North Dakota Law Review

Volume 81 | Number 1 Article 2

January 2005

Extortion May No Longer Mean Extortion after Scheidler v. National Organization for Women, Inc.

Matthew T. Grady

EXTORTION MAY NO LONGER MEAN EXTORTION AFTER *SCHEIDLER V. NATIONAL ORGANIZATION FOR WOMEN, INC.*

MATTHEW T. GRADY*

I. INTRODUCTION

Ms. A, who was in the third trimester of her pregnancy, learned that her baby would not have a functioning heart, and thus, would live a short life marked by constant pain and suffering.[1] After discussing the matter with her husband and their religious and medical advisors, Ms. A painfully decided that an abortion was the best option.[2] When Ms. A went to an abortion clinic, a protest "blockade" by Operation Rescue was in full force.[3] Consequently, Ms. A and two other young rape victims (including a fourteen year old), who were separately seeking the clinic's services, were trapped inside the same car in stifling, 110-degree heat.[4] Meanwhile, anti-abortion protest groups continually spat at the women, shook their vehicle, screamed vulgar names at the women, and physically prevented the women from entering the clinic.[5] Ms. A and the two young girls had to wait inside the hot car for two days until federal marshals could clear a path to the clinic.[6]

Unfortunately, the experiences of Ms. A and the young rape victims are not uncommon, as shown by the similar experience of Ms. B.[7] Ms. B attempted to enter an abortion clinic to receive services wholly unrelated to abortion.[8] Ms. B had undergone cancer surgery in an effort to preserve her reproductive organs, and she went to a clinic to obtain a post-operative check-up.[9] Since Ms. B was still too weak to drive herself to the

---

*J.D., *cum laude*, 2004, University of Illinois College of Law; B.S., *with honors*, 2001, University of Illinois. Matthew T. Grady is presently serving as a Judge Advocate in the United States Army. The author would like to sincerely thank all those who contributed to the success of this article.

1. Fay Clayton & Sara N. Love, NOW v. Scheidler*: Protecting Women's Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 982 (1999). The patient's actual name has been withheld to preserve anonymity.

2. *Id.*

3. *Id. See infra* text accompanying notes 65-69 (detailing the protest tactic of "blockades" used by anti-abortion groups).

4. *Id.* at 982-83.

5. *Id.* at 983.

6. *Id.* at 982-83.

7. *See id.* at 987 (withholding the patient's actual name to preserve anonymity).

8. Clayton, *supra* note 1, at 988.

9. *Id.*

appointment, her minister provided a ride to the clinic for her.[10] When the two reached the clinic, they found that another Operation Rescue "blockade" was underway.[11] When the members of Operation Rescue observed Ms. B attempting to reach the clinic entrance, they attacked her.[12] The protestors scratched, clawed, and clubbed Ms. B with an anti-abortion sign until she became unconscious.[13] The attack caused the sutures from Ms. B's surgery to rupture,[14] and as a result of this attack, Ms. B had to be immediately rushed to the emergency room at a nearby hospital.[15]

Regrettably, the violent tactics used by anti-abortion protestors have only increased over time, despite Congressional enactment of the Freedom of Access to Clinic Entrances Act ("FACE") in 1994.[16] While these protests, "blockades," and "rescues" have a dramatic effect on many people and clinics,[17] the possible criminal punishments faced by the perpetrators under state law are remarkably slight. For instance, in *United States v. Arena*,[18] the defendants poured butyric acid on various Planned Parenthood Centers, which forced the facilities to close for several days.[19] Numerous patients and employees suffered various physical illnesses after inhaling the toxic fumes.[20] Moreover, the attacks frightened those affected, as many patients stopped receiving services and many staff members quit.[21] In the meantime, the anti-abortion protestors did not hide their agenda in any fashion, as they sought "to prevent abortions from taking place."[22] Despite the severity of their criminal actions and the seriousness of the

---

10. *Id.*

11. *Id. See infra* text accompanying notes 65-69 (detailing the protest tactic of "blockades" used by anti-abortion groups).

12. *Id.* at 988-89.

13. *Id.*

14. *Id.*

15. Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 694 (7th Cir. 2001).

16. *See, e.g., Ex-GI Held In Abortion Clinic Bomb Conspiracy*, CHI TRIB., Nov. 13, 2003, at 20 (describing how Stephen John Jordi came very close to carrying out his plans to bomb various abortion clinics throughout Florida and Georgia). *See also* 18 U.S.C. § 248 (1994) (setting forth the FACE Act's prohibited practices, penalties, and remedies).

17. *See, e.g.*, United States v. Arena, 180 F.3d 380, 387-88 (2d Cir. 1999) (describing how defendants only received five years probation for their acid attack on a clinic). After anti-abortion protesters poured butyric acid into a Planned Parenthood facility, it ceased operations for ten days and incurred substantial environmental cleanup costs and increased security costs. *Id.* Additionally, the court observed the devastating physical and psychological effects inflicted on patients and staff members alike subsequent to the attacks, ranging from headaches and nausea to elevated feelings of anger, fear, and dread. *Id.*

18. 180 F.3d 380 (2d Cir. 1999).

19. *Arena*, 180 F.3d at 385-87.

20. *Id.* at 388.

21. *Id.*

22. Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 693 (7th Cir. 2001).

consequences that ensued, the defendants in *Arena* were only charged with criminal mischief and endangering public safety under New York law.[23] Subsequently, they either pled guilty or were convicted, and were merely sentenced to five years of probation.[24]

Against this backdrop, the United States Supreme Court was recently presented with *Scheidler v. National Organization for Women, Inc.*,[25] where anti-abortion protest groups, such as those involved in the beginning examples,[26] were charged with extortion in violation of the Hobbs Act.[27] The Court faced the issue of whether intangible rights, such as the right of a business to exercise exclusive control over its assets, could be "obtained" for purposes of the Hobbs Act.[28] Stated differently, the Court was asked to decide whether the Hobbs Act requires an extortionist to physically "obtain" or receive the property that he or she was forcing another to part with by fear.[29]

This article argues that *Scheidler* has substantially altered the traditional, common-law understanding of the meaning of extortion which evolved under the Hobbs Act. Unfortunately, this distortion will have a profoundly negative effect on future prosecutions of extortion under the Hobbs Act. Part II of this article discusses the text of the Hobbs Act and the relevant legislative history surrounding its enactment in 1948. Part II also details the facts and procedural posture of *Scheidler*. Part III argues that the Hobbs Act was indeed violated under the facts presented in *Scheidler*. Part III also reveals that the Court's resolution in *Scheidler* was fundamentally flawed, both as a matter of statutory interpretation and policy. Moreover, Part III demonstrates that *Scheidler* will only undermine the effectiveness of the Hobbs Act as a tool for effective law enforcement and prosecution of organized crime. Such a result is directly contrary to the will of Congress, as reflected in the legislative history surrounding the passage of the Hobbs Act. Finally, Part IV advocates that future courts construe *Scheidler* very narrowly, patterned after the narrow interpretation given in *Dooley v. Crab Boat Owners Association*.[30] Alternatively, Part IV

23. *Arena*, 180 F.3d at 388.

24. *Id.*

25. 537 U.S. 393 (2003).

26. *See supra* text accompanying notes 1-16 (discussing activities and protest techniques of some anti-abortion groups).

27. *Scheidler*, 537 U.S. at 398.

28. *Id.* at 400-01.

29. *Id.* at 401.

30. 271 F. Supp. 2d 1207 (N.D. Cal. 2003).

encourages Congress to overturn *Scheidler* via an amendment to the Hobbs Act.

II. BACKGROUND

A. THE APPLICABLE STATUTORY PROVISIONS AND THE ELEMENTS OF A HOBBS ACT VIOLATION PREMISED ON EXTORTION

The Hobbs Act prohibits "[i]nterference with commerce by threats or violence" as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.[31]

The Hobbs Act then 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."[32] Consequently, the primary elements of an extortion violation under the Hobbs Act are: "(1) that the defendants induce their victims to *part* with property; (2) that the defendants do so through the use of fear; and (3) that, in so doing, the defendants adversely affect interstate commerce."[33] As a simple example, extortion occurs if one threatens to take another's good name or business reputation unless the latter pays the former one thousand dollars.[34] In such an instance, the extortionist has physically "obtained" the victim's one thousand dollars, which the victim paid out of fear to keep his or her favorable business reputation.[35] Of course, this example assumes that the adverse effect on interstate commerce requirement has been met, which is not difficult to do.[36]

---

31. 18 U.S.C. § 1951(a) (2000).

32. *Id.* § 1951(b)(2).

33. United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267, 281 (3d Cir. 1985) (emphasis added).

34. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.4(a) at 198 (2d ed. 2003).

35. *Id.*

36. *See* United States v. Clausen, 328 F.3d 708, 710 (3d Cir. 2003) (noting that a violation of the Hobbs Act need only have "a de minimis impact on interstate commerce" to satisfy its jurisdictional element).

B. THE APPLICABLE LEGISLATIVE HISTORY RELATING TO THE HOBBS ACT

1. *The Impetus for the Enactment of the Hobbs Act*

The Hobbs Act was passed in 1948 as an amendment to the 1934 Anti-Racketeering Act.[37] The purpose of the 1934 Anti-Racketeering Act was "to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce."[38] The original Hobbs Act legislation was not meant to replace or substantially change the 1934 Anti-Racketeering Act.[39] Rather, Congress altered the 1934 Anti-Racketeering Act to strengthen and clarify its provisions in response to the decision by the United States Supreme Court in *United States v. Local 807 of International Brotherhood of Teamsters*.[40] In *Local 807*, various New York City union members compelled out-of-state drivers to turn over their trucks near the city limits.[41] The union members would then take the truck to its destination, unload the merchandise, pick up the goods for the return trip, and eventually surrender the truck back to the out-of-state driver at the same point where the driver was stopped.[42] The union members also demanded the regular union rate from the out-of-state delivery driver for comparable work driving, unloading, and returning the merchandise.[43]

At the time, the 1934 Anti-Racketeering Act provided, in pertinent part, as follows:

> Section 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or

---

37. *See* 91 CONG. REC. 11,911 (1945) (statement of Rep. Jennings) (noting that "[t]he necessity for this measure grows out of the misconstruction placed upon the anti-racketeering law enacted in 1934").

38. United States v. Local 807 of Int'l Bhd. of Teamsters, 315 U.S. 521, 530 (1942).

39. *See* United States v. Culbert, 435 U.S. 371, 378 n.8 (1978) (pointing out that the 1934 Anti-Racketeering Act "was substantially carried forward into the Hobbs Act") (citing U.S. v. Emmons, 410 U.S. 496, 404-05 n. 14 (1973)).

40. 315 U.S. 521 (1942); *See* 91 CONG. REC. 11,841, 11,911-13 (1945) (statements of Reps. Cox, Jennings, and Whittington respectively). *See also Culbert*, 435 U.S. at 376 (acknowledging that "the Hobbs Act was enacted to correct a perceived deficiency in the Anti-Racketeering Act" created by the Court's decision in *Local 807*).

41. *Local 807*, 315 U.S. at 526. In *Local 807*, the court found that the "defendants conspired to use and did use violence and threats to obtain from the owners of these 'over-the-road' trucks $9.42 for each large truck and $8.41 for each small truck entering the city," which reflected the union pay rate for a typical day's work. *Id.* Moreover, many other drivers paid the money demanded by the defendants, but unloaded the goods themselves in the city because the defendants "either failed to offer to work, or refused to work for the money when asked to do so." *Id.*

42. *Id.*

43. *Id.*

> any article or commodity moving or about to move in trade or commerce. . . (a) [o]btains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental or property or protective services, *not including, however, the payment of wages by a bona-fide employer to a bona-fide employee*: or (b) [o]btains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right . . . (d) shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.[44]

Thus, the exception emphasized above would apply if a court found that the money was paid as part of a valid employment arrangement, and the defendants would not have violated the Anti-Racketeering Act.[45] The Court concluded that the exception contained in the Act was not restricted to those individuals who already "attained the status of an employee prior to the time at which he obtains . . . the [property]."[46] Consequently, the exception applied and the Court found that the union members did not violate the Anti-Racketeering Act.[47]

Congressional response to *Local 807* was swift, as Congress sought to overturn the Court's decision.[48] Congress removed the exception relied upon by *Local 807* and "substituted specific prohibitions against robbery and extortion for the Anti-Racketeering Act's language relating to the use of force or threats of force."[49] The purpose of the Hobbs Act was "to protect trade and commerce against interference by violence, threats, coercion, or intimidation."[50] The Hobbs Act was to be of general applicability, as Congress sought to end the restraints on trade produced by fear resulting from violence or the threat of violence.[51] Members of

---

44. *See Culbert*, 435 U.S. at 375 n.5 (emphasis added) (quoting the language of the 1934 anti-racketeering statute as it was originally enacted).

