


Winter 2003

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### Recommended Citation

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## ARTICLES

# BEHIND THE WORDS: INTERPRETING THE HOBBS ACT REQUIREMENT OF “OBTAINING OF PROPERTY FROM ANOTHER”

KRISTAL S. STIPPICH\*

### INTRODUCTION

The Hobbs Act provides:

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.<sup>1</sup>

Extortion is defined by the Hobbs Act 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.”<sup>2</sup> The element of “obtaining of property from another”<sup>3</sup> must be proved both when the government charges the accused with Hobbs Act extortion, and when the government or a plaintiff in a civil case charges a defendant with two or more Hobbs Act violations as predicate acts under the Racketeer Influenced and Corrupt Organizations Act.<sup>4</sup>

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1. 18 U.S.C. § 1951(a) (2000).

2. 18 U.S.C. § 1951(b)(2) (2000).

3. *Id.*

4. The Racketeer Influenced and Corrupt Organizations Act is abbreviated RICO in the text and notes. RICO is a chapter of the Organized Crime Control Act of 1970. 18 U.S.C. §§ 1961-1968 (2000). To make out a RICO violation, the government (or plaintiff in a civil case) must prove that

In the 2002-2003 term, the Supreme Court will consider the issue of the definition of Hobbs Act extortion as it has been applied in civil RICO cases against persons engaged in social protest activity, such as demonstrations at abortion clinics.<sup>5</sup> The use of civil RICO lawsuits in the social protest context has been the subject of several articles over the past decade, many of which have addressed the implications of First Amendment freedoms.<sup>6</sup> As has been well-highlighted in the literature<sup>7</sup> and raised consistently in defendants' arguments at trial,<sup>8</sup> the key issue in dispute is the meaning of the phrase "obtaining of property from another," specifically, the definitions of "property" and "obtaining . . . from."<sup>9</sup>

This article focuses on the plain meaning of the phrase "obtaining of property from another." This article examines two cases where courts have broadly interpreted the "obtaining of property from another" requirement to sustain charges against persons purportedly involved in abortion protest activity. The first case is a case before the Supreme Court in the 2002-2003 term, *Nat'l Org. for Women, Inc. v. Scheidler*,<sup>10</sup> and involves Hobbs Act

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defendant engaged in at least one of the four types of conduct listed in 18 U.S.C. §§ 1962(a)-(d). Persons engaging in an interstate "enterprise" are prohibited from conducting that enterprise's affairs through "a pattern of racketeering activity." 18 U.S.C. 1962(c) (2000). "Racketeering activity means any act or threat involving murder, kidnapping, gambling, arson . . . [or] extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year[.]" 18 U.S.C. § 1961(1)(A) (2000). It also means "any act which is indictable under . . . section 1951 . . ." of title 18 of the United States Code, namely, the Hobbs Act. 18 U.S.C. § 1961(1)(B) (2000).

5. *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), cert. granted, 70 U.S.L.W. 3654 (2000) (No. 01-1118). See also *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) [hereinafter *Scheidler I*] (deciding the issue of whether an economic motive was required to state a RICO claim under § 1962(c)). In *Scheidler I*, the Court held unanimously that the language of § 1962(c) did not require proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. *Id.* at 259. The Court specifically stated, however, that it expressed no opinion on the issue of whether respondents' actions constituted the predicate acts of Hobbs Act violations. *Id.* at 254 n.2, 262.

6. See, e.g., Brian J. Murray, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 696 n.17 (1999) (citing articles and providing an in-depth review of the legislative history and common law foundation of Hobbs Act extortion, and the judicial steps that have enabled courts to apply it in the abortion protest cases).

7. See generally *id.*

8. See *infra* notes 19-41 and accompanying text (showing examples of defendants arguing that the meaning of "property" and "obtaining . . . from" is essential).

9. 18 U.S.C. § 1951(b)(2) (2000).

10. *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (2001). Prior

extortion in the civil RICO context. The second case, *U.S. v. Arena*,<sup>11</sup> involves Hobbs Act extortion in the criminal context.

This article first sets forth a description of *Scheidler* and *Arena*. Next, the article analyzes the main premises of these cases: (1) that “property” includes intangible rights such as the right to do business and, more specifically, to provide and receive abortion services;<sup>12</sup> and (2) that the defendant need not seek or receive anything, since the gravamen of the offense is loss to the victim.<sup>13</sup> This article considers whether these premises comport with a plain language reading of “obtaining of property from another” and whether the cases relied upon by the *Scheidler* and *Arena* courts support these premises.

This Article concludes that the *Scheidler* and *Arena* courts have not employed the plain meaning of the language within the Hobbs Act. With respect to the first premise, although the plain meaning of the term “property” is broad enough to include rights, its placement within the phrase “obtaining of property from another” limits its meaning to a more narrow definition wherein the property can be transferred to the defendant. Thus, the focal point of “property” under the Hobbs Act is the object of the right, not the right itself.

With respect to the second premise, the courts have misconstrued the gravamen of the offense. The rationale that a defendant need not seek or receive anything to “obtain” property under the Hobbs Act flows from the overly expansive definition of property as well as a misunderstanding of economic motive and its relevance to the Hobbs Act. Economic motive is not a requirement of extortion, but specific intent to obtain property is a requirement of extortion. Thus, while a defendant need not be motivated by pecuniary gain, he must intend that the victim transfer the property to himself or another.

Consistent with the common law roots of Hobbs Act extortion, the *Scheidler* and *Arena* rationales would not survive under a

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opinions include: *Nat'l Org. for Women, Inc. v. Scheidler*, No. 86 C 7888, 1999 WL 571010 (N.D. Ill. July 28, 1999); *Nat'l Org. for Women, Inc. v. Scheidler*, No. 86 C 7888, 1997 WL 610782 (N.D. Ill. Sept. 23, 1997); *Nat'l Org. for Women, Inc. v. Scheidler*, 172 F.R.D. 351 (N.D. Ill. 1997); *Nat'l Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); *Nat'l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994); *Nat'l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991).

11. 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000). Prior opinions include: *U.S. v. Arena*, 918 F. Supp. 561 (N.D.N.Y. 1996); *U.S. v. Arena*, 894 F. Supp. 580 (N.D.N.Y. 1995).

12. *Scheidler*, 267 F.3d at 709; *Arena*, 180 F.3d at 392-394. *See also Scheidler*, 1997 WL 610782 at \*16-18; *Arena*, 918 F. Supp. at 568-70.

13. *Id.*

plain meaning of “obtaining of property from another.” However, the convictions in the cases that *Scheidler* and *Arena* relied upon as precedent from the non-abortion protest context could be sustained under the narrower meaning of “obtaining of property from another” advocated in this article.

## I. THE CASES

### *Civil Case: Nat'l Org. for Women, Inc. v. Scheidler*

In 1986, the National Organization for Women and two abortion clinics filed a class action complaint against anti-abortion organization leaders, alleging RICO violations involving predicate acts of murder, kidnapping, theft, Hobbs Act extortion, and state extortion.<sup>14</sup> The plaintiffs also alleged antitrust violations.<sup>15</sup> The Seventh Circuit affirmed the dismissal of the claims reasoning that the antitrust laws were inapplicable for failure to allege that defendants had exercised market control over the supply of abortion services,<sup>16</sup> and that RICO did not cover the defendants' conduct because there was no indication that the alleged racketeering acts were “economically motivated.”<sup>17</sup> The U.S. Supreme Court reversed on the RICO issue, concluding that a RICO claim did not require the racketeering enterprise or the alleged predicate acts be motivated by an economic purpose.<sup>18</sup>

On remand to the District Court for the Northern District of Illinois, the court denied defendants' motion for summary judgment. The court concluded that plaintiffs had alleged Hobbs Act extortion violations and that the evidence was sufficient to sustain them on the theory that defendants' actions, including blockades and sit-ins, interfered with abortion clinics' right to operate their businesses.<sup>19</sup> The court reasoned that the definition of property under the Hobbs Act included intangible property, namely, the right to pursue a lawful business<sup>20</sup> and that the Hobbs Act did “not require that the [d]efendant profit economically from the extortion.”<sup>21</sup> Rather, the gravamen of extortion under the

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14. *Scheidler*, 968 F.2d at 614.

15. *Id.*

16. *Id.* at 622-23.

17. *Id.* at 626.

18. *Scheidler*, 510 U.S. at 257-58.

19. *Scheidler*, 1997 WL 610782 at \*18. In reaching this conclusion, the court relied on its earlier opinion in *Scheidler*, 897 F. Supp. at 1072-73. *Id.* at \*17. The RICO claims based on predicate acts of murder, kidnapping and arson, and theft of fetal remains were found to lack evidence. *Id.* at \*18-19.

20. *Id.* at \*16 (citing U.S. v. Tropiano, 418 F.2d 1069, 1075-76 (2d Cir. 1969); *Liggett Co. v. Baldrige*, 278 U.S. 105 (1928); *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989)).

21. *See id.* (quoting the Seventh Circuit's earlier opinion in *Scheidler*, 968

Hobbs Act was “loss to the victim.”<sup>22</sup>

The jury returned a verdict in favor of plaintiffs and the Seventh Circuit affirmed the verdict.<sup>23</sup> Rejecting the defendants’ argument that rights cannot be considered property under the Hobbs Act, the court of appeals held that intangible property, such as a right to conduct business, was property under the Hobbs Act.<sup>24</sup> The court also rejected the defendants’ argument that they did not obtain property by merely forcing plaintiffs to part with their rights, reasoning that:

[Defendants’] argument [was] contrary to a long line of precedent in this circuit holding that ‘as a legal matter, an extortionist [could] violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim [was] all that [was] required.’<sup>25</sup>

Therefore, under *Scheidler*, the right to operate a business was “property” and interference with that right was “obtaining” sufficient to support a Hobbs Act violation.

