organization for Women (NOW) against anti-abortion protesters led by Joseph Scheidler and the Pro-Life Action Network (PLAN).[5] The theory of NOW's case was that PLAN and Scheidler had committed extortion by staging violent protests outside of abortion clinics, causing their doors to shutter.[6] The Supreme Court in *Scheidler v. National Organization for Women* (*Scheidler II*)[7] held that the abortion protesters were not liable for extortion because they

1. 18 U.S.C. § 1951 (2006).

2. *Id.* § 1951(b)(2).

3. In United States v. Teamsters Local 807, 315 U.S. 521, 535 (1942), the Supreme Court held that union activities, including using threats of force to obtain payments from out-of-town trucking companies in return for permission for their trucks to enter the city, were not illegal under the Anti-Racketeering Act, because that legislation exempted wage payments to employees. In order to remove this loophole in the law, the Hobbs Act eliminated the wage exception at issue. According to one congressman, the Hobbs Act was "made necessary by the amazing [Teamsters Union 807] decision [which] practically nullified the anti-racketeering bill of 1934." 91 CONG. REC. 11,900 (1946) (statement of Rep. Hancock).

4. *See* United States Attorneys' Manual, Title 9, Criminal Resource Manual Chapter 9-131.000, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/131mcrm.htm.

5. *See* NOW v. Scheidler, 765 F. Supp. 937 (N.D. Ill. 1991); *see also* NOW v. Scheidler (*Scheidler I*), 510 U.S. 249 (1994), NOW v. Scheidler, 968 F.2d 612 (7th Cir. 1992).

6. *See* Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 397 (2003).

7. This case reached the Supreme Court for the first time in 1994, when the Court held that no economic motive was necessary to violate RICO. *See Scheidler I*, 510 U.S. at 262. It was heard for the third and final time in 2006, when the Court decided that the Hobbs Act did not cover violence unrelated to robbery or extortion. *See* Scheidler v. NOW (*Scheidler III*), 547 U.S. 9, 13 (2006).

did not intend to obtain or acquire the clinic's property right that they interfered with, i.e., the right to perform abortions.[8]

This holding is problematic in light of prior Hobbs Act decisions. Many criminal statutes impose a requirement that the defendant intended to commit the culpable act at issue. Before *Scheidler II*, in order to "obtain" property under the Hobbs Act, the requisite intent was simply the intent to deprive the victim of his property.[9] After *Scheidler II*, however, the Hobbs Act "intent to obtain" clause requires both that the defendant intended to deprive the victim of his property, as well as that the defendant intended to *acquire* that same property right.[10]

This Note explores the way in which the intent requirement of the Hobbs Act has changed as a result of *Scheidler II* in order to present a litigation strategy for future plaintiffs seeking relief under the statute. This strategy is important in order to maintain Hobbs Act extortion as a powerful cause of action. As previously mentioned, the general purpose of the Hobbs Act at the time of its enactment was to combat racketeering in labor-management disputes. It has also been frequently used in connection with cases involving public corruption, corruption of labor union members, and commercial disputes. As a result, the Hobbs Act is a crucial litigation tool that prosecutors can utilize to deter corruption and violence in private commercial, public official, and labor union settings. Hobbs Act suits also provide significant monetary relief to businesses and individuals affected by corruption and violence. The *Scheidler II* decision therefore raises a concern that the dual Hobbs Act goals of deterrence and relief will be limited as the intent requirement is narrowed.

The public policy ramifications for future plaintiffs following *Scheidler II* are substantial. As a preliminary matter, the narrowed intent requirement of the Hobbs Act may foreclose remedies for many plaintiffs under the Hobbs Act and under the RICO statute. This is problematic from a policy standpoint because defendants who use violence to deprive victims of property without seeking to exercise that property will remain undeterred by the now-hollowed threat of Hobbs

8. *Scheidler II*, 537 U.S. at 394.

9. *See, e.g.*, United States v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977) ("It is well settled that, under the Hobbs Act, it is not necessary to prove that the extortionist himself, either directly or indirectly, received the fruits of his extortion or any benefit therefrom. The gravamen of the offense is loss to the victim . . . We hold, therefore, that for purposes of the "obtaining of property" requirement, the offense of attempted extortion is complete when the defendant has attempted to induce his victim to part with property.").

10. *See Scheidler II*, 537 U.S. at 405.

Act penalties. Plaintiff-victims will have also lost an important avenue of redress. Further, the qualified intent element of the statute now requires that courts look into the underlying motivations of the violent offender, despite the fact that it may not be possible to subject these hidden or multi-faceted motivations to thorough or accurate discovery. This difficulty invites a level of judicial activism and guesswork that removes necessary objectivity from the process of statutory interpretation. Such judicial subjectivity presents problems of consistency and notice, making it impossible for future plaintiffs to evaluate the merit of their claims and potentially resulting in frivolous and costly litigation. Finally, the Supreme Court's interpretation of Congress's language also limits the Hobbs Act in a manner unintended by the elected representatives who crafted the wording of this legislation broadly.

By analyzing *Scheidler II* precedent and progeny, this Note will answer the query of what the scope of extortion liability is under current law. Although one could argue that *Scheidler II* clarifies prior confusing interpretations of the intent element, in reality, the decision may simply be inexplicable by any theory other than that the controversial topic of abortion produces a body of precedent isolated from other areas of the law. If the decision is not truly isolated by its subject matter, however, the reality is that *Scheidler II* implements a new requirement in order to prove extortion. This Note will argue that the "intent to obtain" element arising out of *Scheidler II* does not automatically foreclose plaintiffs' claims when the property right at issue is intangible, or even when one of the property rights is the right to perform or procure an abortion. Rather, this Note presents a litigation strategy going forward for plaintiffs who, in order to succeed, must align the definition of the right that they have been deprived of with the right that the defendant has sought to gain.

The Introduction of this Note introduced extortion under the Hobbs Act, *Scheidler II* and its possible interpretations, and the argument that plaintiffs in extortion actions must define the right they have been deprived of synonymously with the right that the defendant has intended to acquire. Part I will explore the scope of extortion liability prior to *Scheidler II* as background. Part II will explain the *Scheidler II* decision. Part III will illustrate the changes that *Scheidler II* could be interpreted as making, but will show why these changes are not reflective of the actual state of current law. Part IV will serve as a litigation guide for future plaintiffs, in order to avoid foreclosure of their extortion claims. Finally, Part V will provide criticisms and policy ramifications of *Scheidler II.*

I.
BACKGROUND: SCOPE OF PROPERTY RIGHTS CAPABLE OF EXTORTION BEFORE *SCHEIDLER II*

Scheidler II raises the following issue, which this Note attempts to reconcile: How can extortion require the intent to attain something in the victim's possession, but also allow that attainable object to be intangible? Interpreting the Hobbs Act, the *Scheidler II* Court found that the "familiar meaning of the word 'obtain'—to gain possession of—should be preferred to the vague and obscure 'to attain regulation of the fate of.'"[11] This proves problematic, given that the Court does not overturn the oft-reaffirmed rule that intangible rights can be obtainable property for the purposes of the Hobbs Act.[12] At the same time, only depriving plaintiffs of their property cannot be enough to constitute extortion.[13] It is therefore useful to explore the intangible rights encompassed by the "obtainable property" element prior to *Scheidler II*. An analysis of what "obtainable property" includes will help to explore what it means to gain possession of obtainable property. The Court must be imposing a requirement that "gaining possession" necessarily includes the intent to acquire a particular noncontroversial right, such as the right to do business.

A. Extorting an Intangible Right: The Tropiano *Problem*

Scheidler II presents the following conundrum, requiring an analysis of whether the property right that the defendant seeks to obtain must be tangible: the *Scheidler II* Court found that the defendants had not obtained property as required under the Hobbs Act, but did not specify what the "obtaining" element requires. This left the scope of extortion liability undefined. The Court's hedging becomes more problematic in light of the fact that the Court claimed that its decision would not reach *United States v. Tropiano*,[14] a lower court decision cited by the dissent.

The plaintiff in *Tropiano* owned a waste removal business and surrendered his right to solicit customers in Milford, Connecticut when he was threatened by defendants who were also engaged in

11. *Id.* at 404 n.8.

12. *Id.* at 402 n.6.