45. *Local 807*, 315 U.S. at 530 (deferring to the purported Congressional intent to not interfere "with traditional labor union activities").

46. *Id.* at 531.

47. *Id.* at 539. *See Culbert*, 435 U.S. at 376-77 (recognizing that the Court in *Local 807* held that the Hobbs Act "did not cover the actions of union truck drivers who exacted money by threats or violence from out-of-town drivers in return for undesired and often unutilized services" given the presence of the "wage-payments exclusion").

48. 89 CONG. REC. 3,221 (1943) (statement of Rep. Whittington). *See Culbert*, 435 U.S. at 377 (noting that several bills were introduced in Congress to change the result reached in *Local 807*).

49. *Culbert*, 435 U.S. at 377.

50. 89 CONG. REC. 3,194 (1943) (statement of Rep. Fish).

51. *See id.* at 3,206 (statement of Rep. Fellows).

Congress conceded that the Hobbs Act would be "far reaching,"[52] but the majority thought that such action was necessary and used language particularly illuminative given the parties involved in *Scheidler*.[53]

2. *The Basis for the Provisions Constituting the Hobbs Act*

Congress patterned the definition of extortion in the Hobbs Act after New York law.[54] In addition to the text itself, Congress recognized that "[t]he ordinary meaning of the word 'extortion' is a taking or obtaining of anything from another by means of illegal compulsion or offensive action."[55] However, Congress explicitly exempted lawful picketing and other lawful protest activities from the strictures of the Hobbs Act.[56] Nevertheless, unlawful activities undertaken in the course of a strike or protest could "come within the purview" of the legislation,[57] since one's legitimate First Amendment right to strike did not include the right to commit extortion during that strike.[58] Indeed, Congress intended "to make punishable all conduct falling within reach of the statutory language" of the Hobbs Act.[59]

---

52. *Id.* at 3,223 (statement of Rep. Miller).

53. *Id.* at 3,226 (statement of Rep. Robsion) (emphasis added). Representative Robsion stated:

> I am not much worried over the penalties imposed on anyone who actually commits robbery or extortion, in taking money or property or other thing of value from another person by force or violence or by putting him in fear. No individual or group should be permitted to engage in robbery or extortion in this free land of ours, *even a church or association of ministers*.

Id.

54. *Id.* at 3,227 (statements of Reps. Hobbs and Vorys). *See also* 91 CONG. REC. 11,900 (1945) (statements of Rep. Hobbs) (stating that "[t]he definitions in this bill are copied from the New York Code substantially").

55. 89 CONG. REC. 3,205 (1943) (statement of Rep. Graham).

56. *Id.* at 3,208-09 (statements of Reps. Brehm and Russell) (construing the Hobbs Act to not cover labor members engaged in peaceful picketing). *See* 18 U.S.C. § 1951(c) (providing the Hobbs Act "shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45"). *See also* United States v. Culbert, 435 U.S. 371, 377 (1978). *Culbert* recognized that:

> [t]he primary focus in the Hobbs Act debates was on whether the bill was designed as an attack on organized labor[, as] [o]pponents of the bill argued that it would be used to prosecute strikers and interfere with labor unions [while] [t]he proponents . . . steadfastly maintained that the purpose . . . was to prohibit robbery and extortion perpetrated by anyone.

Id. at 377; 91 CONG. REC. 11,843 (1945) (statement of Rep. Michener) (noting that the bill "will not interfere with legitimate strikes").

57. 89 CONG. REC. 3,213 (1943) (statement of Rep. Hobbs). A strike did not give one a license to act as an outlaw. 91 CONG. REC. 11,843 (1945) (statement of Rep. Michener).

58. 91 CONG. REC. 11,901 (1945) (statement of Rep. Hobbs).

59. *See* United States v. Culbert, 435 U.S. 371, 377 (1978) (stressing that the Hobbs Act "was to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of

Moreover, Congress meant to convey a strong message through the broad-reaching piece of legislation. For example, the Hobbs Act was intended to:

> [S]ay to racketeers everywhere that no longer will they intimidate and coerce the weak; no longer will they obstruct and retard, or attempt to obstruct and retard, the orderly transportation of persons and property in interstate commerce or foreign commerce; [as Congress was] . . . determined to be on the side of law and order.[60]

Through passage of the Hobbs Act, Congress harshly attacked those who sought to interfere with trade and commerce by racketeering, "violence, threats, coercion, or intimidation."[61] Consequently, the Court has since recognized that the Hobbs Act "speaks in [a] broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence [and that] [t]he Act outlaws such interference []in any way or degree."[62] More importantly, Congress's remedial legislation against extortion has become an effective tool in the fight against organized crime.[63]

C. THE FACTS AND PROCEDURAL POSTURE OF SCHEIDLER V. NATIONAL ORGANIZATION FOR WOMEN, INC.

1. *The Mafia-like Activities Utilized by Anti-Abortion Groups Such as the Pro-Life Action Network and Operation Rescue*

The Pro-Life Action Network ("PLAN") and Operation Rescue are anti-abortion groups whose members use protest tactics labeled "rescues" or "blockades," whereby the activists "physically block access to abortion clinics so that the patients and staff cannot get in or out of the buildings."[64] As part of these protests, some members would actively destroy a clinic's medical equipment or chain themselves to operating tables in order to

---

any article or commodity in commerce by robbery or extortion as defined in the bill") (citation, internal quotation marks, and emphasis omitted).

60. 91 CONG. REC. 11,917 (1945) (statement of Rep. Rivers). At the same time, Congress recognized that the Hobbs Act "will not inconvenience, will not harm, will not incarcerate one single honorable, honest, decent man in America." 91 CONG. REC. 11,841 (1945) (statement of Rep. Barden).

61. 91 CONG. REC. 11,845 (1945) (statement of Rep. Bradley).

62. Stirone v. United States, 361 U.S. 212, 215 (1960) (citation omitted).

63. *See* United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir. 1985) (illustrating an example of where the Hobbs Act was used to reach members of organized crime who had infiltrated and controlled a union).

64. Nat'l Org. for Women Inc., v. Scheidler, 267 F.3d 687, 693-95 (7th Cir. 2001).

prevent the clinic from using them.[65] In addition, PLAN members physically assaulted clinic staff, employees, and patients on many occasions.[66] Furthermore, PLAN also demanded that other clinics voluntarily shut themselves down or face the consequences of having a "rescue," as previously described, performed at that particular clinic.[67] PLAN implemented these "rescues" in order to prevent patients from obtaining their desired medical services.[68]

2. *The Long Odyssey of the Proceedings at the Lower Court Level*

In 1986, the National Organization for Women, Inc. ("NOW") filed suit in the United States District Court for the Northern District of Illinois.[69] NOW alleged that Joseph Scheidler, the leader of PLAN, and other members of PLAN and Operation Rescue, violated Sections 1962(a), (c), and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO").[70] As part of the complaint, NOW asserted that PLAN engaged in several instances of extortion under the Hobbs Act, which would then serve as predicate acts for the purpose of RICO.[71] The District Court dismissed NOW's RICO complaint because it failed "to allege that the predicate acts of racketeering or the racketeering enterprise were economically motivated."[72] The District Court's dismissal was affirmed by the Court of Appeals for the Seventh Circuit.[73] However, the United States Supreme Court reversed and remanded the case because it concluded that "RICO [did] not require proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose."[74]

Upon remand, the jury found that PLAN had violated the civil provisions of RICO.[75] Based on the jury's special verdict form, the District Court determined that PLAN engaged in twenty-one separate acts of extortion in violation of the Hobbs Act.[76] Following the verdict, the

---

65. *Id.*
66. *Id.*
67. *Id.*
68. Brief for Private Respondents at 4, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) (Nos. 01-1118-19).
69. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 398 (2003).
70. *Id. See also* 18 U.S.C. § 1962 (2000) (providing the text of RICO).
71. *Scheidler*, 537 U.S. at 398.
72. *Id.* (citation omitted).
73. *Id.* (citation omitted).
74. *Id.* at 398-99 (citation omitted).
75. *Id.* at 399.
76. *Id.*

District Court entered a permanent, nationwide injunction, which prohibited PLAN from:

> [I]nterfering with the rights of the class clinics to provide abortion services, or with rights of the class women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.[77]

PLAN appealed the verdict to the Court of the Appeals for the Seventh Circuit. In its appeal, PLAN contended that intangibles such as "the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses"—were not "property" under the Hobbs Act.[78] Alternatively, PLAN claimed that even if such items were considered "property" for purposes of the Hobbs Act, the "property" was not "obtained" by PLAN as expressly required within the Hobbs Act because PLAN simply forced the clinics to "part with" such property items.[79]

The Seventh Circuit deemed PLAN's arguments to be fruitless in light of the settled federal common law interpreting the Hobbs Act. Thus, the court gave PLAN's arguments a cursory treatment.[80] First, the court confirmed that "intangible property such as the right to conduct a business [was] considered 'property' under the Hobbs Act."[81] Second, the court rejected PLAN's alternative argument since a "long line of precedent" held that "an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else [because] [a] loss to, or interference with the rights of, the victim is all that is required."[82] Thus, the Seventh Circuit determined that an extortionist need not physically "obtain" or receive property in order to violate the Hobbs Act, and that a mere disruption of the victim's property rights sufficed. This holding was in conformance with the entire case law that had addressed the topic.[83]

---

77. Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 695 (7th Cir. 2001).

78. *Id.* at 709.

79. *Id.*

80. *See id.* at 707 (observing that PLAN's textualist argument should not detain the Court long, for the Court began this part of its opinion by stating "[t]he defendants have raised a hodgepodge of other challenges to the judgment, none of which need detain us long").

81. *Id.* at 709 (citation omitted).

82. *Id.* (citation omitted).

83. *See generally* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 414 (2003) (Stevens, J., dissenting) (listing the major cases from every federal circuit on the topic and noting that not all require the perpetrator to physically obtain the property he or she extorts).

3. *Scheidler Reaches the United States Supreme Court Again—and the Court Reverses the Lower Court, Finding That PLAN Did Not Commit Extortion*

The United States Supreme Court granted certiorari to determine whether PLAN's actions "constituted extortion in violation of the Hobbs Act."[84] PLAN argued that the Seventh Circuit's decision vastly expanded the definition of extortion under the Hobbs Act since the decision effectively read the "obtaining" requirement out of the statute entirely.[85] PLAN further contended that the Seventh Circuit's opinion wholly conflicted "with the proper understanding of property for purposes of the Hobbs Act."[86] In response, NOW countered that the measures utilized by PLAN caused the class clinics "to give up" certain property rights, such as "a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear."[87] Additionally, NOW argued that PLAN sought to control the use and disposition of the clinics' property by completely disrupting "the ability of the clinics to function."[88] Furthermore, the United States Government, as *amicus curiae*, argued that PLAN obtained the clinics' intangible right to exercise exclusive control over the use of its assets.[89]

The Court began its decision by stating that it need not define "the outer boundaries of extortion liability under the Hobbs Act," such as whether "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."[90] As a result, the Court's initial failure to address this issue and come up with a workable standard adds to the uncertainty surrounding the Court's decision.[91] Regardless of where that boundary may be, the Court decided that PLAN plainly did not obtain NOW's property since such a result would represent a vast expansion of extortion as used in the Hobbs Act.[92] Nonetheless, the Court curiously ensured that its decision

84. *Id.* at 400.
85. *Id.*
86. *Id.*
87. *Id.* at 400-01.
88. *Id.* at 401.
89. *Id.*
90. *Id.* at 402.
91. *See id.* at 412 (Stevens, J., dissenting) (recognizing that "[t]he Court's *murky* opinion seems to hold that [extortion] covers nothing more than the acquisition of tangible property") (emphasis added).
92. *Id.* at 402.

in no way affected or contradicted those lower court rulings such as *United States v. Tropiano*,[93] where "the intangible right to solicit refuse collection accounts" was held to constitute "property" for purposes of the Hobbs Act.[94]

The *Scheidler* Court then began its substantive evaluation of the Hobbs Act by noting "the general presumption that a statutory term has its common-law meaning."[95] At common law, extortion required an individual to actually "obtain" property.[96] New York's common law, which served as the basis for the Hobbs Act,[97] indicated that "obtain" required "both a deprivation and acquisition of property."[98] The *Scheidler* Court's decision also noted that the rule of lenity, which applied to the Hobbs Act since the Hobbs Act is a criminal statute, commanded that "the familiar meaning of the word 'obtain'. . . should be preferred to [a] vague and obscure [meaning]."[99] Thus, the Court concluded that the term "obtain," as used within the Hobbs Act, required one to physically take the property of another.[100]

Next, the Court applied the above principles to the facts presented in *Scheidler*, and held that PLAN did not violate the Hobbs Act because they did not "obtain" NOW's property.[101] Instead, PLAN merely "interfered with, disrupted, and . . . completely deprived [the clinics] of their ability to exercise their property rights."[102] Moreover, PLAN never pursued or received anything of value, which they could then "exercise, transfer, or sell."[103] The Court was concerned that if PLAN's actions constituted extortion under the Hobbs Act, then "the statutory requirement that property must be obtained from another" would be effectively discarded.[104] However, none of the lower federal courts that previously addressed these issues concerned themselves with this argument given the remedial nature

---

93. 418 F.2d 1069 (2d Cir. 1969).