#### *Criminal Case: U.S. v. Arena*

In the mid-1990s, the government charged defendants, Michelle Wentworth and John Arena, with Hobbs Act extortion for releasing butyric acid (a noxious chemical that causes dizziness, nausea, and a burning sensation in the eyes and respiratory system) into a Planned Parenthood facility and at a physician’s office where abortion services were provided.<sup>26</sup> As a result of the attacks, the offices closed, revenues were lost, patients were intimidated, and “employees quit out of fear.”<sup>27</sup>

After they were convicted, defendants filed post-trial motions, arguing that they did not commit Hobbs Act extortion since, like the New York statute from which the federal statute was derived, “obtaining” of property required more than deprivation of property.<sup>28</sup> The defendants argued that the government needed to demonstrate that they manifested “larcenous intent” – specific

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F.2d at 630 n.17, and relying on *U.S. v. Anderson*, 716 F.2d 446 (7th Cir. 1983); *U.S. v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

22. *Id.* at \*17 (citing *U.S. v. Santoni*, 585 F.2d 667 (4th Cir. 1987)).

23. *Scheidler*, 267 F.3d at 710. The jury found twenty-one Hobbs Act violations, twenty-five state extortion law violations, twenty-five acts of conspiracy to violate federal and state law, four acts of threats of physical violence, twenty-three violations of the Travel Act, 18 U.S.C. § 1952 (2000), and twenty-three attempts to commit one of these crimes. *Id.* at 695.

24. *Id.* at 709 (citing *U.S. v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)).

25. *Id.* (citing *U.S. v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

26. *U.S. v. Arena*, 918 F. Supp. 561, 564-65 (N.D.N.Y. 1996).

27. *Id.* at 565.

28. *Id.* at 568.

intent to get the property for their own or another's benefit.<sup>29</sup>

The District Court for the Northern District of New York upheld the convictions reasoning that it was an "uncontested precept that the right to conduct a lawful business free from threats and violence [was] property within the meaning of the Hobbs Act."<sup>30</sup> As to the "obtaining" element, the court held that a defendant need not receive the benefit of his conduct<sup>31</sup> nor manifest a specific intent to appropriate the victim's property, because Hobbs Act extortion, unlike state extortion prior to adoption of the Hobbs Act, was a general intent crime.<sup>32</sup> The court also held that economic motive was not required.<sup>33</sup>

Thus, the court reasoned that even if the defendants did not have specific intent to take the property of the victims, they still could have obtained property for purposes of the Hobbs Act.<sup>34</sup> Specifically, the defendants met the "obtain" requirement because in the process of inducing the victims to consensually depart with their right to conduct a lawful business free from violence and threats, the defendants obtained the benefits of the closing of clinics offering services that they considered abhorrent.<sup>35</sup>

The Second Circuit affirmed the convictions.<sup>36</sup> The court of appeals reiterated that the concept of property was not limited to tangible property, but extended to intangible property "such as rights to solicit customers and to conduct a lawful business,"<sup>37</sup> including the "right to conduct a business free from threats of violence and physical harm[.]"<sup>38</sup> Moreover, the court explained that the concept of "obtain" had been broadly construed such that the defendant did not need to either seek or receive an economic benefit.<sup>39</sup> However, the court did not adopt the District Court's

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29. *Id.*

30. *Id.* at 568 (citing *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990); *U.S. v. Tropicano*, 418 F.2d 1069, 1077 (2d Cir. 1969)).

31. *Id.* at 569 (citing *United States v. Green*, 350 U.S. 415, 420 (1956); *United States v. Clemente*, 640 F.2d 1069, 1079-80 (2d Cir. 1981)).

32. *Id.* (citing *U.S. v. Bryson*, 418 F. Supp. 818, 826 (W.D. Okla. 1975); *U.S. v. Furey*, 491 F. Supp. 1048, 1059 (E.D. Pa.), *aff'd*, 636 F.2d 1211 (3d Cir. 1980)).

33. *Id.* at 570 (citing *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1349 (3d Cir. 1989)).

34. *Id.*

35. *Id.* In reaching this conclusion, the court found particularly persuasive a footnote in the Seventh Circuit decision, *U.S. v. Lewis*, 797 F.2d 358, 364 n.3 (7th Cir. 1986). This footnote is discussed later in the text.

36. *Arena*, 180 F.3d at 401.

37. *Id.* at 392 (citing, *inter alia*, *U.S. v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983); *Tropicano*, 418 F.2d at 1075-76).

38. *Id.* at 394.

39. *Id.* "[L]ack of economic motive does not constitute a defense to Hobbs Act crimes[.]" (quoting *McMonagle*, 868 F.2d at 1350).

analysis of “obtain.” Instead, it relied on the dictionary definition of “obtain” and stated that:

A perpetrator plainly may ‘obtain[]’ property without receiving anything, for obtaining includes ‘attain[ing] . . . disposal of,’ . . . and ‘disposal’ includes ‘the regulation of the fate . . . of something, . . . .’ Thus, 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.<sup>40</sup>

Therefore, under *Arena*, the right to conduct business free from threats of violence and physical harm was “property” and using force to cause the victim to abandon her right was “obtaining” sufficient to support a Hobbs Act violation.<sup>41</sup>

## II. THE RATIONALES BEHIND *SCHEIDLER* AND *ARENA*

Two main premises control *Scheidler* and *Arena*. First, “property” for purposes of Hobbs Act extortion includes intangible property, such as the right to conduct business or the right to conduct business free from threats of violence and physical harm. Second, to “obtain” the property, the defendant does not need to seek or receive anything since the gravamen of the offense is loss to the victim.

This section examines whether these premises hold up under a plain meaning interpretation of “obtaining of property from another.” In addition, since the application of Hobbs Act extortion in *Scheidler* and *Arena* is heavily dependent on a series of prior cases, principally criminal Hobbs Act extortion cases, these cases will be analyzed with regard to how they are consistent with the plain meaning of “obtaining of property from another.”

### A. *Premise 1: Property Includes “Rights”*

The courts in both *Scheidler* and *Arena* held that the property extorted could consist of intangible property, specifically the right to conduct a business. In each case, the property extorted was the right to provide (and/or receive) abortion services. Although general and legal definitions of the term “property” speak broadly in terms of rights, the text of the Hobbs Act extortion definition that places the term “property” within the phrase “obtaining of property from another,”<sup>42</sup> arguably restricts the meaning to the object of that right, *e.g.* customer revenues.

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40. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1559 (1976)) (internal citations omitted).

41. *Id.* (noting that such interpretation was implicit in cases such as *Anderson*, 716 F.2d at 447-50 and *McMonagle*, 868 F.2d at 1350).

42. 18 U.S.C. § 1951(b)(2) (2000).



### 1. Text

Although the Hobbs Act defines the term “extortion,” it does not define the terms “property” or “obtain.” It is therefore appropriate to look to the ordinary meaning of these terms.<sup>43</sup> The dictionary provides for the definition of “property,” as “1. (a) Something owned; a possession. (b) A piece of real estate . . . (c) Something tangible or intangible to which its owner has legal title: properties such as copyrights or trademarks. (d) Possessions considered as a group. 2. The right of ownership; title.”<sup>44</sup> The legal dictionary defines “property” as:

That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. . . . [E]verything which is the subject of ownership, . . . tangible or intangible, . . . everything that has an exchangeable value or which goes to make up wealth or estate. . . .<sup>45</sup>

Since the courts have focused on the aspect of property dealing with rights, it is necessary to define that term. The term “right” as a noun is defined, in part, as “a just or legal claim or title.”<sup>46</sup> The legal dictionary definition of “right” is, in part,

a power, privilege, faculty, or demand, inherent in one person and

43. See *Russello v. United States*, 464 U.S. 16, 21 (1983) (citing to various dictionary definitions and stating that where a term is not specifically defined in RICO, that silence compels the court to “start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used,” and quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). See also *Scheidler I*, 510 U.S. at 257 (referring to dictionary definition of “affect” in interpreting the phrase “affect interstate commerce”).

44. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1405 (4th ed. 2000). See also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 935 (10th ed. 1999) (defining “property” as “2 a: something owned or possessed; specif: a piece of real estate b: the exclusive right to possess, enjoy, and dispose of a thing: Ownership c: something to which a person or business has a legal title . . .”).

