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The Anticompetitive Effects of Anti-Abortion Protest

Melanie K. Nelson†

Each year, reproductive health providers suffer devastating monetary losses at the hands of violent and aggressive anti-abortion activists. Over two thousand acts of violence and over twenty-eight thousand acts of disruption have occurred since 1977, including bombings, arsons, death threats, assaults, acid attacks\(^1\) and blockades.\(^2\) Since 1990, abortion providers have incurred over $8.5 million in physical damages from arsons and bombings alone.\(^3\)

The legal system must provide an effective remedy to deter this violent activity and assure that violence and coercion do not impede a woman’s constitutional right to abortion.\(^4\) Criminal prosecutions present logical remedies for arsons, assaults and bombings. Trespasses can be punished criminally or remedied through state tort actions.\(^5\) However, neither criminal nor state tort laws address the systemic loss of business revenues clinics suffer as a result of these activities. Further, traditional remedies deal only with individuals and fail to address the culpability of organizations.\(^6\)

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1 See Part II D 1.


4 See Roe v Wade, 410 US 113, 154 (1973) (establishing abortion as a fundamental privacy right under the Constitution).

5 See Cleveland v Municipality of Anchorage, 631 P2d 1073, 1083 (Ala 1981) (upholding convictions of anti-abortion protesters for violating criminal trespass ordinance by refusing to leave abortion clinic); 1 Am Jur 2d Abortion and Birth Control § 81 (1994) (“Traditionally criminal trespass or civil injunction of trespass have been the remedies pursued by abortion clinics or other persons or entities against whom picketing or other activities have been addressed. Abortion protesters may also be held liable for tortious interference with business.”).

6 See Part III A.
Contemporary understanding of the policy behind the Sherman Act and the scope of the statute reveal that antitrust regulation can and should compensate for the economic damages caused by certain types of illegal protest activity. Legal recognition and compensation for the economic harms inflicted upon businesses and consumers comport with antitrust law’s ultimate goal of protecting a competitive marketplace.

The modern anti-abortion movement provides a useful example of the type of protest activity that antitrust laws should remedy. The actions of anti-abortion protesters are unmistakably economic in character—regardless of motive, they may result in complete economic destruction. Anti-abortion protests corrupt the natural functioning of the marketplace. Blockades and forced closings of clinics limit consumers’ free exercise of choice. Violent or destructive protests may impose unfair costs and barriers to entry on existing and potential competitors. However, these protests fall outside the purview of traditional antitrust suits. Such normative judgments about typical antitrust cases should not interfere with objective legal assessment of whether direct-action protest satisfies the elements necessary for Sherman Act liability.

Part of the instinctive reluctance to impose antitrust liability in these instances stems from obvious First Amendment implications. Political protest activities and civil disobedience lie at the very heart of our culture’s reverence of the First Amendment right to freedom of speech. However, the First Amendment does not protect violent or otherwise illegal acts, regardless of their expressive character. By focusing on violent, and non-violent but illegal, protest tactics, normative perceptions of antitrust’s limitations give way

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7 15 USC §§ 1-7 (1994).
8 See Part IID 2.
9 See Part I B.
10 See Part IID 2.
11 See Part IID 2.
12 See Part IID 2.
13 See Mississippi Women’s Medical Clinic v McMillan, 866 F2d 788, 791 (5th Cir 1989) (describing abortion protest cases as a “clash ... between constitutional rights defined by the Supreme Court: an old one tracing its roots to the speech clause of the First Amendment and before, and a new one stemming from Roe v Wade”).
14 See Part IV A 2.
15 See Wisconsin v Mitchell, 508 US 476, 484 (1993) (“Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection.”), quoting Roberts v United States Jaycees, 468 US 609, 628 (1984).
to a rational and useful application of the Sherman Act. Application of antitrust laws could effectively deter perpetrators and adequately compensate businesses and the public for the anticompetitive harms protesters inflict. Part I of this Comment introduces the elements of a successful Sherman Act 1 violation and some relevant doctrinal exceptions to antitrust liability. Part II explains how certain violent anti-abortion protest activities satisfy these requirements. Part III demonstrates the failure of other laws to compensate individuals and the public for anticompetitive distortions of the market. Part IV argues that doctrinal exceptions to antitrust liability, in particular Noerr-Pennington petitioning immunity16 and First Amendment principles, do not prohibit application of antitrust laws to certain types of direct-action protest. Finally, Part V proposes a test for determining the constitutionality of applying antitrust laws to particular types of protest activity.