94. *Scheidler*, 537 U.S. at 402 n.6.

95. *Id.* at 402 (citations omitted).

96. *Id.* at 402-03.

97. 91 CONG. REC. 11,843, 11,905 (1945) (statements of Reps. Michener and Robsion). *See also supra* note 54 and accompanying text (providing and explaining the statement of Reps. Hobbs and Vorys).

98. *Scheidler*, 537 U.S. at 403 (citations omitted).

99. *Id.* at 403-04 note 8; *see id.* at 409 ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, [a court should] choose the harsher only when Congress has spoken in clear and definite language.").

100. *Id.* at 404.

101. *Id.* at 405, 409.

102. *Id.* at 404.

103. *Id.* at 405.

104. *Id.*

of the Hobbs Act and the powerful legislative history showing Congress' intent to rid the country of extortion by all means.[105] Regardless, the Court further found that if the "obtain" requirement were eliminated from the Hobbs Act, "the recognized distinction between extortion and the separate crime of coercion" would no longer exist.[106] This distinction was allegedly recognized in the New York Penal Code when "Congress turned to New York law in drafting the Hobbs Act."[107] The Court argued that PLAN had simply engaged in acts of coercion against the class clinics,[108] which was not prohibited by the Hobbs Act.

4. *The Dissenting Opinion Found That the Facts Presented in Scheidler Reflected a Classic Example of Extortion*

The *Scheidler* dissent recognized that no prior federal court had ever construed the Hobbs Act to only cover the actual, physical acquisition of tangible property.[109] Such a cramped construction was unwarranted, especially given that the term "property" had been expansively construed for the last few decades to include "the intangible right to exercise exclusive control over the lawful use of business assets."[110] The federal common law involving extortion, built over the previous fifty years further clarified that "the right to serve customers or to solicit new business [was]. . . a protected property right."[111] Consequently, under a "commonsense" reading of the Hobbs Act, "[t]he use of violence or threats of violence to persuade the owner of a business to surrender control of such an intangible right is an appropriation of control embraced by the term 'obtaining.'"[112] Moreover, no prior federal case had ever even discussed the alleged importance of the distinction between "extortion" and the lesser crime of "coercion."[113]

---

105. *See id.* at 412 (Stevens, J., dissenting) (finding that "[n]o other federal court has ever construed [the Hobbs Act] so narrowly"). *See also supra* text accompanying notes 60-61 (explaining the original Congressional intent of the Hobbs Act).

106. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 405 (2003).

107. *Id.*

108. *Id.* (noting that the crime of coercion "involves the use of force or threat of force to restrict another's freedom of action").

109. *Id.* at 412 (Stevens, J., dissenting) (8-1 decision).

110. *Id.* (Stevens, J., dissenting).

111. *Id.* (Stevens, J., dissenting).

112. *Id.* (Stevens, J., dissenting).

113. *Id.* at 415 n.1 (Stevens, J., dissenting) (citation omitted). *See also* Brief for the States of California, et al. as Amici Curiae at 16, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) (Nos. 01-1118-19) (acknowledging that while coercion might have a broader reach than extortion, the two crimes necessarily overlap and that "one who commits extortion ordinarily also commits coercion").

The dissent concluded by providing three additional considerations in support of its analysis. First, "the uniform construction of the [Hobbs Act] that ha[d] prevailed throughout the country for decades should remain the law unless and until Congress decide[d] to amend the statute."[114] Second, every federal court, including the Supreme Court, had "consistently identified the Hobbs Act as a statute that Congress intended to be given a broad construction."[115] Finally, "the principal beneficiaries of the Court's dramatic retreat from the position that . . . federal courts have maintained throughout the history of [the Hobbs Act] will certainly be the class of professional criminals whose conduct persuaded Congress that the public needed federal protection from extortion [to begin with]."[116]

III. ANALYSIS

A. PLAN DID COMMIT EXTORTION UNDER THE HOBBS ACT AND THE FEDERAL COMMON LAW FRAMEWORK PRIOR TO THE SUPREME COURT'S RECENT DECISION IN *SCHEIDLER*

1. *Governing Principles at the Time of the Scheidler Decision*

a. The Expansion of "Property" Through the Passage of Time

Prior to *Scheidler*, extortion under the Hobbs Act had been broadly used as an effective prosecutorial weapon. In turn, courts gradually extended flexibility to the explicit provisions contained in the statute. First, various courts expanded the Hobbs Act by eliminating the requirement that an extortionist actually receive tangible, physical property. This extension was first documented in *United States v. Tropiano*, which stated that "[t]he concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, [was] not limited to physical or tangible property or things, but include[d], in a broad sense, any valuable right considered as a source or element of wealth."[117]

This evolvement was again noted in *United States v. Arena*,[118] which acknowledged that "[t]he concept of 'property' under the Hobbs Act [was]

---

114. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 416-17 (Stevens, J., dissenting) (citations omitted).

115. *Id.* at 417 (Stevens, J., dissenting) (citations omitted).

116. *Id.* (Stevens, J., dissenting).

117. United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969) (citations omitted).

118. 180 F.3d 380 (2d Cir. 1999).

an expansive one."[119] *Arena* recognized that the property involved in the usual extortion prosecution typically involved an existing physical asset.[120] However, the *Arena* court reiterated that the concept of property under the Hobbs Act was "not limited to tangible things, but include[d] intangible assets such as rights to solicit customers and to conduct a lawful business."[121] Similarly, additional support for the premise that intangible rights are covered under the Hobbs Act comes from *United States v. Lewis*.[122] *Lewis* concluded that "the 'property' of which the victim [of extortion was] deprived need not be tangible, but may be no more than the right to make his business decisions free of threats and *coercion*, or other intangible rights."[123] *Lewis*, like the majority of lower federal courts, used "coercion" and "extortion" interchangeably, probably due to the similarity between the two crimes.[124]

More importantly, even New York, whose extortion statutes served as the basis for the provisions of the Hobbs Act,[125] adopted the expansive definition of property as illustrated in *Tropiano*, *Arena*, and *Lewis*. New York's expansive reading of the definition of property, as used in the context of extortion, began with *People v. Barondess*.[126] The court in *Barondess* wrote that "there would obviously be no reason for so distinguishing the word 'property' as it ha[d] been used in [the extortion statutes] as to apply it solely to tangible articles capable in and of themselves of receiving direct injury by the unlawful or wrongful act of another."[127] Instead, the court maintained that property, as referred to in the extortion statutes, referred to property "in its broad and unrestricted sense, applying . . . to whatever may be properly maintained to be property."[128]

---

119. *Arena*, 180 F.3d at 392.

120. *Id.*

121. *Id.* (citations omitted). *See also* United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267, 281 (3d Cir. 1985) (listing decisions from other circuits that have extended the Hobbs Act to protect both intangible and tangible property).

122. 797 F.2d 358 (7th Cir. 1986).

123. *Lewis*, 797 F.2d at 364 (citations omitted and emphasis added). *See also* United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980) (finding that the "right to solicit business free from threatened destruction and physical harm falls within the scope of protected property rights under the Hobbs Act," since "the right to make business decisions and to solicit business free from wrongful coercion is a protected property right" under the Hobbs Act property concept).

124. *See infra* text accompanying notes 209-12 (discussing the strong similarities between coercion and extortion).

125. *See supra* text accompanying notes 54, 97 (discussing the use of New York law's definitions of extortion and coercion in the Hobbs Act).

126. 31 N.E. 240 (N.Y. 1892).

127. *Barondess*, 31 N.E. at 242.

128. *Id.*

People v. Wisch[129] later reinforced the conclusion drawn in *Barondess*.[130] *Wisch* held that the meaning of property, as used in the context of extortion, was broad and that extortion covered intangible property.[131] Consequently, *Wisch* found that a milk route might constitute property capable of being taken in an extortion prosecution.[132] Furthermore, *People v. Kacer*,[133] a later New York decision, made clear that "extortion statutes seek to protect a broad range of interests from oppression by those with special powers."[134] Thus, the case law of the federal circuits, and of New York itself, demonstrate that "property," as used in the Hobbs Act, includes both tangible and intangible property rights.[135]

b. The Gradual Erosion of the "Obtain" Requirement

In addition to the expansion of the term "property" as used in the statute, various 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*[136] 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.[137] The *Frazier* court was able to reach this result because "*[t]he gravamen of the offense [was] loss to the victim.*"[138] The *Frazier* court also 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."[139] Thus, extortion can occur, for example, if the extortionist demands his or her victim to

129. 296 N.Y.S.2d 882 (N.Y. Sup. Ct. 1969).

130. *Wisch*, 296 N.Y.S.2d at 886.

131. *Id.*

132. *Id.*

133. 448 N.Y.S.2d 1002 (N.Y. Sup. Ct. 1982).

134. *Kacer*, 448 N.Y.S.2d at 1008.

135. *See, e.g.*, Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989) (pointing out that other circuits "are unanimous in extending the Hobbs Act to protect intangible, as well as tangible, property").

136. 560 F.2d 884 (8th Cir. 1977)

137. *Frazier*, 560 F.2d at 887. *See also* Brief of Amici Curiae Former Federal Prosecutors et al. at 18, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) (Nos. 01-1118-19) (stating that "[n]o [relinquishment] requirement existed at common law, and Congress has never imposed such a limitation by statute").

138. *Frazier*, 560 F.2d at 887 (citations omitted and emphasis added); *see also* United States v. Stillo, 57 F.3d 553, 559 (7th Cir. 1995) (finding that "the gravamen of the offense is loss to the victim," as the Hobbs Act does not require the extortionist to act for his or her own benefit); United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978) (same); United States v. Hyde, 448 F.2d 815, 843 (5th Cir. 1971) (same); United States v. Provenzano, 334 F.2d 678, 686 (3d Cir. 1964) (same).

139. *Frazier*, 560 F.2d at 887.

"burn one million in cash,"[140] or if the extortionist takes the right of a business "to make a business decision free from outside pressure wrongfully imposed...."[141]

Moreover, *Arena* is again instructive as to the development of the common law in this context. In *Arena*, the court reasoned that "[s]ince the Hobbs Act concept of property is broad, 'the Act's requirement that property be 'obtained' [should be] given a similarly broad construction.'"[142] Furthermore, "[t]o commit extortion within the meaning of the Act, the perpetrator of a physical attack or threat need neither seek nor receive an economic benefit...and there is no requirement that the perpetrator of an extortion receive the benefit of his act."[143] This is true because "[a] perpetrator plainly may 'obtain' property without receiving anything, for obtaining includes 'attaining...disposal of' and 'disposal' includes 'the regulation of the fate...of something.'"[144] In sum, the federal common law prior to *Scheidler* made clear that the Hobbs Act covered intangible property rights and that the extortionist was not required to take actual, physical receipt of the "property" taken from another by force.[145]

2. *PLAN Did Commit Extortion Under the Hobbs Act According to the Federal Common Law Developed Prior to Scheidler*

The crux of the problem in *Scheidler* was whether PLAN and Operation Rescue "obtained" the "property" of the class abortion clinics for purposes of the Hobbs Act. After applying the federal common law in place prior to *Scheidler*, one can see that PLAN and Operation Rescue did, in fact, commit extortion under the Hobbs Act.

a. PLAN Committed Extortion by "Obtaining" the Abortion Providers' Lost Profits

First, PLAN "obtained" the "property" of the abortion clinics in the form of lost profits, as many women refused to patronize abortion clinics

---

140. United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986).

141. *Santoni*, 585 F.2d at 673.