45. BLACK’S LAW DICTIONARY 1216-17 (6th ed. 1990).

46. AMERICAN HERITAGE DICTIONARY, *supra* note 44, at 1500. See also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 44, at 1008 (defining “right” as “2: something to which one has a just claim: as a: the power or privilege to which one is entitled b (1): the interest that one has in a piece of property – often used in pl. . . . (2) pl: the property interest possessed under law or custom and agreement in an intangible thing esp. of a literary and artistic nature . . . 3: something that one may properly claim as due.”).

incident upon another. Rights are defined generally as ‘powers of free action.’ . . . [G]iving to the term a juristic content, a ‘right’ is well defined as ‘a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.’<sup>47</sup>

The dictionary provides for the definition of “obtain” as “[t]o succeed in gaining possession of as the result of planning or endeavor; acquire.”<sup>48</sup> The term “possession,” as a noun, means “[t]he act or fact of possessing [or] [s]omething owned or possessed.”<sup>49</sup> As a verb, “possess” is to “[t]o gain or exert influence or control over; dominate [or] [t]o control or maintain (one’s nature) in a particular condition[.]”<sup>50</sup> The term “control” as a verb means “to exercise authoritative or dominating influence over; direct[.]” to “regulate” or “to hold in restraint.”<sup>51</sup>

It may be tempting to read the phrase “obtaining of property from another” to mean exerting control over someone’s right. Indeed, this is how the Second Circuit in *Arena* interpreted the phrase after looking to the dictionary definition of “obtain”: “A perpetrator plainly may ‘obtain[]’ property without receiving anything, for obtaining includes ‘attain[ing] . . . disposal of,’ . . . and ‘disposal’ includes ‘the regulation of the fate . . . of something[.]’”<sup>52</sup>

However, this interpretation runs afoul of the language of the Hobbs Act extortion definition. First, it ignores the importance of the word “from” in the phrase “obtaining of property from another.” The word “from” specifies a starting point in movement.<sup>53</sup> Thus, whatever is being controlled or regulated must be a type of property that can be *given over* or *transferred from* one

47. BLACK’S LAW DICTIONARY, *supra* note 45, at 1324.

48. AMERICAN HERITAGE DICTIONARY, *supra* note 44, at 1214. *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 44, at 803 (defining “obtain” as “to hold on to, possess, . . . to gain or attain usu. by planned action or effort . . .”).

49. AMERICAN HERITAGE DICTIONARY, *supra* note 44, at 1370. *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 44, at 909 (defining “possession” as “1 a: the act of having or taking into control b: control or occupancy of property without regard to ownership c: Ownership . . .”).

50. AMERICAN HERITAGE DICTIONARY, *supra* note 44, at 1370. *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 44, at 909 (defining “possess” as “1 a: to have and hold as property: own . . . 2 a: to take into one’s possession b: to enter into and control firmly: dominate . . .”).

51. AMERICAN HERITAGE DICTIONARY, *supra* note 44, at 400.

52. *Arena*, 180 F.3d at 394 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1559 (1976)) (internal citations omitted).

53. AMERICAN HERITAGE DICTIONARY, *supra* note 44, at 706. *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 44, at 468 (defining “from” as “1 – used as a function word to indicate a starting point of a physical movement . . . 3 – used as a function word to indicate the source, cause, agent, or basis”).

person to another.

The notion that the property must be capable of being transferred is further supported by the very next phrase in the Hobbs Act extortion definition, which is “with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.”<sup>54</sup> How can an abortion protester obtain the abortion provider’s right to do business with his or her consent under threat or force? Recall that a right is a “just or legal claim”<sup>55</sup> and a person’s “power[] of free action.”<sup>56</sup> Can it be said that the abortion providers in *Scheidler* and *Arena* gave the defendants their *legal entitlement* to provide abortion services as a result of threats of violence or force? Since the essence of a legal right is that society as a whole has agreed to uphold an individual’s moral claim,<sup>57</sup> it does not appear that a right can be transferred from one person to another, other than in a form that would be recognizable *by law*, *e.g.*, by assignment.<sup>58</sup> Therefore, it is more faithful to the syntax of the phrase “obtaining of property from another” and the rest of the extortion definition to conclude that it is not the right that is transferred, but rather the object of the right which is transferred -- *e.g.*, the money or profit to be generated from the exercise of the right.

Moreover, although much of the Hobbs Act precedent that served as support for both *Scheidler* and *Arena* used the broad language of rights, as the following discussion shows, the factual context of the non-abortion protest case precedent supports the narrower interpretation of property. That precedent, therefore, could have been sustained under the narrower definition of “obtaining of property from another.” However, the *Scheidler*, *Arena* and other abortion protest cases could not.

## 2. Case Law

### a) Right to Conduct Business

The Second Circuit’s *U.S. v. Tropiano*<sup>59</sup> is one of the seminal cases relied on by both the *Scheidler* and *Arena* courts, and by other courts outside of the abortion protest context,<sup>60</sup> for the

54. 18 U.S.C. § 1951(b)(2) (2000).

55. AMERICAN HERITAGE DICTIONARY, *supra* note 44, at 1500.

56. BLACK’S LAW DICTIONARY, *supra* note 45, at 1324.

57. *See id.* (explaining that rights are at root moral principles and become legal when society agrees to uphold them).

58. *See id.* at 119 (An “assignment” is the “act of transferring to another all or part of one’s property, interest, or rights.”).

59. 418 F.2d 1069 (2d Cir. 1969).

60. *See generally* United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980); U.S. v. Santoni, 585 F.2d 667 (4th Cir. 1978); U.S. v. Nadaline, 471 F.2d 340

proposition that “property” as defined in section 1951(b)(2) can mean a right to conduct business. In *Tropiano*, defendants Tropiano and Grasso were charged with extortion and attempted extortion in violation of the Hobbs Act.<sup>61</sup> Defendants were partners in a refuse removal company, C&A, which had customers or “stops” in the town of Milford.<sup>62</sup> When a competing refuse removal operator, Caron, began servicing two of C&A’s customers, Grasso told Caron that if Caron did not leave C&A’s accounts alone, he (Grasso) would “push” him out of Milford.<sup>63</sup> Grasso also attempted to persuade other refuse removal operators to put pressure on Caron.<sup>64</sup> Caron did not relinquish the two accounts, but agreed not to solicit any more business in Milford and not to solicit any more of C&A’s customers.<sup>65</sup>

The defendants argued that nothing more than a right to do business was surrendered by Caron, and that such a right was not property that could be “obtained.”<sup>66</sup> The Second Circuit, citing the Supreme Court decision *U.S. v. Green*,<sup>67</sup> reasoned that the “concept of property under the Hobbs Act . . . does not depend upon a direct benefit being conferred on the person who obtain[ed] the property.”<sup>68</sup> The court also cited the Supreme Court’s decision in *Liggett Co. v. Baldridge*,<sup>69</sup> for the proposition that “the right to pursue a lawful business[,] including the solicitation of customers necessary to the conduct of such business[,] had long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution.”<sup>70</sup> Thus, the court opined that Caron “had a right to solicit business from anyone in any area without any territorial restrictions by the appellants and only by the exercise of such a right could [he] obtain customers whose accounts were admittedly valuable.”<sup>71</sup>

This article suggests that *Tropiano*’s holding that the property extorted can be the right to conduct business is based on an unwarranted extension of *Green* and an inapposite analogy to *Liggett Co.* In *Green*, the Supreme Court upheld Hobbs Act extortion convictions of a union and one of its members for

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(5th Cir. 1973).

61. *Tropiano*, 418 F.2d at 1071.

62. *Id.* at 1072.

63. *Id.*

64. *Id.* at 1073.

65. *Id.*

66. *Id.* at 1075.

67. 350 U.S. 415 (1956).

68. *Tropiano*, 418 F.2d at 1076 (citing *U.S. v. Green*, 350 U.S. 415 (1956)).

69. 278 U.S. 105 (1928).

70. *Tropiano*, 418 F.2d at 1076 (citing *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928)).

71. *Id.*

attempting to obtain from a particular employer money payment of wages to laborers, called swampers, for unwanted and superfluous services.<sup>72</sup> Rejecting the trial court's conclusion that the alleged extorter had to obtain the property for his own benefit the Court, without expounding upon the specific language of the Hobbs Act, stated 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."<sup>73</sup>

However, the Court did not go so far in *Green* to hold that the property extorted is the right, nor did it describe that right as broadly as *Tropiano* did. In fact, in *Green*, the government indictment had identified the property as "wages to be paid for imposed, unwanted, superfluous and fictitious services"<sup>74</sup> and the Court, in upholding the convictions, relied on *U.S. v. Local 807 Int'l Bhd. of Teamsters*,<sup>75</sup> a case where union members were offering superfluous services and were "trying by force to get jobs and pay from the out-of-state truckers by threats and violence."<sup>76</sup>

Although *Green* held that "extortion . . . in no way depends upon having a direct benefit conferred on the person who obtains the property,"<sup>77</sup> *Tropiano* went a step further and held that the "property . . . does not depend upon a direct benefit being conferred on the person who obtain[ed] the property,"<sup>78</sup> which, when combined with its broad definition of property as a right, nullified the meaning of "obtain." Thus, *Green's* interpretation of who ultimately receives the benefit of the wages should not be read to mean that there is no "obtain" requirement. In *Green*, the defendants still obtained the jobs and wages for the swampers.

*Liggett Co.* also does not support the broad proposition in *Tropiano*. In *Liggett Co.*, which involved a state statute requiring that only licensed pharmacists could own drug stores, the Supreme Court held that "appellant's business is a property right,"<sup>79</sup> and by prohibiting the exercise of a property right, the state statute "denie[d] what the Constitution guarantees."<sup>80</sup> However, as even *Tropiano* noted, *Liggett Co.* involved the Fifth and the Fourteenth Amendments, which speak in terms of

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72. *Green*, 350 U.S. at 417.

73. *Id.* at 420.

74. *Id.* at 417.

75. 315 U.S. 521 (1942).

76. *Green*, 350 U.S. at 420 (emphasis added).

77. *Id.* (emphasis added).

78. *Tropiano*, 418 F.2d at 1076 (emphasis added) (citing *U.S. v. Green*, 350 U.S. 415 (1956)).

79. *Liggett Co.*, 278 U.S. at 111 (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921); *Truax v. Corrigan*, 257 U.S. 312, 327 (1921)).

80. *Id.* at 113.