13. *Id.* at 405 ("To conclude that [acts of interference and disruption without acquiring any property] constitute extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.").

14. 418 F.2d 1069 (2d Cir. 1969).

waste removal.[15] The Second Circuit concluded that the intangible right to solicit refuse collection accounts constituted property under the Hobbs Act definition.[16] This opinion was apparently not reached by the *Scheidler II* Court.[17] *Tropiano* also found that Hobbs Act decisions do not limit the concept of property to physical or tangible property, but also include, in a broad sense, any valuable right considered as a source or element of wealth.[18]

There is "no dispute" that by ultimately "shutting down" the plaintiffs' abortion clinic, the defendants in *Scheidler II* interfered with, disrupted, and in some instances, completely deprived the plaintiffs of their ability to exercise their property rights.[19] How is the abortion supporters' right to do business materially different from the right to solicit refuse collection accounts in *Tropiano*? Is the Court being intellectually honest in refusing to acknowledge that the facts in *Scheidler II* reach an analysis of *Tropiano*?

These questions cannot be answered without an analysis of the Second Circuit's interpretation of the "obtain" requirement in *United States v. Tropiano*. This analysis is particularly useful because *Tropiano* remains good law under *Scheidler II*,[20] and thus is an informative benchmark for guiding future litigation. The Second Circuit held that threats of physical violence to persuade the owners of a competing

15. *Id.* at 1076.

16. *Id.* at 1075–76.

17. The Court declared that "we need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets . . . accordingly, the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as United States v. Tropiano, 418 F.2d 1069, 1076 (1969), in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts 'constituted property within the Hobbs Act definition.'" *Scheidler II*, 537 U.S. at 402 n.6.

18. *Id.* at 414 (Stevens, J., dissenting) (quoting *Tropiano*, 418 F.2d at 1075–76); *see also* Bianchi v. United States, 219 F.2d 182, 189 (8th Cir. 1955) (finding that the threat of a prolonged illegal strike would create more fear because of potential economic loss to the victim than the threat of destruction of a few boards or tools, and thus defining property capable of extortion broadly as "the exclusive right to possess, enjoy, and dispose of, a thing . . . any valuable right or interest considered primarily as a source or element of wealth").

19. *Scheidler II*, 537 U.S. at 404–05.

20. *See, e.g.*, United States v. Gotti, 459 F.3d 296, 323 (2d Cir. 2006) ("In construing the scope of the Scheidler II holding, we are guided by the majority's explicit statement that Scheidler II did not even reach, much less reject, our holding in Tropiano. Indeed, we believe that the appropriate interpretation of Scheidler II must be one that co-exists with Tropiano, both as to the 'property' and 'obtaining' prongs [of the Hobbs Act]. Thus . . . we easily conclude that Scheidler II did not overturn Tropiano's broad interpretation of the Hobbs Act's reference to 'property,' nor otherwise suggest that only tangible property rights can be extorted under the Hobbs Act.").

trash removal company to abstain from soliciting customers in certain areas was a violation of the Hobbs Act.[21] This finding was derived from legislative history and numerous decisions under the Hobbs Act, all of which interpreted its language broadly, manifesting "a purpose to use all of the constitutional power Congress has to punish interference with interstate commerce by extortion."[22] The commonly-asserted intangible property right at issue in *Tropiano* is the right to solicit business, which again has been defined expansively as "any valuable right considered as a source or element of wealth."[23] The *Tropiano* court emphasized that the right to pursue a lawful business, including the solicitation of customers, is a property right within the Fifth and Fourteenth Amendments, and is therefore also a property right under the Hobbs Act.[24]

If *Tropiano* remains good law, and *Scheidler II* implies that it does,[25] then the resulting conclusion is that the right to solicit business, an intangible property right, can be obtained under the statutory definition. As will be analyzed in Part II, *Scheidler II* adds that the Hobbs Act's "obtain" element requires that the defendant intend to acquire the property right that he seeks from his victim. Because the *Scheidler II* Court defined the lost property right as the right to perform or procure abortions, it concluded that the defendants never sought to acquire that right.[26] The question of whether this was an avoidable result will be explored in Parts III, IV, and V. Before tack-

21. *Scheidler II*, 537 U.S. at 413 (Stevens, J., dissenting) (citing *Tropiano*, 418 F.2d at 1075–76).

22. *Id.* (Stevens, J., dissenting) (quoting *Tropiano*, 418 F.2d at 1075–76).

23. Rodonich v. House Wreckers Union, Local 95 of Laborers' Int'l Union, 627 F. Supp. 176, 178–79 (S.D.N.Y. 1985) (quoting *Tropiano*, 418 F.2d at 1075 (asserting the right to solicit business is a property right)); *see, e.g.*, United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978); United States v. Nadaline, 471 F.2d 340, 344 (5th Cir. 1973); *Bianchi*, 219 F.2d at 189; United States v. Stofsky, 409 F. Supp. 609, 615 (S.D.N.Y. 1973).

24. *Scheidler II*, 537 U.S. at 414 (Stevens, J., dissenting) (quoting *Tropiano*, 418 F.2d at 1076) ("'The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution. Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928); cf., Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921) . . . Caron's right to solicit accounts in Milford, Connecticut constituted property within the Hobbs Act definition.' *Tropiano*, 415 F.2d at 1075–76 (some citations omitted).").

25. *See id.* at 402 n.6 ("Accordingly, the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as United States v. Tropiano, 418 F.2d 1069, 1076 (1969), in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts 'constituted property within the Hobbs Act definition.'").

26. *Id.* at 400–01.

ling that issue, however, it is first useful to understand what other types of intangible property rights were "obtainable" before *Scheidler II* in order to determine whether those rights are within the current scope of extortion liability.

B. Extortion Does Not Require a Conferred Benefit

The Hobbs Act does not require that a benefit be conferred on the alleged extortionist. Physical possession of the property at issue by the extortionist has never been a necessary element of Hobbs Act extortion, neither before nor after *Scheidler II*. This rule originates with the case *United States v. Frazier*.[27] The defendant in *Frazier* proposed a scheme to a man named James Clayton to obtain money from a St. Louis Bank through its president, whereby Clayton would chain what appeared to be an explosive belt to the president, making removal of the belt contingent upon payment of a substantial sum of money.[28] Clayton contacted the FBI, and assisted the bureau in feigning the defendant's plot.[29] The court in *Frazier* concluded that, contrary to what the defendant argued, the reduction of extorted property to actual, physical possession by the defendant was not necessary because "the gravamen of the offense [was] loss to the victim."[30] Further, *Frazier* held that, for "purposes of the 'obtaining of property' requirement, the offense of attempted extortion is complete when the defendant has attempted to induce his victim to part with property."[31]

C. Extorting the Union Right to Protest before Scheidler II

Statutorily protected union rights are also defined as property capable of extortion under the Hobbs Act.[32] Union rights, including the right to democratic participation in the affairs of the union, are property considered "extortable" for purposes of the Hobbs Act because the act's language makes no distinction between tangible and intangi-

27. 560 F.2d 884, 887 (8th Cir. 1977); *see also* Matthew T. Grady, *Extortion May No Longer Mean Extortion After* Scheidler v. National Organization for Women, Inc., 81 N.D. L. REV. 33, 48 (2005) ("[V]arious courts expanded the Hobbs Act by eliminating the requirement that the extortionist actually receive the benefits of the 'property' extorted from his or her victim. The court in United States v. Frazier began this movement by concluding that the reduction of extorted property to actual, physical possession by the extortionist was not a necessary element of the Hobbs Act.").

28. *Frazier*, 560 F.2d at 885.

29. *Id.*

30. *Id.* at 887.

31. *Id.*

32. *See* United States v. Local 560, 550 F. Supp. 511, 519 (D. N.J. 1982).

ble property.[33] In considering whether intangible rights are "property" under the act, the Third Circuit in *United States v. Local 560* found it material that an expert witness believed that a significant proportion of the union's members were "induced by fear . . . to surrender their membership rights . . . [not feeling] free to criticize openly the policies and practices of the Local 560 leadership (and, thus . . . their union democratic rights)."[34] The court asserted that its holding was supported both by the language of the act, which makes no distinction between tangible property and intangible property, and by other circuits which, in considering the same question, were unanimous in extending the Hobbs Act to protect intangible property.[35]

Convinced by the unique need for equitable courts to protect union rights, the Third Circuit stated that "the right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied."[36] The protected right to do business, acknowledged under *Tropiano* and *Scheidler II*, may be analyzed similarly to the right to participate democratically in a union. This comparison is made possible by the protected status of both rights under Hobbs Act extortion liability case law.[37] Future courts may look at the circumstances under which certain plaintiffs, for example those performing abortions as a business, are exercising their right to do business, and decide under the *Local 560* rationale that there is a unique need for equitable courts to protect that right.