142. United States v. Arena, 180 F.3d 380, 394 (2d Cir. 1999) (quoting Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2d Cir. 1990)).

143. *Id.* (citations omitted).

144. *Id.* (quoting WEBSTERS'S THIRD NEW INT'L DICTIONARY 1559, 655 (1976)).

145. *See* Carole Golinski, Recent Decision, *In Protest of* NOW v. Scheidler, 46 ALA L. REV. 163, 179-80 (1994) (noting that the "obtain" requirement of the Hobbs Act "has received liberal interpretation by the courts" and that courts have extended the Hobbs Act to specifically protect one's intangible property rights).

out of fear.[146] In *Northeast Women's Center Inc. v. McMonagle*,[147] the defendants stormed onto the premises of an abortion clinic, blocked access to the clinic's operating rooms, and destroyed some of the clinic's medical equipment.[148] The defendants also physically attacked patients who were attempting to gain access to the abortion clinic.[149] The defendants' activities were the primary cause of the clinic eventually losing its lease in the building that it was occupying.[150]

The *McMonagle* court found that the defendants had violated the Hobbs Act by obtaining the clinic's right to continued operation of its business.[151] The court reasoned that the defendants' activities essentially forced the clinic out of business.[152] The right to conduct one's business, and to receive the fruits and benefits therefrom, was a recognized property right.[153] Thus, PLAN "obtained," as will be shown in Part III.B.1-2, the class clinics' "property" when they forced the clinics to close down and lose the revenue that would have accrued to them had they still been fully operational.[154] As a result, PLAN effectively threatened the class clinics to either close down or else burn one million in cash revenue.[155]

---

146. *See, e.g.*, Respondent's Brief at 1-3, *Scheidler* (Nos. 01-1118-19) (describing how PLAN members assaulted clinic patients); Clayton, *supra* note 1, at 971-72 (elaborating on how PLAN threatened and physically attacked, assaulted, shoved, grabbed, and spat at women who were attempting to gain access to clinic entrances); Patricia Ireland, *The Rescue Racket: Organized Crime and Mob Violence Against Women and Doctors*, 21 OHIO N.U. L. REV. 845, 846 (1995) (recounting how a protestor "blasted through the door" to a clinic, knocked an administrator down, and proceeded to jam his elbows against the administrator's neck, throw his forearms across the administrator's throat, and physically slam the defenseless administrator against the wall).

147. 868 F.2d 1342 (3d Cir. 1989).

148. *McMonagle*, 868 F.2d at 1345-46.

149. *Id.* at 1346.

150. *Id.*

151. *Id.* at 1350.

152. *Id.*

153. *Id.*

154. *See* United States v. Nadaline, 471 F.2d 340, 344 (5th Cir. 1973) (concluding that business accounts and the unrealized profits from those accounts are intangible property within the purview of the Hobbs Act).

155. *See* United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986) (stating that extortion can occur if the extortionist demands his or her victim to "burn one million in cash"); *see also* United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980) (acknowledging that "[t]hreatened force may encompass fear of economic loss as well as physical violence"); Kristal S. Stippich, *Behind the Words: Interpreting the Hobbs Act Requirement of "Obtaining of Property from Another,"* 36 J. MARSHALL L. REV. 295, 307 (2003) (recognizing that "the revenues from the accounts that [one] would not be servicing" could constitute "property" capable of being "obtained" for purposes of the Hobbs Act).

b. PLAN "Obtained" the Clinics' Right to Conduct Their Business Free from Unwanted and Wrongful Fear

Second, PLAN similarly committed extortion by "obtaining" the abortion clinics' right to make business decisions or otherwise conduct their business free from wrongful outside influence, force, or pressure.[156] In *Arena*, the defendants poured butyric acid, a hazardous and toxic liquid, on the premises of various reproductive health providers.[157] The attacks caused various clinics to close for several days, caused physical and psychological harm to patients, doctors, and clinic employees alike, and resulted in large environmental clean-up costs, which were undertaken by the various medical facilities.[158] The *Arena* court concluded that the defendants had "obtained" the clinics' "right to conduct a business free from wrongful force, coercion or fear."[159] The court found that the attacks were "part of an overall strategy to cause abortion providers...to give up their property rights to engage in the business of providing abortion services for fear of future attacks."[160]

Given the similarity in facts between *Arena* and *Scheidler*, one would think that the well-reasoned *Arena* decision would directly apply to *Scheidler*. Under *Arena*, PLAN essentially acquired the clinics' ability to conduct its daily business and make its own business decisions free from unwanted, wrongful interference.[161] Instead, the clinics felt forced to give into PLAN's demands for fear of future "rescues" or "blockades."[162] However, the Court chose not to follow *Arena* because it felt that the "familiar meaning" of "obtain" should be used over the "vague and obscure" meaning, especially in light of the rule of lenity.[163] Nevertheless, the negative ramifications from the Court's decision to depart from *Arena* will be explored in Part III.C.

---

156. *See, e.g.*, United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978).

157. United States v. Arena, 180 F.3d 380, 385-86 (2d Cir. 1999).

158. *Id.* at 386-88.

159. *Id.* at 392.

160. *Id.* at 393.

161. *Id.*

162. *See* Respondent's Brief at 4-7, *Scheidler* (Nos. 01-1118-19) (describing the tactics used by PLAN). Specifically, "PLAN's blitzkrieg tactics were widely feared by abortion providers and their clients, and they were explicitly designed to cause such fear." *Id.* at 6.

163. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 403-04 n. 8 (2003).

c. PLAN Committed Extortion by "Obtaining" the Clinics' Right to Solicit Prospective Business Clients

Third, PLAN "obtained" the "property" of the class clinics by taking away the clinics' right to solicit prospective patients. In *Tropiano*, the defendant threatened Caron to stop Caron from servicing the defendant's refuse or garbage removal customers.[164] As a direct result of the defendant's threat and out of fear for himself and his family, Caron stopped soliciting the defendant's customers.[165] The defendant argued that he did not "obtain" any property because the right to solicit business was too "amorphous" to come within the ambit of the Hobbs Act.[166]

Tropiano rejected the defendant's argument and found that the right to solicit business accounts unhindered by any territorial restrictions was a property right that could be extorted.[167] The facts in *Scheidler* are analogous to those in *Tropiano*. For instance, PLAN threatened protests and engaged in other acts of violence in order to prevent the clinics from serving their customers and from attracting new ones.[168] These protests even caused some clinics to occasionally shut their doors to business for extended periods of time.[169] Therefore, PLAN committed extortion under *Tropiano* by "obtaining" the clinics' right to solicit new business customers and accounts.[170] Stated differently, a clinic might have been afraid to actively solicit and advertise their abortion services for fear that it would cause a backlash from PLAN. Practically speaking, there is no difference between the threat made in *Tropiano* (e.g. "don't serve my refuse or garbage customers or I'll kill you"), and the threat made in *Scheidler* (e.g. "don't serve this segment of the population or we'll shut down your business").

---

164. United States v. Tropiano, 418 F.2d 1069, 1073 (2d Cir. 1969).

165. *Id.* at 1074.

166. *Id.* at 1075.

167. *Id.* at 1076. *See also* United States v. Zemek, 634 F.2d 1159, 1173 (9th Cir. 1980) (explaining that the defendants in the case allegedly committed extortion by obtaining the "goodwill and customer revenues of a competing tavern"). The defendants in *Zemek* obtained their competitor's goodwill and revenues by "damaging the tavern with a Molotov cocktail. . .; destroying [the tavern] by fire. . .; tailing the owners of the tavern; breaking into their home and threatening the occupants. . .; and plotting to blow up the tavern [at a later date]." *Id.* Similar to *Tropiano*, the *Zemek* court held that "[t]he right to make business decisions and to solicit business free from wrongful coercion is a protected property right." *Id.* at 1174. The similarities of *Scheidler* to *Zemek* are startling as PLAN acted like the defendants in *Zemek* in order to obtain the goodwill and customer revenues of the various abortion clinics, and to prevent the clinics from soliciting future business out of fear.

168. Respondent's Brief at 1-8, *Scheidler* (Nos. 01-1118-19).

169. *Id.* at 6.

170. *Tropiano*, 418 F.2d at 1075-76.

3. *PLAN Even Committed Extortion Under New York Law, Which Is Significant Since It Served as the Basis for the Hobbs Act*

In *People v. Spatarella*,[171] the defendant threatened the victim to stop servicing a business customer or face the prospect of "end[ing] up in the hospital."[172] The victim complied with the defendant's demand and discontinued his business relationship with the customer at issue.[173] The applicable New York extortion statute at the time provided:

> A person obtains property by extortion when he compels or induces another person to *deliver* such property to himself or to a third person by means of instilling in him a fear that, if the property is not so *delivered*, the actor or another will: (i) [c]ause physical injury to some person in the future.[174]

Thus, one could argue that this New York extortion statute was more strenuous than the present form of the Hobbs Act since it required actual *delivery* of property to the extortionist while the Hobbs Act merely requires "the obtaining of property from another."[175] Accordingly, the defendant in *Spatarella* argued that the New York extortion statute did not apply to him because it was physically impossible to take or *deliver* a business customer to another.[176]

Nonetheless, the court rejected the defendant's "overly literal arguments."[177] Instead, the court found that the defendant committed extortion and held that the property obtained by the defendant was the business generated by the victim's customer.[178] The court stressed

> that physical destruction to property was not all that was envisioned under the statute; that if a business were left to wither and die for lack of workmen to carry it on there would be just as destructive an effect as if real or personal property used in the business were destroyed. [Continuing on, the court stated that] business is property, as much so as the articles themselves which are included in its transactions. . .[f]or it has been said by Blackstone that property consists in the free use, enjoyment, and

171. 313 N.E.2d 38 (N.Y. 1974).
172. *Spatarella*, 313 N.E. 2d at 39.
173. *Id.*
174. *Id.* (emphasis added).
175. 18 U.S.C. § 1951(b)(2) (2000).
176. *Spatarella*, 313 N.E.2d at 39 (emphasis added).
177. *Id.* at 40.
178. *Id.*

> disposal of all the owner's acquisitions, without any control or diminution save only by the laws of the land.[179]

Furthermore, the court reiterated "that the word property as used in the statute 'is intended to embrace every species of valuable right and interest and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property.'"[180] The court even stated that "the extortionist's demand for the business itself, or a part of it, [was], if anything, more egregious than the demand simply for money."[181] Clearly, intangible rights qualify as "property" for purposes of the New York extortion statute.[182]

Correspondingly, the facts presented in *Scheidler* were similar to those in dispute in *Spatarella*. PLAN sought to end the business generated from the various patrons of the class abortion clinics, much like the defendant in *Spatarella* sought the business generated from the victim's customer for himself. Instead of threatening "stop serving X or end up in the hospital," as demanded in *Spatarella*, PLAN demanded "stop serving X or we will shut down your clinics."[183] In sum, the abortion clinics possessed an advantageous business relationship with women who were seeking abortion services, but the medical providers were deprived of that business arrangement because of PLAN's illicit behavior.[184] PLAN committed the worst

---

179. *Id.* (citations omitted).

180. *Id.* (citation omitted).