“deprivation,”<sup>81</sup> rather than “obtaining . . . from” language. Thus, unlike the Hobbs Act, the focus of the language in the Fifth and Fourteenth Amendments is the loss to the victim.<sup>82</sup>

If *Tropiano*'s reasoning is amiss, the convictions therein could still have been upheld under the narrower reading of property advocated in this article. In *Tropiano*, Grasso attempted to repossess the Milford accounts that Caron was serving and force Caron not to solicit any more customers in Milford.<sup>83</sup> Thus, the *Tropiano* court could have upheld the defendants' convictions by holding that the property that was obtained was not Caron's right to do business but, rather, the revenues from the accounts that Caron would not be servicing.

Indeed, the Fifth Circuit characterized the property extorted in *U.S. v. Nadaline*,<sup>84</sup> not as a right to do business, but as the “intangible property” of “business accounts” and “unrealized profits.”<sup>85</sup> There, Eggers, a sales representative, resigned from Fotechrome and went to work for a competitor, Drive-In Cameras.<sup>86</sup> Eggers told the owner of Drive-In Cameras that his accounts would follow him wherever he went and Drive-In hired him.<sup>87</sup> Soon thereafter, the chairman of Fotechrome called Drive-In's owner and told him to get rid of Eggers or he would “work him over.”<sup>88</sup>

The defendant was convicted of extortion under the Hobbs Act.<sup>89</sup> In upholding the convictions, the court reasoned that “[o]bviously the extortion here involved was concerned with business accounts and unrealized profits from those accounts.”<sup>90</sup> This narrower characterization of property more accurately fits within the text of section 1951(b)(2), and similar reasoning would have permitted the *Tropiano* court to uphold the convictions against Grasso and *Tropiano* for obtaining (or attempting to obtain) unrealized future revenues from refuse removal stops.

#### b) Right to Conduct Business Free From Threats of Violence and Physical Harm

A variation on the definition of property utilized by the

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81. See, e.g., U.S. CONST. AMEND. XIV, § 1 (stating “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

82. See *Truax*, 257 U.S. at 327 (stating “Intention to inflict the loss and the actual loss caused are clear.”).

83. *Tropiano*, 418 F.2d at 1075.

84. 471 F.2d 340 (5th Cir. 1973).

85. *Id.* at 344.

86. *Id.* at 342.

87. *Id.*

88. *Id.*

89. *Id.* at 341.

90. *Id.* at 344.

Second Circuit in *Arena* is that “the property in question is the victim’s right to conduct business free from threats of violence and physical harm.”<sup>91</sup> A similar view of property was embraced by the Third Circuit in *Northeast Women’s Ctr. Inc. v. McMonagle*, a civil RICO case, when it suggested the property in question is the “right to make business decisions free from outside pressure wrongfully imposed.”<sup>92</sup>

This interpretation also stems from *Tropiano*. The Second Circuit in *Arena* accepted the characterization of property from the District Court,<sup>93</sup> which, in turn, cited *Tropiano*.<sup>94</sup> The Third Circuit in *McMonagle* relied on the Fourth Circuit’s decision in *U.S. v. Santoni*,<sup>95</sup> which, in turn, relied on *Tropiano*.<sup>96</sup> However, while *Santoni* utilized broad language to describe “property,” its factual context did not require the court to embrace such a broad definition.

In *Santoni*, defendants Santoni and Jakubik were convicted of violations of the Hobbs Act.<sup>97</sup> Santoni, a member of the Maryland House of Delegates, and Jakubik, had a scheme whereby contractors were required to kick-back some percentage of contract fees in exchange for assurances of future contracts and evasion of inspections during performance of the contracts.<sup>98</sup> They arranged one such scheme with Municipal Chemical Corporation (which was an FBI front), and they demanded Olympos Painting Company to give Municipal a subcontract to clean two schools.<sup>99</sup> Olympos gave Municipal the subcontract and Municipal granted a kick-back to Santoni.<sup>100</sup>

Jakubik argued that he had not extorted property because he did not receive a benefit from the subcontract, and there was no loss to Olympos because the subcontract was entered into for

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91. *Arena*, 180 F.3d at 394 (emphasis added).

92. 868 F.2d 1342, 1350 (3d Cir. 1989) (citing *U.S. v. Santoni*, 585 F.2d 667 (4th Cir. 1978)).

93. *Arena*, 180 F.3d at 394.

94. *Arena*, 918 F. Supp at 568 (citing *Tropiano*, 418 F.2d at 1077).

95. 585 F.2d 667 (4<sup>th</sup> Cir. 1978).

96. *Id.* at 673 (citing *Tropiano*, 418 F.2d at 1076).

97. *Id.* at 669.

98. *Id.* at 670.

99. *Id.*

100. *Id.* Jakubik introduced Santoni to Nicolaidis, the president of Olympos, as “a state delegate [who] can help you if you ever have a problem . . . And it is good to have a friend like this . . . on account of [Santoni’s] being a politician and state delegate.” *Id.* When Nicolaidis hesitated on the deal, Jakubik reminded Nicolaidis “about . . . knowing people, that they can help contractors, that it’s good to have these people as friends, and sometimes you couldn’t afford to have them against you.” *Id.* Santoni informed him that there would be no trouble with inspectors. *Id.*

valuable consideration.<sup>101</sup> The Fourth Circuit reasoned that the defendant did not need to receive a direct benefit from the extortion,<sup>102</sup> the “gravamen of the offense is loss to the victim,”<sup>103</sup> and loss of intangible property rights sufficed.<sup>104</sup> The court concluded that, as in *Tropiano*, where the “property extorted was the right of Caron . . . to solicit business free of territorial restrictions wrongfully imposed by its competitors,” the property extorted by Jakubik was “the right of Olympos to make a business decision free from outside pressure wrongfully imposed.”<sup>105</sup>

The convictions in *Santoni*, like those in *Tropiano*, could have been sustained on a narrower reading of “property” as the intangible property of future revenues from business accounts. Jakubik intended that funds be paid to a third party—Municipal. The facts of *Santoni* are analogous to those in *Green*, where the defendant union representative was asking for money to be paid in the form of wages for labor.<sup>106</sup> In both cases, the defendants sought money and third persons benefited from the receipt of the money sought.

Broad interpretations of property as a “right to conduct business” and a “right to conduct business free from threats of violence and physical harm,” nullify the need for obtaining the property of the clinics (*i.e.*, future revenues), and enable liability to be imposed merely upon a finding that the protesters “used force, threats of force, fear and violence in their efforts to force the [clinics] out of business”<sup>107</sup> or convictions to stand where the defendant “used violence to force her victim to abandon [her right].”<sup>108</sup> While Hobbs Act extortion does require proof of “wrongful use of actual or threatened force, violence or fear,” [Sandra: insert footnote here: 18 U.S.C. § 1951 (b)(2).] the expansive interpretations given by courts in the abortion protest context have collapsed the “obtaining of property from another” into the “wrongful use” elements. Under these interpretations, all that is needed to violate the Hobbs Act is a threat of force, which causes a person not to freely exercise his or her right (and the requisite affect on commerce). While, this article does not purport

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101. *Id.* at 672.

102. *Id.* at 673 (citing *Green*, 350 U.S. at 420).

103. *Id.* (citing *U.S. v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977)).

104. *Id.* at 673 (citing, *inter alia*, *Tropiano*, 418 F.2d at 1075-76).

105. *Id.* In *Tropiano*, the Second Circuit opined that Caron “had a right to solicit business from anyone in any area without any territorial restrictions by the appellants and only by the exercise of such a right could [he] obtain customers whose accounts were admittedly valuable.” *Tropiano*, 418 F.2d at 1076.

106. *See generally* *U.S. v. Green*, 350 U.S. 415 (1956).

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

108. *Arena*, 180 F.3d at 394.



to explain how broadly the phrase “wrongful use of . . . force . . . or fear” should be interpreted,<sup>109</sup> it notes that it should not be used to gloss over the requirement of “obtaining of property from another.”

c) Property Under the Mail Fraud Statute

The Supreme Court’s decisions under the mail fraud statute provide guidance for how “property” -- including intangible property -- can be interpreted so as not to do away with the “obtain” element. The mail fraud statute prohibits a person from “having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>110</sup> In *McNally v. U.S.*,<sup>111</sup> a case involving a scheme to have the Commonwealth of Kentucky pay money to petitioners’ insurance agent, the Court held that the “scheme to defraud” language required a scheme to defraud “money or property.”<sup>112</sup> Although the prosecution had argued that the petitioners’ scheme defrauded citizens’ of their intangible right to have the Commonwealth’s affairs conducted honestly, the Court reasoned that absent explicit Congressional direction, the definition of property could not be expanded to encompass such intangible right.<sup>113</sup> The Court emphasized that the mail fraud statute was not intended to protect “the intangible right of the citizen to good government.”<sup>114</sup> Indeed, were it to embrace such a definition, the Federal Government would become involved “in setting standards of disclosure and good government for local and state officials.”<sup>115</sup>

Just as in *McNally*, where the broader interpretation of property would involve policing of local governments generally, a definition of property under the Hobbs Act that collapses the “obtaining of property from another” and “wrongful use” elements would lead to policing every action that generally affected commerce. If Congress intended the Hobbs Act extortion provision to be such a tool, it should be explicitly stated in the text of the act.<sup>116</sup>

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109. *But see* U.S. v. Clemente, 640 F.2d 1069, 1076-77 (2d Cir. 1981) (stating “It is obvious that the use of fear of financial injury is not inherently wrongful.”).

110. 18 U.S.C. § 1341 (2000) (emphasis added).

111. 483 U.S. 350 (1987).

112. *Id.* at 364.

113. *Id.* at 352-61.

114. *Id.* at 356.