I. SHERMAN ACT SECTION 1 LIABILITY FOR DIRECT ACTION PROTEST

A. Elements of Sherman Act Section 1 Claim

The Sherman Act prohibits “every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”17 Initially, for a court to find Sherman Act liability, the anticompetitive activity must implicate interstate commerce.18 Courts must also identify a contract, combination or conspiracy.19 Next, the courts must consider whether liability may attach to organizations that are not business competitors in the traditional sense and that do not act out of purely economic mo-


17 15 USC § 1 (1994).

18 See Gulf Oil Corp v Copp Paving Co, 419 US 186, 194 (1974) (“The jurisdictional reach of § 1 . . . is keyed directly to effects on interstate markets and interstate flow of goods.”).

19 Earl W. Kintner, 2 Federal Antitrust Law § 9.2 at 5 (Anderson 1980) (“Only those concerted activities of contracting, conspiring, and combining, which intentionally restrain or have the effect of unreasonably restraining trade of commerce, come within the reach of Section 1.”).
Finally, courts must determine whether the conduct at issue constitutes an unreasonable restraint of trade creating anticompetitive effects.\footnote{See generally \textit{Goldfarb v Virginia State Bar}, 421 US 773 (1975). In dicta, the Court first raised the issue of non-profit exemptions from antitrust laws: "The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." Id at 788-89 n 17.}

1. Defining commerce.

The Supreme Court defined the breadth of Sherman Act jurisdiction early in the statute’s history.\footnote{See Part I D.} In \textit{Northern Securities Co v United States},\footnote{See \textit{Standard Oil Co of New Jersey v United States}, 221 US 1, 59-60 (1911) (describing the scope of the Sherman Act as an "all embracing enumeration to make sure that no form of contract or combination by which an undue restraint of . . . commerce was brought about could save such restraint from condemnation." (emphasis omitted).} the Court established that the Sherman Act "embrace[s] and declare[s] to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states."\footnote{193 US 197 (1904).} Under this broad principle, the Sherman Act’s potential jurisdiction coincides with the breadth of interstate commerce.

While a recent Supreme Court decision appears to narrow the definition of interstate commerce,\footnote{19 US Const Art I § 8 Cl 3 ("The Congress shall have Power... To regulate Commerce... among the several States... ").} modern non-profit organizations engage in activities that clearly involve interstate commerce.\footnote{26} As the Supreme Court announced in \textit{McLain v Real Estate Board of New Orleans, Inc},\footnote{444 US 232 (1980).} since the enactment of the Sherman Act “experience, forms and modes of business and commerce have changed along with changes in communication and
travel, and innovations in methods of conducting particular businesses have altered relationships in commerce. Application of the [Sherman] Act reflects an adaptation to these changing circumstances.\footnote{28}

Courts have recognized the commercial effects of non-profit activity in several contexts, including: professional associations setting ethical standards for members;\footnote{29} universities setting financial aid policies;\footnote{30} hospitals providing medical services to local patrons;\footnote{31} and abortion clinics purchasing supplies in interstate commerce.\footnote{32} Therefore, antitrust law can regulate activity with some commercial character as long as it substantially affects interstate commerce.\footnote{33}

2. Identifying combinations and conspirators.

Due to the unlikelihood of a contractual relationship between protesters and the object of their protest, § 1 liability turns upon whether a combination or conspiracy exists.\footnote{34} Courts apply the

\footnote{28} Id at 241.

\footnote{29} See Boddicker v Arizona State Dental Association, 549 F2d 626, 629 (9th Cir 1977) (finding interstate nexus due to the scope of the ASDA's membership, programs and dues); American Medical Association v United States, 130 F2d 233, 249 (DC Cir 1942) ("Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the Sherman Act.") (citations omitted).

\footnote{30} See United States v Brown University, 5 F3d 658, 668 (3d Cir 1993) (holding that award of scholarships constituted commercial activity).

\footnote{31} See Hospital Corp of America v FTC, 807 F2d 1381, 1384 (7th Cir 1986) (noting competitive effect of merger of two hospitals); FTC v University Health Inc, 938 F2d 1206, 1209 (11th Cir 1991) (granting preliminary injunction against merger of non-profit hospitals). But see Dedication and Everlasting Love to Animals v Humane Society, 50 F3d 710, 713–14 (9th Cir 1995) (holding that non-profits' solicitation of charitable contributions did not constitute commercial activity).