181. *Id.*

182. *Spatarella*, 313 N.E.2d at 40. *See also* People v. Wisch, 296 N.Y.S.2d 882, 886 (N.Y. Sup. Ct. 1969) (demonstrating that the defendants in the case threatened milk dealers "that their supply of milk would be cut off, that they would have work stoppages and they would be put out of business."). Since the meaning of property under the extortion statute is "broad" and covers "intangible property," "[a] milk route which has a pecuniary value is property and may be the subject of an extortion." *Id.* *Scheidler* is again analogous to this decision, as PLAN directly threatened the clinics with "blockades" and "rescues" that would result in work stoppages. Respondent's Brief at 4-7, *Scheidler* (Nos. 01-1118-19). Additionally, PLAN's ultimate goal was to shut down the clinics through the tactics mentioned in Part II.C.1. *Id.* Moreover, since serving a specific clientele has pecuniary value, this could represent potential property subject to an extortion prosecution. *See also* People v. Kacer, 448 N.Y.S.2d 1002, 1007-08 (N.Y. Sup. Ct. 1982) (stating that "a threat to prevent an award of a future contract qualifies as a threat to harm a business"). PLAN essentially engaged in the same activity as that of the defendant in *Kacer*, for they threatened the clinics with violent protests in order to prevent women from entering into abortion contracts with a clinic. Respondent's Brief at 4-7, *Scheidler*, (Nos. 01-1118-19).

183. Respondent's Brief at 4, *Scheidler* (Nos. 01-1118-19).

184. *See Spatarella*, 313 N.E.2d at 40 (recognizing that the victim "possessed an advantageous business relationship which was based on an at-will arrangement and which, because of [the defendant's] forceful and illegal behavior, deprived [the victim] of that business arrangement, the advantage of which was obtained by and accrued to the defendant directly in consequence of his extortive activity"). Even if the defendant had not directly received the beneficial relationship with the victim's former business customer, the defendant would still have been convicted of extortion at federal law. *See, e.g.*, United States v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977) (noting that "it is not necessary to prove that the extortionist himself, either

form of extortion as noted in *Spatarella*, by seeking to end the clinic's business.[185]

Therefore, as this Section demonstrates, the Hobbs Act protects one's interest in intangible property.[186] Furthermore, the clinics impacted by PLAN's activities had protected intangible property at stake under the federal common law framework developed prior to *Scheidler*.[187] These property rights included, among others, the lost business profits generated by the clinics, the right to make business decisions free from unwanted outside forces, and the right to solicit prospective customers or clients.[188] In sum, the clinics had some sort of property rights at stake, "or otherwise there would be no motivation for [the clinics'] acquiescence in the demands of [PLAN]."[189] Part III.B.1-2 of this Article will show that PLAN also "obtained" the intangible rights possessed by the various class abortion clinics.

B. BY FORCING THE CLINICS TO ABANDON THEIR INTANGIBLE PROPERTY RIGHTS, PLAN "OBTAINED" CONTROL OF THESE RIGHTS, AND COMMITTED BOTH EXTORTION AND COERCION

1. *PLAN "Obtained" the Clinics' Intangible Property Rights by Causing the Clinics to Surrender Such Rights to PLAN*

By causing the various clinics to abandon their intangible property rights, PLAN "obtained" this property for purposes of the Hobbs Act by asserting effective control over it.[190] When one is forced to abandon or part with their intangible property right to make a business decision free from harassment, such property must accrue or flow to another, as it just does not remain uncontrolled in the middle of space.[191] Instead, the extortionist has

---

directly or indirectly, received the fruits of his extortion or any benefit therefrom [since] [t]he gravamen of the offense is loss to the victim").

185. *See supra* text accompanying note 181 (explaining the *Spatarella* court's statement that trying to deprive someone of their actual business may be worse than just demanding money).

186. *See supra* text accompanying notes 118-37 (discussing lower court interpretation of extortion under the Hobbs Act).

187. *See supra* text accompanying notes 118-26 (explaining some of the federal common law on extortion prior to *Scheidler*).

188. *See supra* Part III.A.2.a-c (arguing that PLAN in the *Scheidler* case did actually commit extortion).

189. United States v. Hathaway, 534 F.2d 386, 395 (1st Cir. 1976).

190. *See* Brief of Amici Curiae Former Federal Prosecutors et al. at 9-10, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) (Nos. 01-1118-19) (arguing that the pressure put on clinics by organizations such as PLAN deprives the clinics of an intangible property right).

191. *See* United States v. Arena, 180 F.3d 380, 394 (2d Cir. 1999) (finding that "even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless 'obtain[ed]' that property if she has used violence to force her victim to abandon it").

obtained property in the sense that "they have secured for themselves the use that they want of it," such as preventing the victim from competing with the extortionist or forcing the victim from freely running their business.[192] By finding that PLAN's actions simply interfered with or disrupted the clinics' functions,[193] the *Scheidler* majority ignored the reality of PLAN's devastating effects and failed its "duty to construe the statute so as to make it an effectual piece of legislation."[194]

For example, suppose the school bully threatens a fellow classmate by stating, "Don't come to school this week or I will make your life unbearable." The target, knowing full well that the bully has inflicted severe pain on many fellow students in the past, convinces his or her guardian that they were suddenly hit with a mysterious sickness and could not attend school for the week. For all effective purposes, has not the school bully both interfered with, and gained control of, the victim's right to receive an education for the week?[195] The decision not to go to school was solely determined by the bully's threat, for the victim would have gone but for the fear of being pummeled. In this instance, the victim's decision, and the *abandonment* of his or her right to receive an education for a week, was controlled, exercised, determined, acquired, obtained, dominated, or compelled by the bully's threat.[196]

The decision faced by the victim in the aforementioned example can be directly paralleled to the decision faced by many of the clinics affected by PLAN's actions. The clinics transferred control over their business decisions to PLAN when they gave in to PLAN's demands and closed down or abandoned their business.[197] In essence, "[i]t is difficult to conceive a set of facts that more clearly sets forth extortion as it is defined" in the Hobbs Act because "obtain" is synonymous with "gaining control over" in these

---

192. Transcript of Oral Argument at 6, 13, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) (Nos. 01-1118-19).

193. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404-05 (2003).

194. Commonwealth v. Downey, 429 N.E.2d 41, 44 (Mass. App. Ct. 1981).

195. *Scheidler*, 537 U.S. at 404-05.

196. In *Arena*, the court held that:

> [W]here the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act.

180 F.3d at 394. *See also* People v. Cadman, 57 Cal. 562, 564 (Cal. 1881) ("Assuming. . .that the right to take and prosecute an appeal is property within the meaning of the Code, it follows that a threat made for the purpose of inducing an appellant to dismiss an appeal is a threat made with intent to extort property from another."). Thus, under the common law stemming from *Cadman*, extortion did occur if one abandoned or gave up their property right in response to the fear produced by another's threat. *Id.*

197. Transcript of Oral Argument at 23, 44, *Scheidler* (Nos. 01-1118-19).

instances.[198] Moreover, a restrictive reading of the "obtain" requirement would not further the underlying purposes of the Hobbs Act.[199]

Further, suppose the target in the above-described school example ignored the bully's threat and went to school that week. As a result, the bully subsequently destroyed the victim's school supplies (i.e. the bully threw the victim's trapper in the mice-filled dumpster and snapped the victim's pencils in half). Did the bully "obtain" the victim's school supplies? Otherwise, how was the bully able to destroy the target's school supplies without first physically "obtaining" them? Again, the parallel to PLAN's activities can be drawn, for they destroyed clinic property on many occasions as part of their "rescues."[200] Thus, it is contradictory for *Scheidler* to recognize that PLAN destroyed medical equipment, yet still hold that they did not physically "obtain" any clinic property.[201]

2. *PLAN Committed Extortion Under a Natural Reading of the Word "Obtain"*

A commonsense approach to the definition of "obtain" also demonstrates that PLAN obtained the class clinics' intangible property, as referenced in Part III.A.2. "By its plain interpretation, the word 'obtain'... includes the [extortionist's] 'obtaining' control over the victim's property [since this] control causes the victim to discard or surrender that property."[202] Moreover, in its simplest terms, "obtain" means "to get possession of, especially by trying," or "to arrive at, to reach, to achieve."[203] Under this definition, PLAN "gained" or "attained," with extensive planning and effort, the clinics' intangible property right to go about its business free from wrongful harassment because PLAN's influence dominated the clinics' decision-making.[204] By relinquishing control over their voluntary business decisions, the clinics gave in to PLAN's threats.

---

198. *See* Libertad v. Welch, 53 F.3d 428, 438 n.6 (1st Cir. 1995) (noting that the appellees used force, such as engaging in acts of physical destruction, trespass, vandalism, etc., in order to extort the abortion clinic's "intangible right to freely conduct one's lawful business").

199. *See supra* text accompanying notes 60-62 (providing statements of members of Congress on the intent behind the Hobbs Act).

200. Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 702 (7th Cir. 2001).

201. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 405 (2003).

202. Brief of Amici Curiae Former Federal Prosecutors et al. at 9, *Scheidler* (Nos. 01-1118-19).

203. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1236 (Deluxe 2d ed., 1983). *See also* MERRIAM-WEBSTER ONLINE DICTIONARY, at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=obtain&x=17&y=22 (last visited Jan. 26, 2004) (defining "obtain" as "to gain or attain usually by planned action or effort").

204. *See e.g.*, *supra* text accompanying notes 18-22 (explaining how attacks with butyric acid on one clinic forced that clinic to close for a period of time to clean up).

Consequently, this relinquishment, or turning over control, was "gained" or "attained" by PLAN.

Furthermore, other words associated with the verb "obtain" include "acquire, win, gain, attain, procure," or "get."[205] These words could also adequately describe PLAN's conduct. By forcing the clinics to abandon their intangible rights, as set forth in Part III.A.2, for a set period of time, PLAN acquired, gained, picked up, secured, etc. those rights of the clinic. In this regard, it might be helpful for one to think of these intangible rights as part of a zero-sum game. What was lost by the clinics, for example, the ability to solicit new business clients or make truly free business decisions apart from wrongful outside pressure, was gained by PLAN. The forfeited intangible property rights that the clinics formerly enjoyed did not remain lost somewhere in the middle of space not possessed or controlled by anyone. Rather, they are claimed, gained, and "obtained" by PLAN themselves, as evidenced by PLAN's conduct after forcing the clinics to close.[206]

3. *Scheidler's Emphasis on Coercion was Misplaced and Unnecessary, and Will Only Result in Obscuring Federal Extortion Law*

Additionally, the Court's curious invocation of the crime of coercion to describe PLAN's conduct does not take away from the fact that PLAN also committed extortion under the Hobbs Act.[207] The Court's distinction between extortion and coercion is impractical and unhelpful for future courts facing the Hobbs Act given the similarity between the two crimes, for extortion "is simply a subset of coercion."[208] Coercion only occurs if liberty was the sole object of one's threat.[209] For example, if a victim was only forced to depart with their First Amendment right to free speech, then coercion was the only crime that had been committed.[210] In contrast, if one was forced to give up control of one's property, then both coercion and

---

205. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1236 (Deluxe 2d ed., 1983). *See also* MERRIAM-WEBSTER ONLINE THEASAURUS, *at* http://www.m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=obtain&x=19&y=15(last visited Jan. 26, 2004) (listing synonyms of "obtain" as to "acquire, annex, chalk up, gain, have, pick up, procure, secure, [and] win").

206. Respondent's Brief at 6, *Scheidler* (quoting PLAN leader Scheidler as bragging to his followers that "[w]e got four abortion facilities to quit doing abortions one day[,] [w]e just told them to quit . . . [a]nd if you don't we'll come in and shut you down").

207. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 405-06 (2003).