115. *Id.* at 360.

116. After the *McNally* decision, Congress passed a statute, which provides: “For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right to honest services.” 18 U.S.C. § 1346.

One might argue that *McNally* provides little guidance, since it involved “government” whereas the abortion protest cases involved the conduct of “business.” The Second Circuit in *Arena*, relying on its earlier decision in *Town of West Hartford v. Operation Rescue*,<sup>117</sup> made such a distinction.<sup>118</sup> In *Town of West Hartford*, the plaintiffs were abortion clinics as well as the town.<sup>119</sup> The clinics argued that the defendants had extorted from them a closure of their facilities. The town argued that the defendants had extorted its ability to protect the rights of the clinics and its citizens because it spent more money on manpower and equipment to respond to the protesters’ illegal activities, than they normally would spend on police enforcement in the town.<sup>120</sup> The Second Circuit concluded that the term property could not plausibly be construed to encompass altered official conduct,<sup>121</sup> because “[v]irtually any conduct that elicits a governmental response . . . require[s] activity by one or more salaried employees.”<sup>122</sup>

In *Arena*, the Second Circuit did not consider the closing of the clinics to be merely “altered conduct” as a result of the defendants’ activity because, as it reasoned, the property extorted by the clinics involved the “conduct of business,” whereas that of the town in *Town of West Hartford* was merely a “governmental response to unlawful acts.”<sup>123</sup> However, the court did not offer any support for the distinction between business and government from the language of the Hobbs Act. Nor does there appear to be any. At its root, both the clinics and the government were claiming a loss of wealth (or potential wealth) – the clinics from the loss of clients, and the government from the expenditure of resources. Thus, there is no basis to distinguish cases involving government and business and *McNally* is useful as a guide for defining “property” in the Hobbs Act context.

The Supreme Court described the type of intangible property that is acceptable in *Carpenter v. U.S.*<sup>124</sup> There, the Court held that the intangible property of “confidential business information” was covered by the mail fraud statute.<sup>125</sup> Winans, an advice columnist for the Wall Street Journal interviewed corporate executives about stocks for his column, “Heard On the Street.”<sup>126</sup> H entered into a

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117. 915 F.2d 92 (2d Cir. 1990).

118. *Arena*, 180 F.3d at 393 (citing *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990)).

119. *Town of West Hartford*, 915 F.2d at 92.

120. *Id.* at 94.

121. *Id.* at 102.

122. *Id.*

123. *Arena*, 180 F.3d at 393.

124. 484 U.S. 19 (1987).

125. *Id.* at 25.

126. *Id.* at 22.

scheme whereby he gave information to a brokerage firm regarding the timing and contents of the column before it was printed.<sup>127</sup>

Defendants argued that there was no “money or property” involved in the scheme to defraud. The Court distinguished *McNally*'s reasoning, stating that unlike an

intangible right to honest and impartial government . . . [which is] too ethereal in itself to fall within the protection of the mail fraud statute . . . . Here, the object of the scheme was to take the Journal's confidential business information – the publication schedule and contents of the ‘Heard’ column – and its intangible nature does not make it any less ‘property,’ [under section 1341.]<sup>128</sup>

In response to the defendants' argument that they did not cause the Journal to suffer any monetary loss or publicize the information, the Court commented that “it [was] sufficient that the Journal had been deprived of its right to exclusive use of the information which is an important aspect of the confidential business information and most private property.”<sup>129</sup> While this statement might appear that the Court is approving of a view of property in the mail fraud statute as “exclusive use,” which, in turn, requires only that defendants need “affect” the plaintiffs' use of the property, the *Carpenter* Court did not go so far.

The Court first dissected the property at issue, the “confidential business information,” into its most basic elements – the contents of the column and the publication schedule – which it stated was the goal of the defendants to take.<sup>130</sup> Only by the taking of the contents of the column and the publication schedule could the Court have then said that the defendants deprived the Journal of its exclusive use of that information.<sup>131</sup> Thus, the property *primarily* at issue in *Carpenter* was the contents of the column and the publication schedule.

Likewise, in the abortion protest context, it is only when the protesters get or potentially get the revenues generated from the provision of abortion services that they can be said to have deprived the clinics of their exclusive right to control the provision of services. Any broader interpretation would result in the clinics having a right to control a person's choices rather than their own

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127. *Id.* at 23.

128. *See id.* at 25. The Court went on to state that “news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered . . . and to be distributed and sold to those who will pay money for it[.]” *Id.* at 26 (quoting *Int'l News Services v. Associated Press*, 248 U.S. 215, 236 (1918)).

129. *Id.* at 26-27.

130. *Id.* at 26.

131. *Id.* at 26-27.

businesses. For example, if a clinic client freely chose not to get an abortion because she changed her mind as a result of something a protester said or did, does that mean the clinic was extorted of the money the client would have paid had she gotten an abortion? Clearly, not.<sup>132</sup>

In sum, the courts' conclusions in *Scheidler* and *Arena* that the "property" under the Hobbs Act includes the right to conduct business and/or to do so free from wrongful pressure is erroneous. The text of section 1951(b)(2), the factual context of the various criminal cases (in the non-abortion protest context) relied upon by *Scheidler* and *Arena*, and the Supreme Court's interpretation of property under the mail fraud statute support a narrower reading of the term "property" under the Hobbs Act: a reading that is limited to the object of the right – future revenues, information, etc.

*B. Premise 2: "Obtain": Defendant Does not Need to Seek or Receive Anything Since the Gravamen of the Offense is Loss to the Victim*

The courts have also turned to another premise to sustain convictions and verdicts under the Hobbs Act: in order to "obtain" property, the defendant need not seek or receive anything since the gravamen of the offense is loss to the victim. The corollary of this proposition is that Hobbs Act extortion is a general intent not specific intent crime and, therefore, the defendant does not need the specific intent to obtain property.

In *Scheidler*, the Seventh Circuit held that the defendant need not seek money or anything else, since a "loss to, or interference with the rights of, the victim is all that is required."<sup>133</sup> The District court in *Scheidler* had relied on a two-part proposition that: (a) the defendant need not profit economically from the extortion;<sup>134</sup> and (b) the "gravamen" of extortion under the Hobbs Act is loss to the victim.<sup>135</sup>

In *Arena*, the Second Circuit concluded that the defendant

132. The *Scheidler* plaintiffs also presented arguments that "an agreement not to do abortions" is the property extorted. *Scheidler*, 897 F. Supp. at 1073 n. 20. An agreement, however, consists in the promises of *two* parties and it is difficult to conceptualize how an agreement could be obtained from only *one* of them.

133. *Scheidler*, 267 F.3d at 709 (citing *U.S. v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

134. *Scheidler*, 1997 WL 610782 at \*16 (citing *Scheidler*, 968 F.2d at 630 n.17 (citing *Anderson*, 716 F.2d 446 (7th Cir. 1983)) and *U.S. v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

135. *Id.* at \*17 (citing *U.S. v. Santoni*, 585 F.2d 667, 672 (4th Cir. 1987)).

does not need to either receive or seek an economic benefit<sup>136</sup> and that defendant “obtains” the victim’s property by “disposing” of the right by “regulating” its fate.<sup>137</sup> Defendant obtains the property by causing the victim to abandon exercise of the right.<sup>138</sup> The District Court in *Arena* had reasoned that a defendant does not need to receive the benefit of his conduct.<sup>139</sup> The District Court had also reasoned that a defendant does not need to have the specific intent to appropriate the victim’s property because Hobbs Act extortion is a general intent crime,<sup>140</sup> and economic motive is not required.<sup>141</sup>

The result of these interpretations has been to read out of the “obtaining of property from another” element the requirement that the defendant intend to obtain the property (i.e., the revenues generated from the provision of abortions services) for himself or others. Instead, the defendant need merely cause the victim to cease the exercise of his or her right to engage in the business of providing abortion services.

### 1. Text

The courts’ expansive interpretation, again, runs afoul of the “obtaining of property from another” language. As has been discussed with respect to the term “property,” the plain meaning of the phrase “obtaining of property from another” requires that there be a transfer of property from the one person to another. An abortion protester does not “obtain” a right to provide abortions if he or she merely causes the abortion provider to cease provision of abortion services. Revenues generated by provision of abortion services are the object of the right and an abortion protester neither seeks those revenues nor seeks to provide abortion services to the clients. Thus, the rationale that a defendant obtains property by causing an abortion provider to abandon exercise of his or her right simply does not comport with the language of “obtaining of property from another.”<sup>142</sup> Additionally, as set forth below, most of the Hobbs Act extortion cases in the criminal context, which do not involve abortion protests but were looked to by the *Scheidler* and *Arena* courts, do not support those courts’ broad interpretation of “obtain.”

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136. *Arena*, 180 F.3d at 394 (citing *McMonagle*, 868 F.2d at 1350).

137. *Id.* (citing Webster’s Third New International Dictionary 1559 (1976)).

138. *Id.*

139. *Arena*, 918 F. Supp. at 569 (citing *Green*, 350 U.S. at 420; *U.S. v. Clemente*, 640 F.2d 1069, 1079-80 (2d Cir. 1981)).

140. *Id.* (citing *U.S. v. Bryson*, 418 F. Supp. 818, 826 (W.D. Okla. 1975); *U.S. v. Furey*, 491 F. Supp. 1048, 1059 (E.D. Pa. 1980)).

141. *Id.* at 570 (citing *McMonagle*, 868 F.2d at 1349).

142. 18 U.S.C. § 1951 (b) (2000).