\footnote{32} See Feminist Women's Health Center, Inc v Mohammad, 586 F2d 530, 540–41 (5th Cir 1978) (finding an interstate nexus because claims were allegedly affected purchases of out-of-state supplies and business with out-of-state patients).

\footnote{33} See United States v Yellow Cab Co, 332 US 218, 225–26 (1947) ("[T]he amount of interstate trade... affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged... Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected."). See also Lopez, 514 US at 559–60 (giving examples of activities that “substantially affect” interstate commerce), citing Katzenbach v McClung, 379 US 294, 299 (1964) (involving restaurants utilizing substantial interstate supplies); Heart of Atlanta Motel, Inc v United States, 379 US 241, 261 (1964) (holding that inns and hotels catering to interstate guests sufficiently affect interstate commerce); Wickard v Filburn, 317 US 111, 128–29 (1942) (allowing federal regulation of wheat production primarily for home consumption).

\footnote{34} See Northern Securities Co v United States, 193 US 197, 403 (1904) (Holmes dissenting) ("The words [in § 1] hit two classes of cases... c]ontracts in restraint of trade and combinations or conspiracies in restraint of trade.").
terms "combination" or "conspiracy" to mean a union or association of two or more persons, intent on accomplishing the same purpose. The combination or conspiracy must be continuous, constituting acts performed over a period of time. Finally, participants need only share a "common scheme"—they need not know of every act performed during the course of the conspiracy.

Therefore, a trade group or political organization falls within the definition of a combination or conspiracy. Such organizations, by definition, are composed of two or more persons with a common purpose. Any form of collective activity by two or more people with an illegitimate purpose and continuous operation may properly be condemned under antitrust laws if it operates in restraint of trade. Under this rubric, actions of non-profits can justify liability when the actors involved succeed in creating anticompetitive effects.

3. Identifying necessary anticompetitive intent.

To substantiate a Sherman Act § 1 civil claim, plaintiffs need only prove general intent. Courts have held that proof of concerted action that unreasonably restrained trade establishes suf-

35 "Combination" and "conspiracy" may be used interchangeably. See Kintner, 2 Federal Antitrust Law § 9.4 at 13 (cited in note 19); Perma Life Mufflers, Inc v International Parts Corp, 392 US 134, 141–42 (1968) (defining combinations as theories of conspiracy).

36 Kintner, 2 Federal Antitrust Laws § 9.3 at 8 (cited in note 19). See American Tobacco Co v United States, 328 US 781, 810 (1946) ("Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, ... a conspiracy is established."); United States v Crescent Amusement Co, 323 US 173, 189–90 (1944) (defining combination in terms of "unity of purpose" and "unity of action").


38 See TV Signal Co of Aberdeen v American Telephone and Telegraph Co, 462 F2d 1256, 1259–60 (8th Cir 1972) ("Although knowledge is implicit in the requirement of unity of purpose, no case of which we are aware requires that each party to a conspiracy knows of each transaction encompassed by the conspiracy .... [T]hat defendants knowingly participated in a common scheme or purpose ... is enough to satisfy any knowledge requirement of § 1.").


40 Id.

41 See United States v United States Gypsum Co, 438 US 422, 443–44 (1978) (holding that only a showing of general intent was required to establish misdemeanor Sherman Act violation); Interstate Circuit, Inc v United States, 306 US 208, 226–27 (1939) (explaining that, for Sherman Act purposes, knowledge of each act and an intent to commit each act constituted sufficient intent despite the actor's lack of specific intent to violate the antitrust laws). See also Albert Pick-Barth Co, Inc v Mitchell Woodbury Corp, 57 F2d 96, 101 (1st Cir 1932) (holding that if the defendant's "purpose and intent ... [was] to eliminate the plaintiff as a competitor" they had acted in violation of § 1 of the Sherman Act). But see George R. Whitten, Jr, Inc v Paddock Pool Builders, Inc, 508 F2d 547, 560 (1st Cir 1974) (refusing to apply per se test declared in Pick-Barth).
ficient general intent.\textsuperscript{42} General intent may be inferred from proof of anticompetitive results in civil antitrust cases. In analyzing the intent necessary to substantiate a civil § 1 violation, the Second Circuit held that “the government need not prove that it was the defendants’ purpose to affect commerce; it suffices that their conduct had that natural effect.”\textsuperscript{43} Courts faced with a civil § 1 claim must examine the results of the organization’s activity instead of its specific motivations. For criminal prosecutions under the Sherman Act, however, the government must prove general intent—it cannot be inferred from the fact that the defendants engaged in anticompetitive conduct.\textsuperscript{44} Thus, for civil liability, a non-profit organization need only intend an act that creates anticompetitive effects; whether the organization ultimately intended to create anticompetitive effects is only relevant to criminal prosecutions.