The idea that the extortionist does not need to receive a benefit to be liable for extortion, as explained in Part B, is reiterated throughout

33. United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 282 (3d Cir. 1985).

34. *Id.* at 278.

35. *Id.* at 281 (citing United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980) (asserting that a tavern owner's right to solicit business accounts free from threatened destruction and physical harm falls within scope of protected property rights); United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978) (discussing the right to make business decisions free from outside pressure wrongfully imposed); United States v. Nadaline, 471 F.2d 340, 344 (5th Cir. 1973) (addressing the right to solicit business accounts); United States v. Tropiano, 418 F.2d 1069, 1075–76 (2d Cir. 1969) (considering the right to solicit business accounts)).

36. *Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d at 281–82 (concluding that the membership's intangible property right to democratic participation in the affairs of the union is properly considered extortable "property" for purposes of the Hobbs Act).

37. *See, e.g.*, United States v. Gotti, 459 F.3d 296, 323 (2d Cir. 2006) (recognizing the right to do business in Tropiano as a protected property right under the Hobbs Act); *see also* United States v. Bellomo, 176 F.3d 580, 592–93 (2d Cir. 1999) (holding that the right of the members of a union to democratic participation in a union election is property because the fact that the right is intangible "does not divest it of protection under the Hobbs Act").

case law and is also acknowledged by the *Scheidler II* Court as remaining binding precedent.[38] In *United States v. Green*, the extortion provision of the Hobbs Act prohibited a union and its representatives from attempting, through threats or force, to obtain money from an employer in the form of wages for fictitious unwanted services, even though money was not sought for the benefit of the parties indicted.[39] This idea was reaffirmed in *United States v. Provenzano*, in which the Third Circuit held that it is not necessary to prove that the extortionist himself, directly or indirectly, received "fruits of his extortion or *any benefits therefrom.*"[40] Before *Scheidler II*, this meant that defendants need not try to obtain the property for themselves personally. Part III will explain whether this has changed after the *Scheidler II* decision.

Finally, another example involving a union is also helpful to illustrate what the Hobbs Act required, before the *Scheidler II* decision, in order for an extortionist to obtain property in violation of the act. In *United States v. Glasser*, a union was accused of destroying plate glass windows installed by nonunion shops, coupled with sending anonymous communications and subsequently conveying lists of unionized glaziers to insurance companies.[41] These actions raised the fair inference, according to the *Glasser* court, that destruction was intended as a threat from the union for purposes of the Hobbs Act.[42] The Second Circuit found that these actions led to financial harm from the cost of replacing the windows and paying escalated insurance premiums, as well as deprivation of the right to seek future plate glass installation contracts from nonunion glaziers by threat and destruction of nonunion work.[43]

This result, in particular the holding that the deprivation of the right to seek future plate glass installation contracts constituted "obtaining property,"[44] seems consistent with the *Tropiano* decision.[45] However, the *Scheidler II* Court made it clear that "mere deprivation" cannot be enough for extortion liability.[46] The *Glasser* decision still raises the question, also explored in Part III, whether these activities,

38. Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 402 (2003) (citing United States v. Green, 350 U.S. 415, 420 (1956)).

39. *Green*, 350 U.S. at 420 (explaining that "extortion . . . in no way depends on having a direct benefit conferred on the person who obtains the property").

40. 334 F.2d 678, 686 (3d Cir. 1964) (emphasis added).

41. 443 F.2d 994, 997–98 (2d Cir. 1971).

42. *Id.* at 1007.

43. *Id*.

44. *Id.*

45. United States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir. 1969).

46. Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 404 (2003).

presumably union activities protesting intrusion on their territory by non-union businesses, are protected in a post-*Scheidler II* world.

D. How Narrow is Scheidler II*?—A Precursor*

The same reasoning regarding the "obtaining" requirement in *Scheidler II*, and also the best potential way to narrow the impact of *Scheidler II* on the Hobbs Act intent requirement, is found in *United States v. Panaro*, a Ninth Circuit precursor to the *Scheidler II* decision.[47] *Panaro* interpreted the "obtain" requirement as calling for acquisition or possession of the victim's dispossessed property.[48] In *Panaro*, four co-conspirators sought to put an auto repair store owner out of business in order to obtain his business for themselves.[49] The Ninth Circuit found this to be crucial to the co-conspirators' convictions under the Hobbs Act, using language from *Provenzano*, which held that "*it is enough* that payments were made at the [extortionist's] direction to a person named by him,"[50] and concluding that "there must be an 'obtaining': someone—either the extortion[ist] or a third person—must receive the property of which the victim is deprived."[51]

However, as has been argued earlier, this ruling is inconsistent with multiple precedents holding that intangible rights are property for extortion purposes. Because intangible property cannot be acquired or possessed by either the extortionist or a third party, it is the intent to obtain the right that is key.[52] That intent, according to the Supreme Court the first time it heard *Scheidler*, need not be economically motivated.[53] In order to remain consistent with the decisions involving intangible property, the *Panaro* decision must therefore be read as applying only to the type of tangible property at issue in that case. This Note will argue that a similarly narrow reading also applies to the *Scheidler II* decision, as will be explained in Part V.

47. United States v. Panaro, 266 F.3d 939, 948 (9th Cir. 2001).
48. *Id.* at 948.
49. *Id.*
50. United States v. Provenzano, 334 F.2d 678, 686 (3d Cir. 1964) (emphasis added).
51. *Panaro*, 266 F.3d at 948.
52. United States v. Smith, 631 F.2d 103, 104 (8th Cir. 1980) ("But it is the intent to compel the victim to part with his money that controls.").
53. NOW v. Scheidler (*Scheidler I*), 510 U.S. 249, 252 (1994).

II.
EXPLANATION OF THE *SCHEIDLER II* DECISION

A. Scheidler II*: A Summary*

A summary of the background of the *Scheidler II* case is necessary in order to fully understand the confusion posed by its holding in the context of the Court's treatment of the scope of extortion. In 1986, NOW partnered with two health care centers that performed abortions and filed a lawsuit against a coalition of anti-abortion individuals and organizations, including PLAN.[54] NOW claimed the defendants were involved in a nationwide conspiracy to "shut down" abortion clinics through a pattern of racketeering activity that included acts of extortion.[55]

The plaintiffs' theory was that, by "obstructing access to the clinics, trespassing on clinic property, and using violence or threats of violence against the clinics, their employees, or their patients,"[56] the defendants caused women to give up their property right of being able to seek medical services, and caused clinics, doctors, nurses, and staff to give up the property right of providing those medical services.[57] If these protesting activities could be defined as extortion under the Hobbs Act,[58] and if NOW and the clinics could establish that the activities constituted a pattern under the Racketeer Influenced and Corrupt Organizations Act (RICO),[59] then the protesters could be liable for treble damages, permitting the court to triple the amount of the actual and compensatory damages to be awarded. Because Hobbs Act extortion is a predicate racketeering offense triggering RICO when the other elements of RICO are also met, this clearly provides a great incentive to bring Hobbs Act claims.[60]

The *Scheidler* case worked its way through the court system for approximately twenty years, ultimately reaching disposition at the Supreme Court of the United States a total of three times.[61] The Court decided the issue most crucial to this Note—whether the abortion opponents' activities constituted extortion within the meaning of the

54. Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 398 (2003).
55. *Id.* at 397–98.
56. *Id.* at 399.
57. *Id.* at 400–01.
58. 18 U.S.C. § 1951(a) (2006).
59. *Id.* § 1964(c).
60. *Id.* § 1961(1)(B) ("'Racketeering activity' means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 (relating to interference with commerce, robbery, or extortion)").
61. *See supra* notes 5–7 and accompanying text.