## 2. Case Law

### a) Defendant Need Not Receive the Benefit of His Conduct

The Supreme Court's decision in *U.S. v. Green*,<sup>143</sup> is the seminal case cite for the proposition that the perpetrator need not receive the benefit of his conduct.<sup>144</sup> Recall that the Court in *Green* upheld Hobbs Act extortion convictions of a union and one of its members.<sup>145</sup> Green was the representative that was trying to force an employer to pay money in the form of wages for unwanted "swamper" services. Green had argued that the charged acts would be criminal only if he obtained a personal benefit.<sup>146</sup> The Court rejected Green's argument, reasoning that the Hobbs Act concept of extortion did not require that the person obtaining the property be the intended beneficiary.<sup>147</sup> That is, Green could still be convicted under the statute even if he was not the person paid.<sup>148</sup> However, although defendant Green did not intend to personally gain from his acts, he still intended to obtain the money for others who would benefit.<sup>149</sup> Thus, the Court in *Green* never held that no one need be the intended beneficiary of the property that is obtained.<sup>150</sup>

*U.S. v. Clemente*,<sup>151</sup> one of the cases relied upon by the District court in *Arena*,<sup>152</sup> likewise does not do away with the requirement that the defendant intend to obtain the property, either for the benefit of himself or others.<sup>153</sup> In upholding a jury conviction against the ringleader of an organized enterprise for extorting money from companies to have their ships unloaded, the Second Circuit in *Clemente* noted that the jury was instructed that it must find "that the *purpose* of the defendant you are considering *was to obtain money for himself or others . . .*"<sup>154</sup>

### b) Defendant Need Not Have an Economic Motive

The proposition that the defendant need not have an economic motive was highlighted by the Third Circuit in

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143. 350 U.S. 415 (1956).

144. *Id.*

145. *Id.*

146. *Id.* at 417.

147. *Id.* at 420.

148. *Id.*

149. *Id.*

150. *Id.*

151. 640 F.2d 1069 (2d Cir. 1981).

152. *Arena*, 918 F. Supp. at 568 (citing, inter alia, *Clemente*, 640 F.2d at 1079-80).

153. *Clemente*, 640 F.2d at 1077.

154. *Id.* (emphasis added).

*McMonagle*.<sup>155</sup> There, the defendants argued that they did not commit extortion because Hobbs Act extortion requires an economic motive. The Third Circuit held that this argument “ignore[d] well-established precedent holding that lack of economic motive does not constitute a defense to Hobbs Act crimes.”<sup>156</sup>

*U.S. v. Starks*,<sup>157</sup> a Third Circuit case, is the oldest of the precedent cited by the *McMonagle* court. *Starks* was also cited by the District Court in *Scheidler*.<sup>158</sup> In *Starks*, the defendants were charged with Hobbs Act violations for conspiring and attempting to extort money from a tavern.<sup>159</sup> Robinson, a Muslim, visited Rice who owned Nookies Tavern and told Rice to have 200 dollars for Founder’s Day, a Muslim holiday, when he came back.<sup>160</sup> Robinson returned with another person and told Rice to make 200 dollars weekly payments as “taxes.”<sup>161</sup> The defendants argued that they were soliciting for voluntary contributions to Muslim religious causes.<sup>162</sup> The Third Circuit reasoned that there was no exception in the Hobbs Act permitting extortion for religious purposes.<sup>163</sup>

*U.S. v. Cerilli*,<sup>164</sup> another Third Circuit case cited by the *McMonagle* court, upheld Hobbs Act convictions against employees of the Pennsylvania Department of Transportation. In *Cerilli*, the defendants had requested payments for setting up leases for road work, which defendants had argued were political contributions.<sup>165</sup>

The proposition in *Starks* and *Cerilli* that motive is irrelevant to Hobbs Act extortion is unremarkable since criminal law generally holds that motive is irrelevant to criminal liability.<sup>166</sup> Nevertheless, the defendants in both cases intended to obtain money from the victims for themselves or others.<sup>167</sup> Thus, *Starks* and *Cerilli* do not stand for the broader holding that defendants under the Hobbs Act extortion provision do not need to seek

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155. 868 F.2d 1342 (1989).

156. *Id.* at 1350 (citing *U.S. v. Anderson*, 716 F.2d 446 (7th Cir. 1983); *U.S. v. Cerilli*, 603 F.2d 415 (3d Cir. 1979); and *U.S. v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

157. 515 F.2d 112 (3d Cir. 1975).

158. *Scheidler*, 1997 WL 610782 at \*16 (citing *inter alia*, *U.S. v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

159. *Id.* at 115.

160. *Id.* at 119.

161. *Id.*

162. *Id.*

163. *Id.* at 124.

164. 603 F.2d 415 (1979).

165. *Id.* at 418.

166. KADISH AND SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 214 (6th ed. 1995) (citing JEROME HALL, PRINCIPLES OF CRIMINAL LAW 88 (2d ed. 1960)).

167. See generally *U.S. v. Cerilli*, 603 F.2d 415 (1979); *U.S. v. Starks*, 515 F.2d 112 (1975).

property in a form that can be transferred to them.

The final case cited by the *McMonagle* court was *U.S. v. Anderson*,<sup>168</sup> a Seventh Circuit case. *Anderson* was also cited by the *Scheidler* courts,<sup>169</sup> and was noted by the Second Circuit in *Arena*.<sup>170</sup> *Anderson* does appear to hold that defendants under the Act's extortion provision do not need to seek transferable property.<sup>171</sup> In *Anderson*, defendant was charged with Hobbs Act attempt and conspiracy to extort.<sup>172</sup> He and two other men abducted a doctor and his wife from their home at gunpoint.<sup>173</sup> They told the doctor that they wanted only money and took over 300 dollars from them.<sup>174</sup> For the first two days that they held the doctor and his wife in captivity, they spoke only of how they could obtain the doctor's money, but on the last day they said they would have to kill them unless the doctor agreed to stop performing abortions and close his clinic immediately.<sup>175</sup> The doctor agreed.<sup>176</sup>

Although the defendant argued that there was insufficient evidence to support his conviction for Hobbs Act violation based on extortion,<sup>177</sup> the Seventh Circuit affirmed the conviction on the ground that the threats were sufficient to obstruct interstate commerce.<sup>178</sup> The court did not specifically address what "property" had been "obtained" from the doctor.

Some commentators posited that the result in *Anderson* is supportable on the ground that the defendant intended to get money because he had already obtained 300 dollars and talked about getting the doctor's money up until the last couple of days of their captivity.<sup>179</sup> Yet, the implicit rationale of *Anderson* is that the defendant did not intend to obtain money but, rather, to

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168. 716 F.2d 446 (1983).

169. *Scheidler*, 1997 WL 610782 at \*16 (citing *Scheidler*, 968 F.2d at 630 n. 17 (citing *U.S. v. Anderson*, 716 F.2d 446 (7th Cir. 1983))).

170. *Arena*, 180 F.3d at 394 (citing *U.S. v. Anderson*, 716 F.2d 446, 450 (7<sup>th</sup> Cir. 1983)).

171. See *Anderson*, 716 F.2d at 450 (holding threats were sufficient to obstruct interstate commerce).

172. *Id.* at 447-48.

173. *Id.* at 447.

174. *Id.*

175. *Id.* at 447-48.

176. *Id.* at 448.

177. *Id.* at 450.

178. *Id.*

179. See Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, THE SUP. CT. REV. 129, 139 n.59 (1994) (noting defendants' motive to gain economic advantage by talking about how to get money in the first few days of captivity). See also Jay Alan Sekulow and Walter M. Weber, *NOW v. Scheidler: An Inside Look*, 21 OHIO N.U. L. REV. 959, 987 n.209 (1995) (noting that although the court did not deal with the "obtaining from" element of extortion, there was evidence that defendant obtained \$300).



induce the doctor to abandon his right to do business. Indeed, the Seventh Circuit made this rationale explicit in its recent *Scheidler* opinion, which cited *Anderson* for the proposition that intangible property, such as a right to conduct business, qualifies as property under the Hobbs Act.<sup>180</sup>

By accepting a broad interpretation of property as a right, the *McMonagle* and *Anderson* (and later *Scheidler*) courts did not need to find that the defendants intended to “obtain” that right. They only needed to find that the victim ceased to exercise a property right. In essence, then, by saying that economic motive is not a defense to Hobbs Act extortion in the abortion protest cases, the courts confuse economic motive with specific intent to obtain a type of property that can be transferred from one person to another.

c) Loss to the Victim is All that is Required

The Seventh Circuit in *Scheidler* also stated that the defendant need not seek money or anything else, since a loss or interference with the victim’s rights is all that was required.<sup>181</sup> The Seventh Circuit relied for this proposition on its prior opinion *U.S. v. Stillo*.<sup>182</sup> In *Stillo*, a state court judge and his son were convicted of extortion for taking bribes in exchange for fixing court cases. The defendants argued that the government failed to prove that they had agreed to extort money.<sup>183</sup> The *Stillo* court noted the broad proposition in *U.S. v. Lewis*,<sup>184</sup> that an extortionist need not seek money or anything else, but can violate the Hobbs Act by merely creating a loss or an interference with the victim’s rights.<sup>185</sup> It then stated that although an extortionist need not seek or receive money, as a factual matter, there was more than enough evidence for a jury to find that the *Stillo* defendants had extorted money since the evidence showed every bribe involved a cash payment.<sup>186</sup>

In *Lewis*, the defendant admitted to mailing a letter to Johnson & Johnson (J&J) threatening to put cyanide in Tylenol if J&J did not wire money to a certain bank account.<sup>187</sup> J&J was willing to do so, but did not at the FBI’s instruction.<sup>188</sup> The

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180. *Scheidler*, 267 F.3d at 709 (citing *U.S. v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)).