208. Respondent's Brief at 27 n.32, *Scheidler* (Nos. 01-1118-19).

209. *Id.*

210. *Id.*

extortion have taken place, with coercion being a lesser-included offense.[211] Since PLAN obtained the clinics' intangible property, as shown in Parts III.B.1-2, PLAN committed both the crimes of extortion and coercion. The *Scheidler* Court itself even recognized the overlap of the two crimes when it stated, "coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property."[212]

Nonetheless, the Court provided no guidance for future courts attempting to distinguish between these seemingly congruent crimes. Instead, the Court recounted that PLAN merely restricted the clinics' "freedom of action."[213] PLAN's tactics undoubtedly caused many clinics to lose business accounts and profits.[214] Yet, since when were lost profits or the ability to make business decisions free from wrongful outside pressure associated with "freedom of action" and not "property"? While *Scheidler* offered no explanation, such a question illustrates that there is no "clear line dividing 'obtaining property' and restraining liberty."[215] Finally, "[n]one of the cases following. . .*Tropiano*. . .even considered the novel suggestion that this method of obtaining control of intangible property amounted to nothing more than the nonfederal misdemeanor of 'coercion.'"[216] In this regard, the Court's work is questionable since it contravenes all of the "well-considered opinions" issued by the lower courts.[217]

C. IF THE COURT INSISTS THAT INTANGIBLE "PROPERTY" MUST BE PHYSICALLY ACQUIRED BEFORE A HOBBS ACT VIOLATION WILL BE FOUND, THEN THIS ABSURD RESULT WILL SEVERELY HAMPER EFFECTIVE LAW ENFORCEMENT IN THE FUTURE

The Court's "new" approach[218] to the "obtain" requirement in the Hobbs Act represents an abrupt departure from previous federal common

---

211. *Id.*

212. *Scheidler*, 537 U.S. at 407-08. *See also* Brief for the States of California et al. as Amici Curiae at 16, *Scheidler* (Nos. 01-1118-19) (arguing that overlap exists "between the property interests protected by prohibitions on extortion and liberty interests protected by prohibitions on coercion [as] one who commits extortion ordinarily also commits coercion").

213. *Scheidler*, 537 U.S. at 405.

214. *See supra* Part III.A.2.a (discussing how PLAN 'obtained' the lost profits of the clinics, and thus, committed extortion).

215. Brief for the States of California et al. at 16, *Scheidler* (Nos. 01-1118-19).

216. *Scheidler*, 537 U.S. at 415 n.1 (Stevens, J., dissenting).

217. McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).

218. By departing from the traditional principles concerning the Hobbs Act that had been developed and established over the past three decades by numerous federal court decisions, I believe that the Supreme Court has set forth a new, more restrictive approach to any extortion prosecution under the Hobbs Act. As demonstrated by the decisions beginning in Part III.A, the federal common law had become more elastic and flexible in dealing with the many intangible property right problems presented by a modern extortion prosecution. This beneficial evolvement

law. Since *Frazier*, courts have uniformly rejected any defense arguments that "the term 'obtaining of property,' as used in the Hobbs Act, meant 'reduc[tion] to actual physical possession.'"[219] However, this was essentially the argument made by PLAN and accepted by *Scheidler*,[220] and an argument that will also reduce the effectiveness of the Hobbs Act as a prosecutorial weapon, especially as applied to organized crime prosecutions. In fact, *Scheidler* will "have grave implications for federal law enforcement, [since] it. . .decriminalize[s] serious criminal conduct that affects national interests, and criminal conduct that Congress has rightly outlawed through the various federal extortion statutes."[221] The following examples will illustrate this prediction, as they demonstrate that illegal acts, which previously would have constituted extortion, no longer fit the definition of extortion after *Scheidler*.

1. *The Court's New "Obtain" Requirement Would Have Prevented Past Successful Prosecutions of Organized Crime Members Under the Hobbs Act*

In *United States v. Local 560 of the International Brotherhood of Teamsters*,[222] the United States Government brought a civil RICO action against several reputed organized crime members.[223] The Government alleged that the defendants had extorted Local 560's "right[] to vote, speak, and assemble freely by systematic acts of intimidation."[224] The extorted property right was also described as "the membership's. . .right[] to democratic participation in their union's affairs."[225] Many union members were intimidated and feared to participate in the affairs of their local union because of the repeated acts of violence by the defendants, which included several acts of murder.[226] The court found that this fear caused "a significant proportion of Local 560's rank and file. . .to *surrender* their membership rights."[227] The defendants argued that only physical, tangible

---

has now been reversed by *Scheidler*, and the Court's new framework will have profoundly negative effects, as will be demonstrated by this Part.

219. United States v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977).

220. *Scheidler*, 537 U.S. at 404-05.

221. Brief of Amici Curiae Former Federal Prosecutors et al. at 21, *Scheidler* (Nos. 01-1118-19).

222. 780 F.2d 267 (3d Cir. 1985).

223. *Teamsters Local 560*, 780 F.2d at 269-71.

224. *Id.* at 271.

225. *Id.* at 275.

226. *Id.* at 271, 275.

227. *Id.* at 278 (emphasis added).

property was capable of being extorted under the Hobbs Act.[228] However, the court summarily dismissed this argument and held that "right[s] incident to union membership are protectible property interests" since "the language of the Hobbs Act makes no. . .distinction between tangible and intangible property."[229] Thus, the court upheld the defendants' convictions under the Hobbs Act.[230] Presumably, the court assumed that the defendants had "obtained" the union's intangible right to democratic participation in their affairs even though the court was silent as to this point.

Nevertheless, given *Scheidler*, the defendants in *Teamsters Local 560* would now likely argue that they did not commit extortion because they did not physically "obtain" the member's right to freely participate in their union. This case illustrates the inherent problem with *Scheidler's* restrictive approach to the "obtain" requirement. For instance, how can an extortionist actually, physically "obtain" one's right to democratic participation in their union, or any other intangible right for that matter? It is not as if the extortionist can physically capture these intangible rights in order to transfer or sell such property to another for valuable consideration. This is true because, by definition, intangible property rights are those that lack physical form or substance, as "intangible" is defined as "that cannot be touched," or something "that cannot be easily defined, formulated, or grasped."[231] Moreover, other synonyms for "intangible" also include "indiscernible. . ., unapparent. . ., [and] unobservable."[232] Nonetheless, *Scheidler* requires an extortionist to physically "obtain" something of value that can be exercised, transferred, or sold.[233] Yet, this requirement leads to an absurd result, as how can an extortionist physically "obtain" something that lacks tangible form to begin with?[234] For example, it would be

228. *Id.* at 281.

229. *Id.*

230. *Id.* at 296.

231. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 953 (Deluxe 2d ed., 1983).

232. BURTON'S LEGAL THESAURUS 307 (3d ed., 1998). *See also* MERRIAM-WEBSTER ONLINE THESAURUS, *at* http://www.merriam-webster.com/cgi-bin/thesaurus?book=Thesaurus &va=intangible&x=22&y=12 (last visited Feb. 16, 2004) (providing the same synonyms).

233. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 405 (2003). However, this requirement is curious in light of the settled law dictating that "extortion as defined in [the Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." United States v. Green, 350 U.S. 415, 420 (1956). Moreover, extortion "is committed even though the person doing the extortion" might not get or receive the money or other benefit being sought. United States v. Sweeney, 262 F.2d 272, 275 (3d Cir. 1959). Thus, if one does not have to receive the benefit of their crime or the property that they extorted under the Hobbs Act, why does *Scheidler* deem it important for an extortionist to receive "something of value from" his or her victim which could be exercised, transferred, or sold? *See Scheidler*, 537 U.S. at 405.

234. This absurd result should have counseled the Court from taking the overly literal interpretation it did of the meaning of extortion as written in the Hobbs Act. *Scheidler*, 537 U.S. at 402. *See also* Brief for Petitioners Joseph Scheidler et al. at 27, Scheidler v. Nat'l Org. for

physically impossible for the defendants in *Local 560* to "obtain" a union member's intangible right to freely participate in union elections and affairs because, under *Scheidler*, such a right cannot be transferred or sold to another in the secondary market. This example demonstrates that *Scheidler's* "new" rule limiting extortion to the physical receipt or acquisition of property was illogical, absurd, and unsound as a matter of policy.[235]

2. *Recent Cases Exemplify That* Scheidler *Has Made Prosecutions Under the Hobbs Act Less Viable for Federal Prosecutors*

The analysis and conclusions drawn in Part III.C.1 are brought home by the recent decision of *United States v. Bellomo*.[236] In *Bellomo*, one of the defendants, the alleged "boss of the Genovese Organized Crime Family," was charged with violating the Hobbs Act by obtaining "the right of a labor organization's members to free speech and democratic participation in their union's affairs. . .and to loyal and responsible representation by such members' union officers, agents, employees and representatives."[237] The court subsequently addressed the two issues involving the Hobbs Act, including (1) whether "the rights of union members [i.e. their right to democratic participation in their union's elections and affairs]. . .constitute[d] 'property' within the meaning of the Hobbs Act[]" and (2) whether such property "could be 'obtained' within the meaning of the Hobbs Act[.]"[238]

Women, Inc., 537 U.S. 393 (2003) (Nos. 01-1118-19) (stating that even "the trial court in this case acknowledged[] [that] the concept of obtain separate from property makes very little sense in the context of intangible rights") (citation and internal quotation marks omitted). *See generally* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 127-28 (1994) (acknowledging that the absurd result doctrine provides an exception to the general rule of statutory interpretation that a statute should be narrowly construed according to its plain meaning, as reasonable legislators would not intend to create any absurdity).

235. *See generally* United States v. Marcano-Garcia, 622 F.2d 12 (1st Cir. 1980) (providing another example of a case which would not have supported an extortion prosecution under the Court's "new" "obtain" requirement in the Hobbs Act). In *Marcano-Garcia*, Puerto Rican separatists kidnapped the Chilean Honorary Consul and demanded that he, among other things, cancel the Fourth of July celebration, read a prepared statement to the media supporting Puerto Rican independence, and claim that the Chilean government was "an assassin." *Id.* at 14. Assuming *arguendo* that such items properly represent "property" under the Hobbs Act, how does one go about "obtaining" this "property"? Can the cancellation of the Fourth of July celebration be transferred, exercised, or sold to another? Such questions remain unresolved after *Scheidler*.

236. 263 F. Supp. 2d 561 (E.D.N.Y. 2003).

237. *Bellomo*, 263 F.Supp at 564, 569.

238. *Id.* at 569-70.

The court had no problem finding that the intangible rights taken by the defendant constituted "property" for purposes of the Hobbs Act,[239] especially in light of *Arena*,[240] *Tropiano*,[241] and *Teamsters Local 560*.[242] This was mainly because "property" represents "the bundle of rights to a thing" and was "the right of any person to possess, use, enjoy and dispose of a thing."[243] Thus, the court moved on to the heart of the case—"[t]he issue, however, [was] not whether [the] right of a union member [was] property, the question that *Scheidler* asks, [was] it property that is obtainable?"[244]

The Government in *Bellomo* cited *Tropiano* and *Teamsters Local 560*, among others, to argue the following:

> An organized crime figure who extorts a garbage hauler obtains the intangible business opportunities of the victim in exactly the same way that an organized crime figure who extorts union members obtains the intangible property of his victim. In both cases, nothing physical passes from the victim to the defendant, but the victim's intangible right—whether to solicit business or select union officers—is transferred to the extortioner, who then exercises, transfers or sells it for his own enrichment. . . . A union member's ability to nominate and elect his officers is something that organized crime figures can obtain and then exercise, transfer or sell.[245]

Nevertheless, the *Bellomo* court was not persuaded in light of *Scheidler*, for "the [c]ourt [was] constrained to ask how can that union member's right be exercised, transferred or sold?"[246]

Thus, *Bellomo* visibly underscores the concerns raised in Part III.C.1, as the court felt compelled to dismiss the Hobbs Act violation in light of *Scheidler* since the defendant did not "obtain" a "thing" that could be exercised, transferred, or sold to another. However, as previously argued, such a requirement is absurd, as it is utterly impossible for an extortionist to

---

239. *See Id.* at 573 (holding that the word "property," as used in the context of the Hobbs Act, embraces both tangible and intangible "things").

240. *See supra* text accompanying notes 118-21 (discussing the court's interpretation of property in the *Arena* case).

241. *See supra* text accompanying note 117 (stating where the concept of property came from).

242. *See supra* text accompanying note 229 (mentioning the statement by the *Teamsters Local 560* court that the Hobbs Act did not distinguish between types of property [tangible or intangible]).

243. *Bellomo*, 263 F. Supp. 2d at 573 (quoting Wynehamer v. People, 13 N.Y. 378, 433 (1856)).

244. *Bellomo*, 263 F. Supp. 2d at 575.

245. *Id.* at 575 (citation omitted).

246. *Id.* at 575-76.

physically "obtain" a "thing" that lacks tangible form.[247] Moreover, since an extortionist cannot physically present this "thing" to another on the street or at a secondary market, the extortionist also cannot possibly exercise, transfer, or sell these intangible property rights to another.