Hobbs Act—in its second look at the case in 2003.[62] The Hobbs Act defines extortion as "*the obtaining of property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[63] The *Scheidler II* majority operated under the premise that the "obtaining of property" element required clarification, and relied heavily on a 1973 union case, *United States v. Enmons*,[64] in its recognition that the "obtaining" requirement of extortion entails both a deprivation and an acquisition of property.[65] The *Scheidler II* Court reasoned from this that extortion must require something more than mere interference or deprivation of property.[66]

The Supreme Court held in *Scheidler II* that a group of abortion protesters' actions did not constitute extortion of abortion supporters' property under the Hobbs Act.[67] The basis for this decision was that, although the protesters may have deprived or sought to deprive the supporters of their property, they neither pursued nor received "something of value from" the supporters that they could exercise, transfer, or sell.[68] The Court found the ability to "exercise, transfer, or sell"[69] the sought property to be crucial to the scope of extortion liability because, without such a requirement, there would be no distinction between extortion and the separate crime of coercion.[70]

B. Lingering Problems after the Scheidler II *Decision*

The requirement that defendants must seek to attain their victim's property right in order to "exercise, transfer, or sell" it, posed a problem that the Court dealt with dismissively in a footnote. Many cases prior to *Scheidler II* had decided that intangible rights were property capable of being extorted,[71] as explained through the analysis of case law in Part II of this Note. But how could anyone seek to exercise, transfer, or sell an intangible right? In holding that defendants must

62. *Scheidler II*, 537 U.S. at 404–05.

63. 18 U.S.C. § 1951(b)(2) (2006) (emphasis added).

64. United States v. Enmons, 410 U.S. 396, 406 n.16 (1973) ("[E]xtortion requires an intent to obtain that which in justice and equity the party is not entitled to receive").

65. *Scheidler II*, 537 U.S. at 404 (citing *Enmons*, 410 U.S. at 406 n.16).

66. *Id.* at 404.

67. *Id.*

68. *Id.* at 405.

69. *Id.* (citing United States v. Nardello, 393 U.S. 286, 290 (1969)).

70. *Id.* (defining coercion as "more accurately describ[ing] the nature of [the protesters'] actions, involv[ing] the use of force or threat of force to restrict another's freedom of action").

71. *See, e.g.*, United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969).

seek the property they extort in order to exercise, transfer, or sell it, the Court made the express decision *not* to define the outer boundaries of extortion liability regarding this issue of extorting intangible property.[72] The justices reasoned that they "need not now trace . . . the outer boundaries of extortion . . . so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets."[73] However, the Court affirmed that extortion does not depend on having a direct benefit conferred on the person who obtains the property,[74] and agreed that this obtained property could be intangible business information.[75]

Rather than mandating acquisition of a benefit, the current law requires that the extortionist have the intent to obtain or acquire the tangible or intangible property at issue.[76] A stricter acquisition requirement would render hollow the categorization of an intangible right as property. Further, the intent to obtain property under the Hobbs Act need not be economically motivated under RICO.[77]

Can the requirement that a defendant must seek to attain or acquire the object of his victim's loss for someone, and the requirement that the loss need not be tangible or economic, be reconciled? In declining to trace the outer boundaries of extortion, is the Court avoiding the inconsistencies between *Scheidler II* and its precedents in order to reach a desirable result given the controversial subject matter at hand? After *Scheidler II*, what is the scope of extortion under the statute? What must a plaintiff prove in order to fulfill the Hobbs Act requirement of "obtaining" property? How have other courts interpreted the "obtain" requirement and the "property" requirement, and how will the *Scheidler II* decision affect future interpretations? Can abortion protesters, or other political protesters who use violence to shut down the opposition's business, ever be liable for extortion after this decision? This Note will now provide a response to these queries left unanswered by the *Scheidler II* Court.

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72. *See Scheidler II*, 537 U.S. at 402.

73. *Id.*

74. *See id.* (citing United States v. Green, 350 U.S. 415 (1956)).

75. *See id.* (citing Carpenter v. United States, 484 U.S. 19 (1987)).

76. *See id.* at 404.

77. NOW v. Scheidler (*Scheidler I*), 510 U.S. 249, 260–61 (1994) (recognizing that Congress "has not . . . required that an 'enterprise' in [18 U.S.C.] § 1962(c) [2006] have an economic motive" and that the Department of Justice guidelines provide that an association-in-fact enterprise must be "directed towards an economic *or other identifiable goal*").

III.
IMPACT OF *SCHEIDLER II* ON THE SCOPE OF EXTORTION: ANTICIPATED AND ACTUAL

How can an intangible right to solicit customers in *Tropiano* be exercised, transferred, or sold under *Scheidler II* and *Enmons*? A plaintiff's intangible right to solicit customers clearly cannot be acquired in a literal sense, which means that *Scheidler II*'s *Enmons*-inspired interpretation of the "obtaining" element is potentially unworkable. The necessity of determining a defendant's true motive, in order to determine whether the desired property right is sought for the purpose of being exercised, transferred, or sold, presents a second analytical difficulty for the courts. For example, how could a court ascertain whether the defendant in *Tropiano* prevented the plaintiff from soliciting waste removal business in order to intimidate him, or whether the defendant intimidated the plaintiff in order to prevent him from soliciting business? Should it matter for the purpose of determining extortion liability whether the intent to acquire an economic, exercisable benefit was the end goal, or a means to an end? This second problem will be further explored in Part V.

There is a great tension between *Tropiano*, which allows intangible rights to be property capable of extortion,[78] and *Scheidler II*, which seems to contradict *Tropiano* by requiring that the property be sought for exercising, transferring or selling, in light of the fact that *Scheidler II* and *Tropiano* both remain good law.[79] Before *Scheidler II*, *Green*[80] and *Provenzano*[81] held that defendants do not have to try to obtain property for themselves personally, but after *Scheidler II*, the property still needs to be capable of being obtained by someone. Part III will address, through the lens of post-*Scheidler II* union cases, the impact of the Supreme Court decision in 2003.

A. How Extortion of the Union Right to Protest Has Changed

Union protest cases help to illustrate the narrowness of the *Scheidler II* decision, and are an obvious choice for analysis because of the emphasis that the *Scheidler II* Court places on *United States v. Enmons*[82] in determining what the "obtaining property" element of extortion requires. Looking at *Enmons*, including its particular facts,

78. United States v. Tropiano, 418 F.2d 1069, 1075–76 (2d Cir. 1969).
79. *Scheidler I*, 537 U.S. at 394.
80. United States v. Green, 350 U.S. 415, 420 (1956).
81. United States v. Provenzano, 334 F.2d 678, 686 (3d Cir. 1964).
82. *Scheidler II*, 537 U.S. at 404 (citing United States v. Enmons, 410 U.S. 396, 404–09 (1973)).

reasoning, and progeny, will give guidance as to how *Scheidler II* should and will be interpreted by future federal courts. *Enmons* carved out an exception to the Hobbs Act for union protesting, in order to protect legitimate activities that were designated as being part of lawful union activity under a pre-existing statutory scheme, the Labor-Management Reporting and Disclosure Act (LMRDA).[83] This was done by creating a legal separation between the legitimate protesting behavior, which would be protected, and the illegal violence that the individuals participated in, which would be prosecutable under state law.[84]

However, this Note will analyze later cases holding that this is not a blanket exception but a narrow one, meaning not all union protest activities will be protected by the carve-out simply because they are characterized as union protest activities. Because *Scheidler II* follows directly from *Enmons*, it is rational to presume that just as the *Enmons* exception for union activity was narrow and designed to protect only certain types of legitimate union activity outlined in LMRDA from classification as "extortion," *Scheidler II*'s exception under the Hobbs Act for abortion protesters will be similarly narrow.