181. *See id.* (citing *U.S. v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

182. 57 F.3d 553 (7th Cir. 1995).

183. *Id.* at 559.

184. 797 F.2d 358 (7th Cir. 1986).

185. *Stillo*, 57 F.3d at 559.

186. *Id.*

187. *Lewis*, 797 F.2d at 363.

188. *Id.*

defendant was convicted of attempted extortion.<sup>189</sup> He argued that he did not have the requisite intent to support a conviction of attempted extortion because he only wanted to embarrass the victim.<sup>190</sup> As proof of his “noneconomic” motive, he argued it was nearly impossible for him to get money since the account was closed, assigned to another individual, and would be monitored by authorities.<sup>191</sup>

The Seventh Circuit in *Lewis* turned to cases such as *Tropiano* and *Santoni*, and stated that “the ‘property’ of which the victim is 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.”<sup>192</sup> The court also cited *U.S. v. Frazier*,<sup>193</sup> for the proposition that “[l]oss to the victim is the gravamen of the offense.”<sup>194</sup> The *Lewis* court reasoned that defendant did not need to intend to receive the funds demanded.<sup>195</sup> He violated the Act if he simply demanded that J&J burn the cash.<sup>196</sup> The court concluded that the defendant had confused motive and intent, and held that the only intent required was proof that the defendant intended J&J “to part with the property.”<sup>197</sup> Somewhat equivocal, the court stated in dictum in a footnote:

Of course, a showing by the defendant that the extortion scheme would in no way advance his self-interest would undercut the conclusion that he had intent to extort. Most extortionists undoubtedly seek a direct and tangible economic benefit from their demands. Others do not, however, because they may be motivated only by a desire to humiliate the victim or a third party, and the discomfort they cause is the gain they derive from the scheme. Nonetheless, the Hobbs Act prohibits certain interferences with interstate commerce and an extortionate demand may have the proscribed deleterious effect on such commerce, even though the defendant never receives a transfer of property from the victim. . . . What the defendant sought to gain was the personal satisfaction of witnessing the ruination of his wife’s former employer. Thus, he was acting to advance his self-interest even if he knew he would not receive any funds from Johnson & Johnson.<sup>198</sup>

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189. *Id.*

190. *Id.* at 363-64.

191. *Id.* at 364.

192. *Id.* (citing, *inter alia*, *Tropiano*, 418 F.2d at 1075-76; *Santoni*, 585 F.2d at 672-73).

193. 560 F.2d 884, 887 (8th Cir. 1987).

194. *Lewis*, 797 F.2d at 364 (citing *Frazier*, 560 F.2d at 881).

195. *Id.*

196. *Id.*

197. *Id.* at 365.

198. *Id.* at 364 n.3.

*Lewis's* dictum appears to confuse motive and intent and, in fact, penalizes motive, the very factor the court had said was irrelevant to criminal liability.<sup>199</sup> This error was incorporated by the District Court in *Arena*, which concluded that the defendants there obtained the clinics' property for purposes of the Hobbs Act, when in the process of inducing the clinics to part with their rights to conduct business, they gained the benefits from the closing of clinics offering services that they considered abhorrent and was a symbolic victory for their ideology.<sup>200</sup> The dictum was not relied on by other courts and did not serve as the basis for the Second Circuit's decision to affirm in *Arena*.

Regardless, the holding in *Lewis* was enough in and of itself to do away with intent to obtain property. However, the convictions in *Lewis*, an attempted extortion case, could have been upheld without doing so. As just noted, the *Lewis* court looked to *Frazier* for the phrase "gravamen of the offense is loss to the victim."<sup>201</sup> *Frazier* was also an attempted extortion case. Yet, *Frazier*, unlike *Lewis*, did not dispense with specific intent to obtain property requirement. Instead, the outcome in *Frazier* turned on the reasoning that factual impossibility was not a defense to attempted extortion under the Hobbs Act. The *Frazier* court reasoned that if the defendant's attempt had succeeded, it would have resulted in the commission of the crime<sup>202</sup> -- a proposition that could also have been utilized by *Lewis* in upholding the conviction without eviscerating the intent requirement.

Specifically, in *Frazier*, the defendant set up a scheme to attach an explosive belt to a banker and remove it only on the condition that the bank pay money.<sup>203</sup> The bank, with FBI stand-ins, delivered the money to the airport parking lot as defendant had planned.<sup>204</sup> The defendant never came to pick up the money.<sup>205</sup> The government charged the defendant with attempted extortion.<sup>206</sup> The defendant argued that because he only wanted to embarrass the banking community and he never picked up the money, he had not committed extortion.<sup>207</sup>

In upholding the conviction, the Eighth Circuit reasoned that the fact that defendant's motive might only have been to

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199. *Id.*

200. *Arena*, 918 F. Supp. at 570.

201. *Lewis*, 797 F.2d at 364 (citing *Frazier*, 560 F.2d at 887).

202. *Frazier*, 560 F.2d at 888.

203. *Id.* at 885.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

embarrass the banking community was irrelevant.<sup>208</sup> The court reasoned that the factual impossibility of not being able to pick up the money due to some unanticipated intervention does not negate the defendant's "desire to obtain the banks' money" by instilling fear that a banker would be killed.<sup>209</sup>

Moreover, the court reasoned that this was not a case of legal impossibility; rather, had the defendant's scheme succeeded and he had brought about the desired consequences, his acts clearly would have amounted to a crime.<sup>210</sup> The court concluded, for purposes of the obtaining property in an *attempted extortion* case, the offense is complete when the defendant induces the victim to part with the property.<sup>211</sup> When the *Frazier* court stated that "the gravamen of the offense is loss to the victim,"<sup>212</sup> it cited cases where the defendants intended to obtain money or other such property and someone in the scheme actually did receive it.<sup>213</sup> Thus, while loss to the victim may be a hallmark of an attempted extortion case, it should not have been made the determinative factor for extortion cases, generally.

#### d) Hobbs Act Extortion is a General Intent Crime

Extortion at common law was grouped with the larceny-type offenses.<sup>214</sup> The offense of extortion required that the defendant have a purpose to obtain the property of another.<sup>215</sup> The District Court in *Arena* addressed the intent requirement of Hobbs Act extortion. The defendants in *Arena* contended that destruction or deprivation of property alone was not enough, but that the Hobbs Act required specific intent, *i.e.* that defendants intend to take the victim's property for himself or for a third person.<sup>216</sup> Defendants premised their argument on the legislative history of the Hobbs Act, which indicated that extortion was defined by reference to the New York extortion statute from which the federal law was

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208. *Id.*

209. *Id.* at 888.

210. *Id.*

211. *Id.* at 887.

212. *Id.* (citing *U.S. v. Jacobs*, 451 F.2d 530, 535 (5th Cir. 1971); *U.S. v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971); *U.S. v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964)).

213. For example, one of the cases cited by *Frazier*, *Provenzano*, is analogous to *Green* where the money was paid not to the person making the demand but to another person, an attorney. See *Provenzano*, 334 F.2d at 683. See also *Hyde*, 448 F.2d at 843 (scheme to collect the checks); *Jacobs*, 451 F.2d at 533 (stating that defendants conspired to obtain \$50,000 in cash).

214. Murray, *supra* note 6, at 720.

215. See BLACK'S LAW DICTIONARY, *supra* note 45, at 585 (defining extortion).

216. *Arena*, 918 F. Supp. at 568.

derived; the New York statute required that defendants have a specific intent to acquire property.<sup>217</sup> Citing *U.S. v. Bryson*,<sup>218</sup> and *U.S. v. Furey*,<sup>219</sup> the Arena court rejected the defendant's argument, reasoning that the Hobbs Act extortion is a general, rather than specific, intent crime.<sup>220</sup>

A closer look at *Bryson* and *Furey* reveals that these cases actually support the defendants' position. Recall that the Hobbs Act requires interference with interstate commerce by either extortion or robbery,<sup>221</sup> and "extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force . . .".<sup>222</sup> *Bryson* and *Furey* held that the Hobbs Act, as a whole, is a general intent statute.<sup>223</sup> As *Bryson* reasoned, 18 U.S.C. § 1951 does not contain the word "intent" or "specific intent."<sup>224</sup> These courts did not hold that there is no specific intent to obtain property under the Hobbs Act.

In *Furey*, the defendant argued that he did not engage in extortion under the Hobbs Act because he did not intend to instill fear in the victims.<sup>225</sup> The court stated that "[section] 1951 is only a general intent statute,"<sup>226</sup> and that to fully explore the intent requirements, it was necessary to look at the New York extortion law as it existed prior to the passage of the Hobbs Act in 1945.<sup>227</sup> The court, looking to New York case law interpreting extortion cases, concluded that Congress did not require that the defendant have specific intent to instill fear in his victim, but only that the

217. *Id.*

218. 418 F. Supp. 818 (W.D. Okla. 1975).

219. 491 F. Supp. 1048 (E.D. Pa. 1980).

220. *Arena*, 918 F. Supp. at 569 (citing *U.S. v. Bryson*, 418 F. Supp. 818, 826-27 (W.D. Okla. 1975); *U.S. v. Furey*, 491 F. Supp. 1048, 1059 (E.D. Pa. 1980)).

221. 18 U.S.C. § 1951(a).

222. 18 U.S.C. § 1951(b)(2).

223. *See generally* *U.S. v. Bryson*, 418 F. Supp. 818 (1975); *U.S. v. Furey*, 491 F. Supp. 1048 (1980).