D. THE RULE OF LENITY DOES NOT SHIELD PLAN FROM LIABILITY UNDER THE HOBBS ACT

Scheidler's invocation of the rule of lenity was inappropriate since Congress spoke "in clear and definite language"[248] and that "[t]he mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable."[249] During debate of the Hobbs Act, many Congressmen expressly exempted perfectly lawful protestors, picketers, and strikers from the provisions of the Hobbs Act.[250] Only unlawful acts would come within the purview of the proposed legislation.[251] Additionally, the presence of a strike did not give one a license to act as an outlaw and the Hobbs Act in no way interfered with one's ability to carry out a peaceful, law-abiding, and legitimate protest.[252] Thus, many Congressmen agreed with the view that the Hobbs Act would "not inconvenience, . . . harm, [or] . . . incarcerate one single honorable, honest, decent man in America" because honest men would not commit extortion while on strike.[253]

More importantly, "'[t]he simple existence of some statutory ambiguity. . .is not sufficient to warrant application of [the rule of lenity],

---

247. *See supra* Part III.C.1 (discussing *Teamsters Local 560* and how the new "obtain" definition would have prevented the successful prosecution of organized crime figures).

248. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003).

249. Smith v. United States, 508 U.S. 223, 239 (1993).

250. *See, e.g.*, 89 CONG. REC. 3,213 (1943) (providing the statement of Rep. Hobbs). *See supra* text accompanying note 56 (discussing statements by Reps. Brehm and Russell). *See also* Brief for the States of California et al. as Amici Curiae at 11, *Scheidler* (Nos. 01-1118-19) (arguing that "[n]ot only are protest activities ordinarily outside the scope of the Hobbs Act itself, but the First Amendment independently forecloses its application to attempts by protestors, through speech, to pressure a target to conform his conduct to public opinion"). Thus, it is erroneous to contend that application of the Hobbs Act to the defendants in *Scheidler* will result in less social protest by society since the First Amendment fully protects individuals who engage in non-violent protest activities. *See generally* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 709-22 (1999) (discussing the Hobbs Act).

251. 89 CONG. REC. 3,212-13 (1943) (statements of Reps. Springer and Hobbs). *See supra* text accompanying notes 57-58 (providing the statements of Rep. Hobbs).

252. 91 CONG. REC. 11,841-43 (1945) (statements of Reps. Barden and Michener). *See supra* notes 56-58 and accompanying text (discussing the statements of Reps. Brehm, Russell, and Hobbs).

253. 91 CONG. REC. 11,841 (1945) (statement of Rep. Barden). *See supra* note 60 (providing the statement of Rep. Rivers).

for most statutes are ambiguous to some degree.'"[254] Instead, "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived,. . .we can make no more than a guess as to what Congress intended."[255] As previously stated, Congress did not intend for the Hobbs Act to be used in prosecuting groups engaged in legitimate, perfectly lawful protest activities.[256] Thus, the Court did not have to "guess" as to the scope of the coverage entailed by the Hobbs Act, since Congress was clear as to what it sought to remedy.[257] Furthermore, before invoking the safeguards of the rule of lenity, the Court must find that a "grievous ambiguity or uncertainty" exists in the statute.[258] *Scheidler* never identified this "grievous ambiguity or uncertainty" in the statute, probably because the definition of extortion came from New York law and needed no further clarification since New York courts had construed extortion many times.[259] In any event, the rule of lenity does not automatically permit the defendant to prevail and his or her conviction to be dismissed.[260]

Finally, *Scheidler* was heard before the Court precisely because the defendants had been behaving illegally, as the defendants in *Scheidler* candidly admitted that aspects of their conduct were criminal.[261] Hence, PLAN was sufficiently on notice that its illicit conduct could be severely punished, yet they still advocated for the continued lawlessness of its "rescues" or "blockades."[262] Such blatant disregard for society's laws indicate that PLAN should not undeservedly receive the equitable treatment of the rule of lenity, especially since Congress intended the Hobbs Act to serve as a broad weapon against extortion.[263] Thus, the rule of lenity should not apply because this was not "a case where the defendant was in ignorance of the possible criminality of his conduct so that subjecting him to the application of the statute is unfair."[264] No group should be allowed to exist above

254. Muscarello v. United States, 524 U.S. 125, 138 (1998) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

255. *Id.* (citations and internal quotation marks omitted).

256. *See supra* text accompanying note 56 (citing statements by members of Congress debating the Hobbs Act indicating its intended inapplicability to peaceful picketing).

257. *See supra* text accompanying notes 48-53 (providing statements by members of Congress expressly indicating the intent behind the Hobbs Act).

258. *Muscarello*, 524 U.S. at 138-39.

259. 91 CONG. REC. 11,900 (1945) (statement of Rep. Hobbs) (noting that "there is nothing clearer than the definition of . . . extortion in this bill" since the crime has "been construed by the courts not once, but a thousand times").

260. *Muscarello*, 524 U.S. at 139.

261. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404 (2003).

262. *See supra* note 206 (discussing a quote from PLAN's leader about forcing clinics to close).

263. United States v. Culbert, 435 U.S. 371, 373 (1978).

264. Commonwealth v. Downey, 429 N.E.2d 41, 45 (Mass. App. Ct. 1981).

the law, and extortion should be prosecuted regardless of who commits it[265] or regardless of what their ideological motive might have been for acting,[266] because Congress sought to eradicate the fear that griped many individuals who were affected by extortionate threats of violence.[267]

IV. RECOMMENDATION

A. FUTURE COURTS SHOULD NARROWLY CONSTRUE SCHEIDLER TO CIRCUMVENT ITS ABSURD RESULT

Scheidler's effect will be, and has already been, substantial.[268] Many future defendants charged with extortion in violation of the Hobbs Act will make a "*Scheidler*" claim—i.e. extortion was not committed because no physical, tangible item was ever received which could then be resold in the secondary market. As of February 26, 2004, approximately one year after the *Scheidler* decision, this new "*Scheidler*" defense had been invoked in four cases.[269] Thus, what are future courts to do when faced with the onslaught of "*Scheidler*" claims? For one, they can interpret *Scheidler* very narrowly, as the court in *Dooley v. Crab Boat Owners Assocation*[270] did.

1. *The* Dooley *Approach to the* Scheidler *Defense*

In *Dooley*, the Caitlin Ann company owned a fishing boat also named the Caitlin Ann.[271] The plaintiffs oversaw the management of the company, which commercially harvested crab off the Pacific Coast by "using steel and wire traps, or pots, that rest on the ocean floor."[272] A conflict arose

---

265. 91 CONG. REC. 11,912 (1945) (statement of Rep. Hobbs) (pleading that "crime is crime, no matter who commits it"). *See supra* text accompanying note 53 (discussing the statement of Rep. Robison on the Hobbs Act).

266. *See* Ireland, *supra* note 146 , at 850-51 (arguing that "[i]t is sound policy to look at conduct rather than motives" in these sorts of Hobbs Act cases for "that is what the racketeering laws require").

267. 91 CONG. REC. 11,905-07 (1945) (statements of Reps. Robsion and Fellows).

268. Some may argue that little weight should be attributed to *Scheidler*'s discussion of the Hobbs Act since it was decided in the context of a RICO case. However, this argument is unpersuasive in light of the fact that many significant Supreme Court decisions have altered the understanding of the mail fraud statute in the context of RICO cases. *See, e.g.*, Cleveland v. United States, 531 U.S. 12, 16 n.1, 20 (2000) (holding, where the defendant was charged with a RICO violation, that a state or municipal license is not "property" for purposes of the mail fraud statute).

269. United States v. Warner, 292 F. Supp. 2d 1051, 1063 (N.D. Ill. 2003); Interstate Flagging, Inc. v. Town of Darien, 283 F. Supp. 2d 641, 647 (D. Conn. 2003); Dooley v. Crab Boat Owners Ass'n, 271 F. Supp. 2d 1207, 1211 (N.D. Cal. 2003); United States v. Bellomo, 263 F. Supp. 2d 561, 575-76 (E.D.N.Y. 2003).

270. 271 F. Supp. 2d 1207 (N.D. Cal. 2003).

271. *Dooley*, 271 F. Supp. 2d at 1208.

272. *Id.*

when California opened its crab season in 2001 because the three defendant associations, in an act of solidarity, "refused to harvest crab in an effort to negotiate a favorable fixed price with buyers."[273] Trouble brewed between the parties when the plaintiffs "did not join the strike" because they were already under contract to provide crab for a buyer, Exclusive Fresh.[274] On November 16, 2001, certain defendants allegedly "threatened Dooley [and his crew] with trouble if he harvested crab during the strike."[275] Subsequently, the defendants allegedly cut four hundred of the Caitlin Ann's fishing lines the next day.[276] The crew of the Caitlin Ann also found additional cut lines within the next couple of days.[277]

Moreover, "[a]fter Caitlin Ann's crew had begun fishing, Exclusive Fresh refused to perform its contract with Caitlin Ann, allegedly because of threats from [the defendants]."[278] Further, the defendants "deliberately blocked the Caitlin Ann from docking in order to punish plaintiffs for harvesting crab during the strike."[279] This forced the plaintiffs to sail to San Francisco and incur "additional costs and loss of crab."[280] Nonetheless, the plaintiffs were able to find "a new buyer for their crab, J & S Quality Seafood."[281] However, this promptly caused the defendants to allegedly threaten "the owner of J & S with blackballing if he purchased 'scab' crab."[282] In addition, the defendants even purportedly "contacted customers of J & S to dissuade them from purchasing the crab and even intercepted customers in front of the J & S store."[283]

Predictably, the defendants invoked a "*Scheidler*" claim—they argued that they had not violated the Hobbs Act because they did not physically "obtain" any of the plaintiffs' property.[284] Given *Scheidler*, the defendants further contended that "[t]he most that could have been achieved by [their] acts. . .[was] that plaintiffs ceased their fishing operations during the strike."[285] Consequently, the defendants claimed that this "result would deprive plaintiffs of their property but would not transfer that property to [the]

273. *Id.* at 1208-09.
274. *Id.* at 1209 (internal quotation marks omitted).
275. *Id.*
276. Dooley v. Crab Boat Owners Ass'n, 271 F. Supp. 2d 1207, 1209 (N.D. Cal. 2003).
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Dooley*, 271 F. Supp. 2d at 1209.
284. *Id.* at 1210-11.
285. *Id.* at 1212.

defendants."[286] On the other hand, the plaintiffs argued "that *Scheidler* [did] not extend to actions such as the ones at issue in this action, in which an individual seeks *control* over a competitor's right to operate a business."[287]

Dooley began its analysis of *Scheidler* by noting that it "left open the possibility that the right to operate a business could be 'obtained' by opining that 'liability might be based on something as intangible as another's right to exercise exclusive control over the use of a party's business assets.'"[288] *Dooley* then recognized that *Scheidler* accepted *Tropiano* because the Court "specifically stated that it did not reach or reject the holding that the 'intangible right to solicit refuse collection accounts' was property under the Hobbs Act."[289] As a result, the *Dooley* court interpreted these two propositions together to conclude "that if an individual *gains control over* the use of a competitor's business asset, even if the asset is as intangible as the right to solicit business, that person has obtained the property of another within the meaning of the Hobbs Act."[290] Thus, *Dooley* eventually held "[t]he individual that gains *control* over the use of a competing business's asset does more than coerce by restricting the competing business's freedom of action[, since] [t]hat person extorts by acquiring something of value that can be exercised to his benefit."[291]

Applying these principles, *Dooley* found that the defendants had attempted, through threats and property damage, to gain control over Caitlin Ann's intangible property right "to harvest crab during the crab season."[292] For example, the "[d]efendants threatened injury to the crew of the Caitlin Ann, damaged the boat and its fishing equipment, and warned purchasers and their customers that they would be blackballed if they bought crab from plaintiffs."[293] These extortionate acts demonstrated a concerted effort by the defendants "to keep Caitlin Ann from harvesting crab during the

---

286. *Id.*

287. *Id.* at 1213 (emphasis added).

288. *Id.* (citing Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 401 (2003).

289. *Dooley*, 271 F. Supp. 2d at 1213 (citing *Scheidler*, 537 U.S. at 402 n.6).

290. *Dooley*, 271 F. Supp. 2d at 1213 (emphasis added). *Scheidler* specifically left this interpretation open for future courts to take in the course of its decision. *See supra* text accompanying note 90 (discussing the *Scheidler* case's analysis of the Hobbs Act).