The defendants in *Enmons*, union members of the International Brotherhood of Electrical Workers Union, were on strike, seeking higher wages against their employer, Gulf States Utilities Company, when violence erupted.[85] The plaintiffs argued that the defendants' violence and threats were used to force the company to agree to a contract for higher wages.[86] However, the *Enmons* court found that neither the wages of bona-fide employees nor the right to negotiate employment contracts constituted "property" under the Hobbs Act.[87] The workers had a right to disrupt their employer's business during a lawful strike, and therefore the *Enmons* court separated the act of the strike from the acts of violence that occurred during the strike, deciding under this theory that the acts of violence could be punished under state law.[88]

The right of an employee to disrupt the business of an employer stems from a statutorily-created right.[89] The right to protest generally

83. 29 U.S.C. § 401–531 (2006); *Enmons*, 410 U.S. at 410–11.
84. *Enmons*, 410 U.S. at 400–01.
85. *Id*. at 397–98.
86. *Id.* at 397.
87. *Id.* at 399–400.
88. *Id.* at 398.
89. Rodonich v. House Wreckers Union, Local 95 of Laborers' Int'l Union, 627 F. Supp. 176, 178–79 (S.D.N.Y. 1985) (citing the Labor Management Reporting and Disclosure Act at 29 U.S.C. § 411 (2006)).

is protected under the First Amendment. However, the employer-employee relationship is markedly different from the relationship between a protester and the business he protests, to which he is otherwise unconnected by a statutory relationship. It is not apparent that Congress has seen fit to create a property right to protest in a context separate from that of labor union strikes. This is a possible distinguishing factor between *Enmons* and future litigation involving protest activities, although the majority in *Scheidler II* apparently did not find it significant, as it based its ruling largely upon the *Enmons* case.[90] It remains important to note that violence with the purpose of interfering with interstate commerce through extortion remains separate, under *Enmons*,[91] from legitimate union activity, and by extension, from legitimate protest activity.

*B. Impact of the Union Cases on Post-*Scheidler II *Extortion Liability*

Our understanding of *Enmons* and its impact on the progeny of *Scheidler II* must be shaped by its own progeny: *Enmons* was later greatly clarified and narrowed by a Sixth Circuit decision, *United States v. Debs*.[92] In *Debs*, a union's former president was indicted for violations of the Hobbs Act in connection with alleged threats of violence to potential opponents during a union election campaign and for employing extortion to cause the shooting of a union member.[93] The Sixth Circuit rejected the defendant's challenge to his indictment, finding that alleged extortion in a union election campaign could form the basis of a Hobbs Act prosecution.[94] Defendant Debs had attempted to "find solace" in *Enmons* on the theory that campaigning in union elections is a "legitimate labor end," and thus the use of extortion in service of union political goals is exempted from the scope of the Hobbs Act under the *Enmons* carve-out.[95] However, the Sixth Circuit would not abide by this interpretation of the case law, noting that "[Defendant] Debs would have us hold that because some illegality in union activity is justifiable every illegality, including extortion, must also be within the orbit of *Enmons*. Such a holding would immunize

90. Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 404 (2003).

91. United States v. Enmons, 410 U.S. 396, 398 (1973) (affirming that the purpose of the Hobbs Act is not to punish a criminal for violence which may be a crime under state law, but rather to punish interference with interstate commerce by robbery or extortion).

92. United States v. Debs, 949 F.2d 199 (6th Cir. 1991).

93. *Id.* at 200.

94. *Id.* at 201–02.

95. *Id.* at 200 (citing *Enmons*, 410 U.S. at 410).

union members from sanction so long as their otherwise illegal action is committed in the context of labor activity. *We decline to expand* Enmons *this far*."[96]

It was far from revolutionary that the *Debs* court limited *Enmons*, as its decision to do so was based in part on precedent which showed that *Enmons* had not been extended beyond its own set of facts.[97] Indeed, the Sixth Circuit had evidently "approached with broad caution a broad application of the *Enmons* exception to Hobbs Act prosecutions" in the past.[98] This interpretation was not found to be limited to the Sixth Circuit.[99] The reasoning provided by the Sixth Circuit to explain why only a particular type of union activity merits a Hobbs Act exception at common law is that the statutory right to participate in union government is not held accountable by a thriving two-party system, and instead depends upon a one-party system.[100] Because the federal legislature and courts have a "greater duty to combat labor corruption and electoral vice" in this situation, the Hobbs Act remains an important instrument in service of "this democratic objective."[101]

This same point is echoed in Supreme Court jurisprudence. The Court in *United States v. Green* found that there is nothing in the Hobbs Act that indicates "any protection for unions or their officials in attempts to get personal property through threats of force or vio-

96. *Id.* at 201 (emphasis added).

97. *Id.*

98. *Id.* (citing United States v. Jones, 766 F.2d 994, 1002–03 (6th Cir. 1985)) (doubting whether *Enmons'* narrow exception to the Hobbs Act applies to the use of violence outside of the collective bargaining context, in pursuit of goals other than higher wages, and against individuals other than the strikers' employer).

99. *Id.* (citing United States v. Cerilli, 603 F.2d 415, 419 (3d Cir. 1979) ("More importantly, Enmons is a labor case. The Court's reasoning was obviously and explicitly tied to the labor context and more specifically to the strike context. Any application of Enmons to cases outside of that context must be done with caution. Otherwise there is a danger that Enmons, if read as the appellants read it, could effectively repeal the Hobbs Act. . . Thus we understand Enmons as not relying primarily on the legitimacy of the union's objectives but rather on the clear Congressional intent, as expressed both in the legislative history of the Hobbs Act and the entire federal scheme regulating labor-management relations, that violence during labor strikes not be punishable as extortion under the Hobbs Act.)); *see also* United States v. Porcaro, 648 F.2d 753 (1st Cir. 1981) ("We are aware of no case sustaining an Enmons defense to a Hobbs Act conviction outside the labor area, and of several that have explicitly declined to do so. . . [w]e concur in this reading of Enmons, and find no basis for extending Enmons to protect from Hobbs Act prosecution the use of force and threats to resolve a contractual dispute among businessmen."); *see also* United States v. Warledo, 557 F.2d 721, 729–30 (10th Cir. 1977) (Indian group's threats and violence to coerce railroad to pay for alleged tribal lands).

100. *Id.*

101. *Id.*

lence."[102] The Court declares that the Hobbs Act was meant to stop just the sort of conduct that Green participated in, involving force to obtain property, and in "no way depend[ing] on having a direct benefit conferred on the person who obtains the property."[103] *Green* shows that the Court did not intend to protect all union protest-related activities from extortion liability.

The lesson *United States v. Green* and *United States v. Debs* teach together is that *Enmons* has only been held to apply narrowly to protect certain types of legitimate union activity, namely lawful protests, from classification as extortion.[104] The Hobbs Act remains an important prosecutorial tool to be wielded when extortion liability is found, and *Debs* reiterates this importance as it relates to union elections. In providing an exception to Hobbs Act liability for legitimate union protests, *Enmons* thus appears to be the exception, rather than the rule, for extortion liability.

C. An Alternate Explanation to Narrow Scheidler II

Debs also suggests that union cases like the *Enmons* decision are *sui generis* in the same way that abortion cases like *Scheidler II* are *sui generis*.[105] This means that future courts may be able to distinguish *Scheidler II* and *Enmons* on the basis of their subject matter, so that any claim brought under Hobbs Act extortion liability need not follow the dictates of these two cases, so long as the new claim is not union or abortion-related. However, even if the new claim is union or abortion-related, the plaintiff may argue that the impact of *Scheidler II* and *Enmons* is limited by utilizing the following argument. Legitimate union activity is protected under LMRDA,[106] just as the right to protest abortion is protected under the First Amendment.[107] However, this is not an entirely sweeping protection. It is apparent from the holding in *United States v. Debs*[108] that simply because some illegality in union activity is justifiable does not mean that every illegality, including extortion, must be within the orbit of protection created by *United States v. Enmons*.[109] Drawing from this rationale, it should also be apparent that when extortion exists separately from the legitimate act

102. United States v. Green, 350 U.S. 415, 420 (1956).
103. *Id.*
104. *See id.*; *Debs*, 942 F.2d 199.
105. *See Debs*, 942 F.2d 199.
106. 29 U.S.C. § 411 (2006).
107. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble").
108. *Debs*, 942 F.2d at 201–02.
109. United States v. Enmons, 410 U.S. 396, 410 (1973).

of abortion protesting, *Scheidler II* cannot be expanded to create absolute immunity for such activity.