Accordingly, the Supreme Court has held non-profit organizations liable for antitrust violations despite their non-economic motives. For instance, in \textit{NCAA v Board of Regents of the University of Oklahoma},\textsuperscript{45} the Court announced that “[t]here is no doubt that the sweeping language of § 1 applies to nonprofit entities,” adding that “in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct.”\textsuperscript{46} Additionally, in a recent decision analyzing the Sherman Act’s potential application to non-profit enterprises, the Fourth Circuit held that “the dispositive inquiry is whether the transaction is commercial, not whether the entity engaging in the transaction is commercial.”\textsuperscript{47} Thus, as long as the questioned practices substantially affect interstate commerce, general intent is satisfied; the plaintiff and defendant need not be business competi-

\textsuperscript{42} See \textit{United States v Topco Associates, Inc}, 405 US 596, 610 (1972) (holding horizontal restraint on trade per se illegal regardless of the defendant’s alleged specific intent to increase competition); \textit{United States v General Motors Corp}, 384 US 127, 146 (1966) (“[W]here businessmen concert their actions in order to deprive others of access to merchandise . . . we need not inquire into the economic motivation underlying their conduct.”); \textit{Fashion Originators’ Guild of America, Inc v FTC}, 312 US 457, 467-68 (1941) (inferring requisite intent from fashion designer who instituted boycott of retail stores selling copies of the designer’s patterns).

\textsuperscript{43} \textit{United States v Arena}, 180 F3d 380, 390 (2d Cir 1999).

\textsuperscript{44} See \textit{United States Gypsum Co}, 438 US at 435 (“[A] defendant’s state of mind or intent is an element of a criminal antitrust offense which must be established by evidence.”). But see \textit{United States v Gillen}, 599 F2d 541, 543–45 (3d Cir), cert denied, 4 US 866 (1979) (holding that when conduct is unlawful per se, intent may be inferred even in a criminal case).

\textsuperscript{45} 468 US 85 (1984).

\textsuperscript{46} Id at n 22.

4. Identifying anticompetitive effects.

In discerning relevant anticompetitive effects, the Supreme Court announced that “[t]he antitrust laws... were enacted for ‘the protection of competition, not competitors’.” Commenting on the legislative intent underlying the Sherman Act, Robert Bork noted that:

[C]ongress intended the courts to implement... only that value we would today call consumer welfare.... [T]he policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between... activities that increase wealth through efficiency and those that decrease it through restriction of output.

Analysis of the policies underlying the Sherman Act reveals a variety of anticompetitive effects Congress intended antitrust laws to address. An action that results in the destruction of a victim’s business may violate § 1 of the Sherman Act. Other anti-


49 American Society of Mechanical Engineers v Hydrolevel Corp, 456 US 556, 576 (1982) (“It is beyond debate that nonprofit organizations can be held liable under the antitrust laws.”); Goldfarb v Virginia State Bar, 421 US 773, 787 (1975) (“We cannot find support for the proposition that Congress intended any such sweeping exclusion [of an organization of learned professionals]... The language of § 1 of the Sherman Act, of course, contains no exception.”); American Medical Association v United States, 130 F2d 233, 249 (DC Cir 1942) (“Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, ... is sufficient to avoid the penalties of the Sherman Act.”) (citations omitted); Marjorie Webster Junior College, Inc v Middle States Association of Colleges and Secondary Schools, Inc, 302 F Supp 459, 466 (D DC 1969) (“[A] laudatory purpose or intent will not excuse violations of the [antitrust] laws.”) (revd on other grounds). But see Klor’s, Inc v Broadway-Hale Stores, Inc, 359 US 207, 213 n 7 (1959) (“[T]he Sherman Act is aimed primarily at combinations having commercial objectives and is applied only if a very limited extent to organizations, like labor unions, which normally have other objectives.”), relying on Apex Hosiery Co v Leader, 310 US 469 (1940).


52 See Council of Defense of New Mexico v International Magazine Co, 267 F 390, 441 (8th Cir 1920) (finding that a “declared and obvious purpose was to destroy complainant’s business,” in violation of Sherman Act § 1).
competitive effects upon which courts have based liability include erecting barriers to entry, limiting free consumer choice, and causing concentration or monopoly within an industry. In addition, an appreciable reduction in the number of competitors may support a finding of diminished competitive conditions.