224. *See Bryson*, 418 F. Supp. at 827 (citing *U.S. v. Gupton*, 495 F.2d 550 (5th Cir. 1974) and stating that "under the first clause of § 1951(a) the government need not show that the accused set out with the specific conscious purpose or desire to obstruct commerce").

225. *Furey*, 491 F. Supp. at 1063. The definition of Hobbs Act extortion, § 1951(b)(2), is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, . . ." 18 U.S.C. § 1951(b)(2) (2000) (emphases added).

226. *Furey*, 491 F. Supp. at 1061.

227. *See id.* at 1062 (looking to the New York extortion law, *Furey* was following the analytical methodology of a Third Circuit extortion case). *See U.S. v. Sweeney*, 262 F.2d 272, 275 n.3 (3d Cir. 1959) (reasoning that the terms of the Hobbs Act are to be defined by reference to the New York extortion statute from which the federal law was derived and New York defines extortion as a larceny-type offense).

effect or import of his acts be to instill fear in the victim.<sup>228</sup>

However, *Furey* was not analyzing the “obtaining of property from another” element, but rather the “induced by wrongful use of . . . force, violence or fear” element. Indeed, other statements in *Furey* support the notion that specific intent to obtain the property is required: “[u]nder attempted extortion, the property need not be actually obtained by the defendant, but the jury must find only that it *could have been obtained*.”<sup>229</sup> “[T]he property is obtained by the exploitation of or playing upon the victim’s fear, which in turn induces the victim to involuntarily part with his property *to the defendant*.”<sup>230</sup> This language in *Furey* supports the holding that the defendant must have intended to obtain the victim’s property.<sup>231</sup> Thus, the District Court in *Arena* incorrectly used *Furey*’s general intent conclusion concerning “instilling fear” to hold that all that was needed to satisfy the “obtaining of property from another” element was general intent.

Two New York state court cases construing the state extortion statute are particularly instructive for how the “obtaining of property from another element” should be interpreted under the Hobbs Act.<sup>232</sup> In *People v. Squillante*,<sup>233</sup> the state charged labor union members under section 850 of the New York Penal Law, which contains the same language as the Hobbs Act, and was in effect at the time of the enactment of the Hobbs Act.<sup>234</sup> The defendants were charged with having obtained from stores 20 dollars or more per month by demanding, under threat of picketing, that the stores cease dealing with a non-union cartman

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228. *Furey*, 491 F. Supp. at 1063 (citations omitted).

229. *Id.* at 1061 (citing *Sweeney*, 262 F.2d at 275; *U.S. v. Green*, 246 F.2d 155, 159 (7th Cir. 1957)) (emphasis added).

230. *Id.* (citing *U.S. v. Duhon*, 565 F.2d 345, 351 (5th Cir. 1978); *Bianchi v. U.S.*, 219 F.2d 182, 195-96 (8th Cir. 1955))(emphasis added).

231. Indeed, the facts of both *Furey* and *Bryson* support a specific intent to obtain property. In *Furey*, the defendant attempted to extort money from the victim by reason of his official position as a tax assessor and through use of threats of adverse economic consequences. *Furey*, 491 F. Supp. at 1052. In *Bryson*, defendant attempted to obtain a guarantee note of \$10,000 and an \$8,000 check. *Bryson*, 418 F. Supp. at 827.

232. See *U.S. v. Culbert*, 435 U.S. 371, 377 (1978) (noting that Congress intended to define as federal crime conduct it knew was punishable under state law, and the legislative debates were replete with statements that the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes); *U.S. v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (stating that the Hobbs Act “did no more than incorporate New York’s conventional definition of extortion – the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear, or under color of official right”).

233. 185 N.Y.S.2d 357 (N.Y. Sup. Ct. 1959).

234. See N.Y. PENAL LAW § 850 (1917).

and deal instead with union cartmen.<sup>235</sup> One of the theories advanced by the state was that the “stores lost the freedom to contract with the cartmen of their choices, and that right is ‘property’ within [section 850.]”<sup>236</sup> The court rejected the theory, reasoning that:

It would appear that the right to contract may be property injured under section 851 of the Penal Law . . . , but it is difficult to consider that right property obtained under Section 850. ‘Obtaining of property from another imports not only that he give up something but that the obtainer receive something.’<sup>237</sup>

In *People v. Spatarella*,<sup>238</sup> New York’s highest court interpreted section 155.05 of the New York Penal Law, the most recent version of section 850, which provides that “[a] person obtains property by extortion when he compels or induces another person to deliver such property to himself or a third person by means of instilling in him a fear . . . .”<sup>239</sup> There, defendant Spatarella was in charge of the All American Refuse Removal Corporation and Ugenti was president of North Shore Sanitation.<sup>240</sup> Ugenti began servicing one of Spatarella’s customers, Mei-Ting Restaurant, and Spatarella told Ugenti to stop servicing the Mei Ting or he would end up in the hospital.<sup>241</sup> The defendant argued that a customer was not “a thing or property capable of delivery,” nor was the Mei-Ting business “owned” by Ugenti.<sup>242</sup> The court, however, reasoned that the property extorted was not the restaurant but the “business generated from that source.”<sup>243</sup> When Ugenti relinquished his arrangement with Mei-Ting, the advantage from that arrangement was “obtained by and accrued to the defendant directly in consequence of his extortive activity.”<sup>244</sup>

*Tropiano’s* facts, so similar to those of *Spatarella*, could have thus relied on a similar analysis. Had it done so, it would have been clear that it was not the “right” that must be “obtained,” but rather the “business generated from that source.” This would have gone a long way to curtail the expansion of the term “property” in Hobbs Act extortion cases, particularly in the social protest context. Similarly, *Squillante’s* reasoning that a “right” cannot be

235. *Squillante*, 185 N.Y.S.2d at 359-60.

236. *Id.* at 361.

237. *Id.*

238. 313 N.E.2d 38 (N.Y. 1974).

239. N.Y. PENAL LAW § 155.05(2)(e) (1999).

240. *Spatarella*, 313 N.E.2d at 39.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 40.

obtained because “obtaining of property from another” means both a giving up and receiving of something, reinforces that the “obtaining . . . from” element should not be read out of the statute.

### CONCLUSION

The interpretation advocated by this article is one that comports with the plain meaning of Hobbs Act extortion and, particularly, the phrase “obtaining of property from another.” The definition of “property” in the Hobbs Act is not the right to do business or even the more ethereal right to do business free from wrongful pressure or threats of violence or physical harm, but rather the object of that right, such as the revenues. The definition of “obtaining . . . from” is a giving over or transferring of that property by the victim to the defendant. Moreover, although Hobbs Act extortion does not require that the defendant receive a direct benefit from the property or even have a desire (motive) to benefit from the property, it does require that the defendant have a specific intent to obtain the property, which ultimately is received by him or another person.

The article concludes that the definitions in *Scheidler* and *Arena* are not sustainable under the plain meaning of the phrase “obtaining of property from another.” However, employing the narrower definition of “obtaining of property from another” would not upset the outcomes in many of the cases from the criminal context (other than abortion protest criminal cases) relied upon by *Scheidler* and *Arena*. As discussed, such cases could have been sustained under the narrower definition of property advocated by this article.<sup>245</sup>

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245. The Supreme Court issued its opinion in *Scheidler* on February 26, 2003. See *Scheidler v. Nat'l Org. for Women, Inc.*, \_\_ U.S. \_\_, 123 S.Ct. 1057 (2003) [hereinafter *Scheidler II*]. In reversing the Seventh Circuit's decision by a vote of 8-1, the Court held that “obtaining of property from another” element requires both a deprivation and acquisition of the property, and because the petitioners never acquired the property of which respondents were deprived, or even pursued anything of value from the respondents that the petitioners “could exercise, transfer or sell,” the petitioners did not commit Hobbs Act extortion. *Id.* at 1065-66. In other words, the fact that the respondents gave up an alleged intangible “property right of exclusive control of their business,” *e.g.*, the right to provide abortion services, as a result of petitioners' conduct was insufficient, and would amount to no more than the crime of coercion. *Id.* at 1067-68. The Court stated it did not need to trace the “outer boundaries” of extortion liability to see if liability could be based on something as “intangible as another's right to exercise exclusive control over the use of a party's business,” since the petitioners' actions were well beyond whatever the outer boundaries might be. *Id.* at 1064. The Court held that its interpretation was warranted by common law definition of extortion and the state statutes that Congress used as models in formulating the Hobbs Act. *Id.*



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at 1064-65.

The one dissenter, Justice Stevens, suggested that the Court's opinion was "murky" and "seems to hold that the phrase 'obtaining of property from another' covers nothing more than the acquisition of tangible property." *Id.* at 1069-70 (Stevens, J., dissenting). Justice Stevens noted the decades federal case law holding that the Hobbs Act extortion definition is satisfied if the defendant causes the victim to surrender control of the property right to solicit business and expressed the concern that the Court's ruling would impeded prosecution of the "class of professional criminals" whose conduct persuaded Congress to enact the statute in the first place. *Id.* at 1070-72.

Although clearly *Scheidler II* now moots the ultimate conclusion of this article that *Scheidler* had been wrongly decided, the article serves a valuable purpose both for its focus on the plain meaning interpretation of the Hobbs Act—which is consistent with the common law roots—and for its analysis of the federal case law upon which the *Scheidler* and *Arena* courts relied. In essence, it identifies some of the outer boundaries that the Supreme Court did not discuss in *Scheidler II* and, in so doing, addresses the critiques and concerns of Justice Stevens.