IV.
Guide for Future Hobbs Act Plaintiffs: How to Define Your Property Right

The only way to determine whether extortion exists separately from legitimate protesting is, of course, to determine what the scope of extortion is. How did *Scheidler II* modify the Hobbs Act intent requirement? In order to ascertain that a particular activity falls within the scope delineated by *Scheidler II*, its precedent and its progeny, future plaintiffs must concentrate on the intangible right in question. The reason that the *Scheidler II* majority seemed to come out as it did was because the "intangible right" the Court concentrated on was the right to perform abortions. The Court found that the protesters did not attempt to obtain this right.

While federal courts may read the *Scheidler II* decision as a unique subset of law based on its subject matter, and therefore nonbinding on a non-abortion-related issue, there is another option that *Scheidler II* leaves open for interpretation of extortion liability. Future plaintiffs must adequately define and separate the defendants' intent to protest, which is protected, from the defendants' intent to obtain the plaintiffs' intangible rights, such as the right to do business,[110] or the right to preserve one's reputation.[111] These rights are still covered by the Hobbs Act under *Scheidler II* and post-*Scheidler II* cases, and therefore, under the doctrine of stare decisis, these rights must continue to be defined as obtainable property within the bounds of extortion liability.

If the rule in *Scheidler II* is that an intangible, obtainable property right falls within the scope of extortion only if the extortionist's intent was to obtain that right, then it is critical that plaintiffs' extortion claim defines the right that the victim has lost as precisely the same right that the defendant sought to obtain. If *Scheidler II* had a tangible effect, it must have been to underscore the importance of this specific framing.

110. *See* United States v. Tropiano, 418 F.2d 1069, 1075–76 (2d Cir. 1969).
111. *See* State v. Cunningham, 178 Ohio App.3d 558, 2008-Ohio-5164, 899 N.E.2d 171.

A. Future Extortion Cases Related to Abortion

Could a future Hobbs Act claim against abortion protesters achieve a different result? Could the plaintiffs in *Scheidler II* have possibly achieved a different result? Specific framing of the property right being extorted was successful prior to *Scheidler II*, just as it should be following the decision. That does not necessarily mean that *Scheidler II* had no effect, as it clearly emphasized that the extortionist must seek to exercise, transfer, or sell the right he extorts.[112] Despite this change, when the right lost by the victim is framed as the right sought by the extortionist, as in the next case, the result should be the same as before the *Scheidler II* decision.

It is difficult to gauge what the Supreme Court might have decided had *Northeast Women's Center, Inc. v. McMonagle*[113] been granted writ of certiorari after 2003, considering the arguably *sui generis* nature of abortion-related cases.[114] The *McMonagle* case bears a striking resemblance to *Scheidler II* in argument and subject matter, but came to the opposite result. It is unclear, however, whether *McMonagle* would have been decided the other way had it reached the Eastern District of Pennsylvania after 2003.

The *McMonagle* court found that the defendants' activities qualified as extortion because the defendants forced the plaintiff's abortion clinic out of business and therefore obtained the clinic's right to conduct its business free from wrongfully-imposed outside pressures.[115] The rule from *Scheidler II* is that a defendant must not only intend to deprive a victim of his property right, but must also intend to obtain or acquire that property right.[116] In *McMonagle*, the plaintiffs framed the property right as the clinic's right to do business. If the *McMonagle* or the *Scheidler II* plaintiffs had been able to show that the clinics' right to do business was capable of being obtained, even for the purpose of elimination, they should have also been successful under the additional *Scheidler II* requirement. This follows logically if *Tropiano* remains good law, keeping in mind that the intent of the defendant in depriving his victim of the right to compete in the waste removal busi-

112. Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 405 (2003).

113. 689 F. Supp. 465 (E.D. Pa. 1988).

114. *See* Porcelli v. United States, 404 F.3d 157, 161 (2d Cir. 2005) (acknowledging Supreme Court jurisprudence is *sui generis*, although not relying on that fact in concluding that the statutory construction of the Hobbs Act is not properly carried over to the federal mail fraud statute).

115. *See McMonagle*, 689 F. Supp. at 474 (emphasis added).

116. *Scheidler II*, 537 U.S. at 404.

ness may have been to obtain the plaintiff's right to compete, in order to exercise the elimination of that right for purposes of intimidation.

B. Plaintiffs Seeking Extortion Liability Outside the Abortion Context

Future plaintiffs, abortion providers or otherwise, must carefully separate the defendants' protected protesting rights from their intent to obtain the plaintiffs' intangible property rights. When acts of extortion exist separately from the legitimate exercise of free speech or from statutorily protected union activities, the holding of *Scheidler II* cannot be expanded to protect such illegal action.

1. Narrowing Scheidler II

What does this mean for future plaintiffs who seek extortion liability in suits unrelated to abortion protesting? Analysis of the following fact proves significant in suggesting an answer to this query. The conclusion in *Scheidler II*[117] followed directly from *United States v. Enmons*, a case which sought to protect legitimate union activity from extortion liability.[118] *Enmons* carved out an exception to extortion liability for union protesting by legally separating the act of protesting, which would be protected, from acts of violence, which are prosecutable under state law.[119] However, *Debs* shows that the exception from Hobbs Act liability that *Enmons* created for union protesters has been interpreted narrowly.[120] This narrow application of *Enmons* shows that union members will not be immunized from sanction simply because their illegal actions are committed in the context of labor activity.[121]

Courts can distinguish *Scheidler II* in non-abortion cases on the basis that it carves out a narrow exception for abortion protesters in the same way that *Enmons* and its progeny carved out a narrow exception for certain kinds of legitimate union activity. Abortion cases decided by the Supreme Court are arguably *sui generis*, and *Enmons* and *Scheidler II* are comparably limited to their specific set of facts, to the benefit of federal courts in future interpretation of the Hobbs Act.

Cases following the *Scheidler II* ruling in 2003 have narrowed the high court's reasoning, refusing to implement an "intent to acquire" element outside the context of the Hobbs Act. *United States v.*

117. *See id.*
118. United States v. Enmons, 410 U.S. 396 (1973).
119. *See id.* at 400.
120. *See, e.g.*, United States v. Debs, 949 F.2d 199, 201 (6th Cir. 1991).
121. *Id.*

Porcelli,[122] a Second Circuit case, considered whether the *Scheidler II* interpretation of the "obtain" requirement in the Hobbs Act could properly be carried over to the mail fraud statute under which Porcelli had been convicted.[123] The Second Circuit first cautioned that Supreme Court jurisprudence about abortion is *sui generis*,[124] although it did not rely on this rationale in coming to its decision. As *Porcelli* and other opinions suggest,[125] *Scheidler II* may be interpreted in the future as not applicable beyond the abortion context. Next, the Court found unavailing Porcelli's contention that a *Scheidler II* construction of the Hobbs Act should provide him relief because he didn't actually "obtain" money or property by his action.[126] Declining to extend the reasoning of *Scheidler II* beyond *Scheidler II* and beyond the Hobbs Act, the *Porcelli* court held that the defendant need not literally "obtain" money or property to violate the statutes, and did not find the fact that the mail and wire fraud statutes contain the word "obtain" persuasive enough to impose the *Scheidler II* construction.[127] Although the *Porcelli* court found that the "obtain" element in the Hobbs Act does not have the same meaning under the mail fraud statute, the reasoning used to reach that result can still be quite broad in the extortion context.