291. *Id.* (emphasis added). The requirement that an extortionist actually acquire or obtain "control" over something of value within another's business effectively assuages the concerns of *Scheidler* that the statutory language of the Hobbs Act would be discarded if it held that PLAN committed extortion under the facts presented in the case. *See supra* text accompanying note 104 (discussing the *Scheidler* court's concern about labeling PLAN's actions extortion).

292. *Dooley*, 271 F. Supp. 2d at 1214.

293. *Id.*

strike."[294] Moreover, this "[c]ontrol over the Caitlin Ann company's fishing operations during the crab season was of value to defendants."[295] Presumably, this control was of pecuniary value to the defendants.

Future courts can learn something of value from the approach taken by *Dooley*. Under *Dooley*, future courts should narrowly construe *Scheidler* and search for something of value which can be controlled and exercised to the defendant's benefit. For example, the court in *Teamsters Local 560*[296] could have found that the defendants controlled the union's intangible right to democratic participation in its own affairs, which was valuable to the defendants because they used this right to receive payoffs for their own financial gain.[297] Similarly, the *Bellomo* court[298] could have held that the defendants "obtained" the union's intangible right to democratic participation in its union by controlling the valuable benefit of having a union submit to their views and carry out their agenda. Such a narrow interpretation would mitigate the negative result reached by *Bellomo* and cabin the absurd result set forth in *Scheidler*. Furthermore, this construction would facilitate the continued prosecution of white-collar or organized crime defendants under the Hobbs Act.

B. IN THE ALTERNATIVE, CONGRESS SHOULD AMEND THE HOBBS ACT TO CLARIFY THAT AN EXTORTIONIST NEED NOT PHYSICALLY ACQUIRE PROPERTY IN ORDER TO BE CRIMINALLY PROSECUTED

Another potential solution is to lobby Congress to amend the Hobbs Act in such a fashion as to overrule *Scheidler*.[299] Before *Scheidler* was decided, the meaning of extortion under the Hobbs Act had judicially evolved to cover current societal problems, such as that presented in *Scheidler*. This evolvement can be traced to two trends in extortion jurisprudence. First, courts gradually expanded the definition of "property" under the Hobbs Act to include one's intangible property rights, such as the

294. *Id.*

295. *Id.*

296. *See supra* Part III.C.1. (discussing the definitions of the 'obtain' requirement as used by the *Teamsters Local 560* court).

297. *See, e.g.*, United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267, 273 (3d Cir. 1985) (stating that defendant Provenzano used Local 560 to extort payoffs from various companies in return for "labor peace" and that Provenzano recruited another to kill a popular member of the union who posed a threat to the defendant's control over Local 560).

298. *See supra* Part III.C.2. (discussing the *Bellomo* decision).

299. *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 417 n.2 (2003) (Stevens, J., dissenting) (acknowledging that "Congress remains free to correct the Court's error in [this] case").

right to democratic participation in union affairs as shown by *Teamsters Local 560* and the right to solicit business customers free of territorial restrictions as illustrated by *Tropiano*.[300] Next, courts slowly eroded the "obtain" requirement in the Hobbs Act by initially concluding that an extortionist need not directly benefit from his or her illegal acts and then by emphasizing that the gravamen of the crime of extortion is simply a loss to the victim.[301]

These developments illustrate that an extortionist violates the Hobbs Act if he or she deprives another of their intangible property rights to the extent that they gain control over these rights. The two trends represented the state of the federal common law involving extortion at the time *Scheidler* was presented and decided. More importantly, even New York courts incorporated these changes, as shown by New York's highest court in *Spatarella*.[302] This is particularly revealing since New York's extortion statute served as the basis for the extortion definition as originally implemented in the Hobbs Act.[303] Thus, the federal common law sufficiently evolved to cover the form of extortion that was involved in *Scheidler*.

Consequently, the Court's abandonment of this federal extortion common law and its return to a strict construction of extortion was reminiscent of the Court's decision in *McNally v. United States*,[304] which was subsequently overruled by a Congressional statute. *McNally* involved the prosecution of a former public official under the mail fraud statute.[305] The defendants allegedly participated in a self-dealing patronage scheme that "defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly."[306] The Court of Appeals for the Sixth Circuit had upheld the defendant's mail fraud conviction by relying "on a line of decisions from

---

300. *See* Murray, *supra* note 250, at 715 (recognizing that this "judicial extension" of "property" was "surely reasonable" and "justifiable based on the changes that have occurred in the ways in which wealth is owned in a modern society" because "[t]he protection of ownership was, after all, the purpose of extortion").

301. *See id.* at 720 (concluding that these developments "effectively discard[ed] the requirement that an extortionist or some other third party 'get' the property of which the victim is 'deprived[,]' [as] extortionate 'obtaining' now requires only that the victim be 'deprived' of something").

302. *See supra* text accompanying notes 171-85 (discussing how PLAN's actions fit New York law's definition of extortion).

303. *See supra* text accompanying notes 54, 97 (discussing statements made by Reps. Michener, Robsion, Hobbs and Vorys).

304. 483 U.S. 350 (1987).

305. *McNally*, 483 U.S. at 352.

306. *Id.*

the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government."[307] The *McNally* Court found that "[t]he mail fraud statute clearly protect[ed] property rights, but [did] not refer to the intangible right of the citizenry to good government."[308] The Court also invoked the rule of lenity in holding that the scope of property rights under the mail fraud statute was limited to money or property, and did not encompass one's intangible rights, such as the right to honest and faithful services.[309]

Congressional displeasure with *McNally* was rampant, and Congress quickly responded to overrule the Court's decision through legislation.[310] Congress subsequently enacted a law to specifically articulate that the mail fraud statute covered "the intangible right of honest services."[311] One can see many parallels between the circumstances and reasoning in *McNally* and the Court's recent decision in *Scheidler*. For example, the appellate courts in both cases relied upon a long-standing, uniform, consistent, and sensible construction of the applicable statute among the lower federal courts.[312] Moreover, both statutes were to be liberally construed[313] and involved similar subject matter—the interpretation of "property" in the context of a white-collar penal statute.[314] In addition, the Court in both instances specifically chose a limited construction of the relevant statute by invoking the rule of lenity.[315] Finally, the Court also rejected the evolved

---

307. *Id.* at 355.

308. *Id.* at 356.

309. *Id.* at 359-61.

310. PAMELA H. BUCY, WHITE COLLAR CRIME, CASES & MATERIALS 78 (2d ed. 1998) (acknowledging that immediately following the *McNally* decision, "Congress began hearings on how to amend the mail fraud statute to remedy the '*McNally* problem'").

311. *See* 18 U.S.C. § 1346 (2000).

312. *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 412 (Stevens, J., dissenting) (arguing that "[f]or decades[,] federal judges have uniformly given the term 'property' an expansive construction that encompasses the intangible right to exercise exclusive control over the lawful use of business assets" and that the appellate court's decision "is the commonsense reading of the statute that other federal judges have consistently and wisely embraced in numerous cases that the Court does not discuss or even cite"); *McNally*, 483 U.S. at 364 (Stevens, J., dissenting) (pointing out that "[t]he many federal courts that have confronted the question whether these sorts of schemes constitute a 'scheme or artifice to defraud' have uniformly and consistently read the statute in the same, sensible way").

313. *See McNally*, 483 U.S. at 362 (Stevens, J., dissenting); *see also supra* text accompanying note 62 (providing that the Court recognizes that the Hobbs Act's broad language grants Congress many powers to prevent interference in Interstate Commerce through extortion).

314. Of course, *Scheidler* glossed over the concept of "property" under the Hobbs Act because it found that PLAN did not "obtain" anything in any event. *Scheidler*, 537 U.S. at 402. However, the Court's finding demonstrates that intangible rights do not qualify as "property" for purposes of the Hobbs Act because such rights are incapable of being physically "obtained" or captured. *See* Part III.C. (demonstrating the absurdity of this result).

315. *See supra* text accompanying notes 99, 163, 310 (discussing the statutory construction or interpretation used by the *Scheidler* and *McNally* courts, respectively).

federal common law involving the interpretation of either the mail fraud statute or the Hobbs Act.[316]

Given that *Scheidler* poses a serious impediment to the effective enforcement of the Hobbs Act,[317] the Court's interpretation was not true to Congress' original intention in eradicating, by all means possible, the fear that extortion produced.[318] As a result, Congress should recognize *Scheidler's* misconstruction of the Hobbs Act and react accordingly, as they did after *McNally's* similar misconstruction of the federal mail fraud statute. Therefore, Congress should amend the Hobbs Act to restore the previous common law understanding of extortion that was provided by the many lower federal courts, since this jurisprudence had correctly developed the Hobbs Act to cover current societal extortion problems.[319]

V. CONCLUSION

The Hobbs Act was a major remedial piece of legislation that was broadly intended to curb the rising occurrence of extortion. However, its effectiveness was seriously impaired when the Court decided *Scheidler v. National Organization for Women, Inc.*, as the very real possibility exists that the Court's interpretation of the Hobbs Act will only benefit professional criminals like organized crime families.[320] In doing so, the Court summarily rejected the federal extortion common law built to that point. Prior to *Scheidler*, the provisions of the Hobbs Act had been liberally expanded to cover intangible property rights.[321] Additionally, courts recognized that the "obtain" requirement was met when an extortionist deprived his or her victim of property since the heart of extortion focused on the victim's loss.[322] These two lower court trends were sound constructions of the Hobbs Act and its legislative history, and were necessary in order to

316. *See* BUCY, *supra* note 310, at 75 (noting that "[u]ntil 1987 courts affirmed convictions of government officials who had been convicted of mail fraud on the theory that the officials defrauded citizens when the officials represented that they were providing honest and faithful services where they were not"); *see supra* text accompanying notes 109, 299-300 (noting that no prior federal case had interpreted the Hobbs Act as narrowly as did the majority in *Scheidler*).

317. *See supra* Part III.C. (arguing that *Scheidler* hampers effective law enforcement).

318. *See supra* text accompanying notes 50-53, 60-61 (discussing the Hobbs Act, generally).

319. *See supra* text accompanying notes 300-01 (discussing the common law understanding of the Hobbs Act prior to *Scheidler*).

320. McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting) (stating that lingering doubts remain "about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision").

321. *See supra* text accompanying notes 301-02 (discussing the common law understanding of the Hobbs Act prior to *Scheidler*).

322. *See e.g.*, United States v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977) (emphasizing loss to the victim in extortion statutes).

protect society's changing needs. Nonetheless, these lower federal court opinions are now subject to attack by defendants who will argue that they did not commit extortion because they never physically received or obtained the intangible property right at issue.[323]

Moreover, *Scheidler* was especially distressing since no other federal court had ever construed the Hobbs Act so narrowly in holding that extortion required the actual, physical acquisition of property, which could then be exercised, transferred, or sold in turn.[324] In this respect:

> The quality of this Court's work is most suspect when it stands alone, or virtually so, against a tide of well-considered opinions issued by state or federal courts. In these cases I am convinced that those judges correctly understood the intent of the Congress that enacted this statute. Even if I were not so persuaded, I could not join a rejection of such a longstanding, consistent interpretation of a federal statute.[325]

Furthermore, the Court's "retrospective contraction" of extortion's common law meaning under the Hobbs Act also "properly deserves the stigma of judicial legislation."[326] Accordingly, if Congress does not legislatively "fix" the Hobbs Act by overturning *Scheidler*, then future courts faced with a *Scheidler* defense must narrowly construe the Court's decision like that done by the court in *Dooley v. Crab Boat Owners Association*.[327]

---

323. *See supra* text accompanying notes 236-47 (presenting recent cases in which the defendant used the new "*Scheidler*" defense).

324. *Id.* (Stevens, J., dissenting) (observing that "the most distressing aspect of the Court's action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present."). Perhaps the Court's decision in *Scheidler* can be explained by the following observation:

> This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving. . .abortion.

Thornburgh v. Amer. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

325. *McNally*, 483 U.S. at 376 (Stevens, J., dissenting).

326. United States v. Enmons, 410 U.S. 396, 419 (1973) (Douglas, J., dissenting).

327. *See supra* text accompanying notes 271-98 (discussing the *Dooley* court's approach to *Scheidler*).

***