When looked at more closely, the *Porcelli* analysis of the mail and wire fraud statutes mirrors an analysis that could be made of the Hobbs Act. As the Second Circuit notes, the mail fraud statute is written in the disjunctive, but does not criminalize two separate acts.[128] Thus, the first clause in the mail fraud statute referring to "any scheme or artifice to defraud" must be read in connection with "obtaining money or property."[129] Similarly, the Hobbs Act does not criminalize the "obtaining of property from another" separately from acts of "actual or threatened force, violence, or fear."[130] The "obtain" element of the mail fraud statute is read by the *Porcelli* court as requiring that "money or property [be] the object of the scheme."[131] Such a reading

122. 404 F.3d 157, 162 (2d Cir. 2005).
123. *Id.*
124. *See id.* at 161.
125. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., dissenting) (quoting Thornburgh v. Amer. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting)).
126. *Porcelli*, 404 F.3d at 162.
127. *Id.*
128. *Id.*
129. *Id.* (quoting 18 U.S.C. § 1341 (2000)).
130. 18 U.S.C. § 1951(b)(2) (2006) (emphasis added).
131. *Porcelli*, 404 F.3d at 162 (citing United States v. Gole, 158 F.3d 166, 167 (2d Cir. 1998)).

would be entirely consistent with the Hobbs Act "obtain" element, especially in light of intangible rights qualifying as property, and under precedent which specifies that intent to obtain is the crux of the requirement.[132]

2. Framing the Lost Intangible Right Broadly

Another route for plaintiffs, as opposed to arguing that *Scheidler II* and *Enmons* are narrow, is to seek to broaden the definition of what intangible rights can be extorted. The groundwork for this strategy has been laid by the following case which, at the same time as it reaffirms the *Scheidler II* "intent to obtain" requirement, also suggests an extension of the type of right which could be considered intangible property for Hobbs Act purposes. *State v. Cunningham*,[133] looking at both the Hobbs Act under *Scheidler II* and the Ohio criminal code, called extortion "more of an inchoate crime of attempt that requires the alleged extort[ionist] simply to act with a purpose to obtain a 'valuable thing or valuable benefit', but . . . does not require the alleged extort[ionist] to have actually obtained the thing or benefit."[134] This interpretation supports the notion of intent as a key component of the "obtain" requirement, just as it had been prior to the *Scheidler II* decision. The *Cunningham* court goes on to differentiate between coercion and extortion, just as the *Scheidler II* Court did extensively,[135] emphasizing that "the important distinction . . . is extortion's additional evidentiary requirement of an intent to obtain something. It matters not that the thing sought is intangible."[136]

The defendant in *Cunningham*, using threats of force or violence to induce a woman to recant her rape accusation against him, was found by the court to have sought the woman's recantation not for its own sake, but for the valuable benefits that her recantation would bring him.[137] These benefits included the ability to deny that the defendant had committed a crime,[138] the ability to challenge his conviction,[139] and the ability to restore his reputation.[140] The *Cunningham*

132. United States v. Smith, 631 F.2d 103, 104 (8th Cir. 1980) ("But it is the intent to compel the victim to part with his money that controls.").
133. 178 Ohio App.3d 558, 2008-Ohio-5164, 899 N.E.2d 171.
134. *Id.* at 176 n.3.
135. *See* Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 405–08 (2003).
136. *Cunningham*, 899 N.E.2d at 177.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 177 n.4 (acknowledging Shakespeare's recognition of the importance of individual reputation: "Who steals my purse steals trash; 'tis something, nothing; 'twas mine, 'tis his, and has been slave to thousands; but he that filches from me my

court held that these benefits meant that the recantation was an intangible property right which the defendant wanted to obtain, and thus was within the scope of extortion liability.[141] The distinction drawn here between coercion and extortion suggests that an intangible right is obtainable when the extortionist intends to exercise, transfer, or sell it. *Cunningham* shows that intent to exercise, transfer, or sell a right can be framed in a very broad manner. Most importantly, the case presents an illustration of the kind of intangible right that can be protected while still remaining consistent with *Scheidler II*.

V.
CRITICISM AND POLICY RAMIFICATIONS OF THE *SCHEIDLER II* DECISION

A. Criticism of the Decision

Given the Supreme Court's refusal to reach the *Tropiano* decision in *Scheidler II* and its endorsement of the Hobbs Act union cases, the following criticism arises when comparing violent union protests, mob threats and violence, and violent abortion protests. An extortionist must now seek to acquire or obtain his victim's lost property right.[142] Is it appropriate for the law to look into the motivation of the extortionist, including his political ideologies, in order to find him liable under the Hobbs Act? How could the question of whether the alleged extortionist intends to obtain elimination of a business right, or whether he intends to obtain the right to perform an abortion, be subject to thorough discovery? Must the only objective or intent of the extortionist be shutting down non-union or non-mob stores to obtain their business, or can there be an underlying political motivation as well?

Shutting down a business may be a means to an end, and in the case of *Scheidler II*, one sought end is the restriction of abortion rights. It is hard to tell whether the sought end of the defendants' actions in *Tropiano* was the ability to control all waste management businesses, or whether it was to implement fear and control in the community.[143] Giving courts the power to inquire into such motives, and to pick and choose which property right the defendant "truly" seeks, invites judges to impose their own political ideologies in deciding whether a defendant is liable for extortion. Why must the property

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good name robs me of that which not enriches him, and makes me poor indeed." Othello, Act III, Scene iii.).

141. *See id.* at 177.

142. *See* Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 404 (2003).

143. *See* United States v. Tropiano, 418 F.2d 1069, 1075–76 (2d Cir. 1969).

right in *Scheidler II* be the right to perform or procure an abortion—why can it not simply be the right to buy or sell abortions as a business? If we evaluate the *Scheidler II* defendants' motivations as the *Tropiano* court looked at the motivations of organized crime defendants, narrowly defining the property right in question as the right to do business, then courts do not need to ask why fear-mongering tactics were used. It can simply be enough to know that there was intent to elicit fear and effectively force the victim to give up something of tangible or intangible value.

It is true that the right to abortion was *one* right being sought by the *Scheidler II* plaintiffs, a right that the defendants clearly did not wish to acquire for their own use, but a right that they wished to acquire in order to eliminate it.[144] The right to do business was another right sought as a means to the more ideologically-charged right to abortion. The extortion of this right to do business has not historically been ignored by the courts, and it should not be ignored after *Scheidler II* even in cases that also involve charged subject matter. It seems legally inconsistent that the use of violence to shut down businesses which perform abortions is protected from extortion liability, while the use of violence to shut down businesses which perform waste removal is subject to extortion liability. This is especially the case when the intent for both actions may be to obtain fear and control rather than to acquire business.

A second criticism regarding the foreclosing of Hobbs Act claims arises from the *Scheidler II* concurrence. Justice Ginsburg, joined by Justice Breyer, concurred in the *Scheidler II* judgment on the basis of the fact that Congress enacted the Freedom of Access to Clinic Entrances (FACE) Act of 1994,[145] thus crafting a "statutory response that hones in on the problem of criminal activity at health care facilities."[146] On the theory that RICO has already "evolved into something quite different from the original conception of its enactors,"[147] Ginsburg and Breyer both declined to extend RICO further by acknowledging that the plaintiffs' claim falls within the scope of the predicate extortion liability statute.[148]

144. *Scheidler II*, 537 U.S. at 394.

145. 18 U.S.C. § 248 (2006).

146. *Scheidler II*, 537 U.S. at 411 (Ginsburg, J. concurring).

147. *Id.* at 412 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985)) (Ginsburg, J. concurring).

148. *Id.* at 412 (Ginsburg, J. concurring).

There are two main problems with this argument, as Justice Stevens explains in the dissent.[149] The first issue is that the Supreme Court and other federal courts have consistently given the Hobbs Act its congressionally-intended broad construction.[150] Thus, the improper "extension" of extortion liability that the concurrence feared would erode RICO is actually a broadness component that Congress intentionally built into the Hobbs Act. The second difficulty with the concurrence is that, in rejecting the *Scheidler II* plaintiffs' claim, the government's ability to bring criminal prosecutions for conduct that formerly had been included in the scope of extortion liability may be limited.[151] Whether courts are actually limited following the majority's application of law to the *Scheidler II* facts is, however, a function of the precision with which plaintiffs and courts define the right allegedly being extorted, as has been argued in Part IV.

Why should Hobbs Act liability be limited? As Justices Ginsburg and Breyer seemingly fail to acknowledge, criminal actions are capable of violating more than one right at a time. The behavior of the abortion protesters may very well have violated the FACE Act,[152] but it is also possible that their activities violated the Hobbs Act separately. Applying the logic of *United States v. Local 560 of Int'l Bhd. of Teamsters*,[153] so long as the underlying purpose and design of the FACE Act are different from that of the Hobbs Act, use of the former statute will not supersede the use of the latter statute.

The *Teamsters* union case presents a helpful analogy to better understand the relationship between the Hobbs Act and another potentially applicable statute like the FACE Act or LMRDA.[154] In determining whether both statutes could be applied in *Teamsters*, the Third Circuit found it dispositive that the Hobbs Act focused on extortion, while LMRDA focused on prohibiting physical assaults and made no mention of "extortion."[155] Similarly, the FACE Act prohibits force, threat of force, physical obstruction, intentional injury, intimidation, and property damage, but does not refer to "extortion" or to any of the

149. *Id.* (Stevens, J. dissenting).
150. *Id.* at 417 (Stevens, J. dissenting) (citing Stirone v. United States, 361 U.S. 212 (1960); United States v. Staszcuk, 517 F.2d 53 (7th Cir. 1975)).
151. *Id.* at 417 n.4 (Stevens, J. dissenting).
152. 18 U.S.C. § 248(a) (2006).
153. 780 F.2d 267, 282 (3d Cir. 1985) (explaining that because the underlying purpose and design of section 530 of LMRDA is different from that of the Hobbs Act, section 530 does not supersede the use of the Hobbs Act).
154. 29 U.S.C. § 411 (2006).
155. *Teamsters*, 780 F.2d at 282.

elements of extortion which are unrelated to force.[156] This fact demonstrates that the underlying purpose and design of the FACE Act are different from that of the Hobbs Act, and therefore use of the FACE Act should not preclude use of the Hobbs Act in stating a claim based on a series of unlawful activities.

Further support for this notion is found in the direct language of the FACE Act, which provides that "nothing in this section shall be construed to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that provide such penalties or remedies."[157] Thus, the statute demonstrates on its face that the FACE Act need not provide the exclusive remedy for conduct that falls under the FACE Act as well as within the scope of extortion liability under the Hobbs Act.

B. Policy Ramifications

Scheidler II may be a dangerous decision because it cuts off a potentially fruitful avenue of legal action for plaintiffs who are being harassed. Two great public policy concerns which are very politically charged and bear mentioning, but which will not be expanded upon here, are (1) the importance of bringing these types of cases in order to deter violent protest and protect the constitutional rights of victims of such violence; and (2) the importance of preserving practical access to abortions generally. It is impossible to consider the implications of *Scheidler II* without weighing its potential impact on the controversial right to abortion.

Further, the line of *Scheidler* decisions remains problematic in a logical sense. Future plaintiffs seeking relief under the Hobbs Act can either distinguish *Scheidler II* by emphasizing the *sui generis* nature of abortion cases, or by carefully framing the intangible property right they have lost as the intangible property right that the defendant sought to exercise, transfer, or sell. However, the following concerns are apparent. As a first inquiry, why does the Supreme Court stipulate in its first *Scheidler* decision that the extortionist need not have an economic motive to be liable under RICO,[158] but then require that the extortionist seek the victim's property right in order to exercise, trans-

156. 18 U.S.C. § 248(a) (2006).
157. *Id.* § 248(d)(3).
158. NOW v. Scheidler (*Scheidler I*), 510 U.S. 249, 252 (1994) ("RICO requires no such economic motive.").

fer, or sell it under the Hobbs Act, an important RICO predicate offense?[159] How can these two rulings comport with one another?

One possible theory is that in the first *Scheidler* decision, the Court was seeking to preserve RICO liability for political terrorists[160] who may not benefit "financially but still may drain money from the economy by harming businesses."[161] However, this reasoning seems to eliminate the distinction between the motivations and resulting harm associated with terrorist activities and the motivations and resulting harm associated with abortion protest activities. Both groups are motivated by ideological concerns and their actions wreak financial havoc upon their victims. Under the first *Scheidler* opinion, both the terrorists of *United States v. Bagaric*[162] and the protesters of *Scheidler v. NOW* should be liable for extortion under the Hobbs Act. The Court in *Scheidler II* makes clear that the abortion protesters did not seek to exercise, transfer, or sell the clinics they forced their victims to relinquish and shut down.[163] But do political terrorists "exercise, transfer, or sell" the property that they force their victims to relinquish, and then subsequently destroy, any more than the abortion protesters in the *Scheidler* case?

It does appear that political terrorists and mafiosos may be liable under the Hobbs Act and RICO after *Tropiano* and both of the *Scheidler* opinions, but that abortion protesters who threaten and commit violence against abortion clinics enjoy protection from the extortion statute. This Note argues that abortion clinics in the future may be successful if they can frame their lost right as the right to do business, and if they can prove that the protesters sought to exercise, transfer, or sell this right. However, this does not address the conundrum

159. Scheidler v. NOW (*Scheidler II*), 537 U.S. 393, 405 (2003) (citing United States v. Nardello, 393 U.S. 286, 290 (1969)).

160. *See, e.g.*, United States v. Bagaric, 706 F.2d 42, 53–54 (2d Cir. 1983) (affirming convictions, pursuant to RICO, of members of a terrorist group which perpetrated an international extortion scheme against "moderate Croatians" and persons they believed to be supporters of the government of Yugoslavia).

161. *Scheidler I*, 510 U.S. at 259–60 (1994) (citing *Bagaric*, 706 F.2d 42) ("In upholding the convictions, under RICO, of members of a political terrorist group, the Bagaric court relied in part on the congressional statement of findings which prefaces RICO and refers to the activities of groups that 'drai[n] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption.' . . . [T]he Second Circuit decided that the sort of activity thus condemned required an economic motive. We do not think this is so.").

162. *Bagaric*, 706 F.2d 42.

163. As argued earlier, future abortion clinics bringing a similar claim would have to frame the lost right as the right to do business, and not the right to run abortion clinics. A result of the *Scheidler II* opinion may be that plaintiffs must engage in semantic games.

presented by liability for terrorists and mafiosos on the one hand, and protection for abortion protesters on the other hand. One explanation is that the Court wants to shield these protesters from extortion liability based on a belief that abortion protesters are somehow worthy of greater protection because their cause is more accepted in the mainstream than terrorist or mafia causes. This may be an accurate explanation of what the Court is doing in *Scheidler II*, but it is unsatisfying in its subjectivity and in the lack of an intellectual distinction between the activities, motivations, and resulting harms of the protesters, as compared to the activities, motivations, and resulting harms of terrorists or mafiosos.

C. Remaining Question

A final lingering question after *Scheidler II* relates to the emphasis that the Court places on distinguishing the crimes of coercion and extortion. The Court believes that mere deprivation cannot be enough for extortion, as the extortionist must acquire or seek to possess some type of benefit.[164] Though the Court uses the "exercise, transfer, or sell" test in order to make this distinction,[165] it remains unclear why a defendant cannot seek to exercise the destruction of the property he seeks, in light of the rule that the extortionist need not have an economic motivation. Courts have struggled with defining a real difference between cases of coercion and cases of extortion, as is evidenced by the precedents to *Scheidler*.[166] A federal coercion statute would remedy this problem, but to date, none exists.

The policy ramifications of the newly-changed intent requirement of the Hobbs Act are very significant. As a first concern, the narrowed intent requirement of the Hobbs Act may foreclose remedies for many plaintiffs under the Hobbs Act and under the RICO statute. This is problematic from a policy standpoint because defendants who use violence to deprive victims of property without seeking to exercise that property will remain undeterred by the threat of Hobbs Act penalties. Depending on how specifically they are able to frame their lost property right, plaintiffs may have also lost an important avenue of redress. Further, the intent element of the statute now requires that courts look into the underlying motivations of the violent offender, despite the fact that it may not be possible to subject these hidden or multi-faceted motivations to thorough or accurate discovery. This invites a level of

164. *Scheidler II*, 537 U.S. at 405.

165. *Id.*

166. *See* discussion *supra* Part I.

judicial guesswork that removes necessary objectivity from the process of statutory interpretation. Such judicial subjectivity presents problems of consistency and notice, making it impossible for future plaintiffs to evaluate the merit of their claims, potentially resulting in frivolous and costly litigation. The Supreme Court's interpretation of Congress' language also limits the Hobbs Act in a manner which may have been unintended by the elected representatives who crafted the wording of this legislation broadly.

Scheidler II may leave these issues and others unaddressed, and may create more confusion in extortion litigation than existed prior to the Supreme Court's 2003 ruling. This is an admittedly gray area of the law, and the subject matter is controversial. However, this Note argues that plaintiffs should be successful in future extortion claims by distinguishing the *Scheidler II* decision as an abortion case that only applies to future abortion claims, by precisely framing the right lost by the victim, including the right to do business or the right to reputation, as the right sought to be exercised by the defendant, or by emphasizing the legal separation a court can make between a protester's legitimate, constitutionally, or statutorily protected right to demonstrate and a protester's act of violence.