The actions of modern non-profits may involve all of these prohibited behaviors. As noted in one seminal antitrust treatise, "[a]ll the possible objectives of antitrust law—from efficient resource allocation, minimum production costs, and maximum innovation to equal access to the market ... can implicate the activities of non-profit organizations."

B. First Amendment Petitioning Immunity and Antitrust

Even if an activity satisfies all of the elements of a Sherman Act § 1 claim, the Constitution may still immunize that anticompetitive conduct from liability. In *Eastern States Retail Lumber Dealers Assn v United States*, the Supreme Court exempted appeals for government action from antitrust liability. Protest activity—an arguably more indirect form of petitioning than lobbying Congress or seeking relief in the courts—can nonetheless constitute protected petitioning activity. As the Court recog-

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53 See *Standard Oil Co v United States*, 221 US 1, 58 (1911) (interpreting congressional intent of the Sherman Act drafters as "prohibit[ing] ... all contracts or acts which were unreasonably restrictive of competitive conditions ... with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce.").

54 See *United States v Addyston Pipe & Steel Co*, 85 F 271, 282–83 (6th Cir 1898) (indicating that there was no basis upon which to "justify or excuse the restraint[s]" if they "necessarily have a tendency to monopoly").

55 See *Vietnamese Fishermen’s Assoc v Knights of the Ku Klux Klan*, 518 F Supp 993, 1010 (S D Tex 1981) ("A lessening of competitive conditions, can be shown if the number of competitors is reduced appreciably."); *Robert’s Waikiki U-Drive, Inc v Budget Rent-a-Car Systems, Inc*, 491 F Supp 1199, 1213 (D Hawaii 1980) ("Lessening of competition can be shown if the number of competitors is reduced appreciably.").


58 Id at 144–45 (holding that railroad companies’ conspiracy to place restraints on trucking companies did not violate antitrust laws because the railroad companies’ actions were designed to prompt government action); *United Mine Workers of America v Pennington*, 381 US 657, 670 (1965) (holding that the defendant’s good or bad faith in petitioning the government was irrelevant in determining whether antitrust laws applied.) The First Amendment provides: “Congress shall make no law ... abridging the freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances.” US Const Amend I.

59 See Kintner & Bauer, *10 Federal Antitrust Laws* § 77.5 at 218 (Anderson 1984) ("[I]mmunity applie[a] even when the challenged conduct ... was simply an attempt to influence public opinion and general government policy, rather than an attempt to obtain
nized in Allied Tube & Conduit Corp v Indian Head, Inc,60 "immunity cannot be dismissed on the ground that the conduct at issue involved no 'direct' petitioning of government officials, for Noerr itself immunized a form of 'indirect' petitioning."61

Several limitations on Noerr immunity apply in the case of direct-action protest. Though indirect petitioning may receive immunity, Noerr does not extend to marketplace injuries caused by the defendant that do not "flow [ ] directly from government action."62 Furthermore, Noerr immunity does not apply to petitions that merely constitute a "sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."63 If no objectively reasonable attempt to petition exists, the asserted political activity is deemed a "sham" and receives no First Amendment protection.64

Traditional "sham" claims involve litigious defendants who use the courts not to obtain relief, but to harass commercial opponents.65 Professor Hovenkamp offers a definition of "sham" petitioning that applies to a broader range of activities than mere harassing litigation.66 According to Hovenkamp, a sham petition "is nothing more than a subterfuge designed to harass a rival . . . [T]he rival's injury is intended to result not from the governmental action, for no such action is really anticipated, but rather from the petitioning process itself."67 The ultimate test for whether a petition is merely a sham and thus does not receive First Amendment protection is whether the petitioning activity

60 486 US 492 (1988).
61 Id at 503. See also Eastern Railroad Presidents' Conference v Noerr Motor Freight, Inc, 365 US 127, 140 (1960) (finding defendants not liable for conducting fraudulent publicity campaign to influence public opinion about the trucking industry).
63 Noerr, 365 US at 144.
65 California Motor Transport Co v Trucking Unlimited, 404 US 508, 511 (1972) (holding that defendants had conspired to put plaintiffs out of business by instigating federal and state lawsuits).
67 Id.
constitutes an “objectively reasonable” attempt to attain a favorable government response.\textsuperscript{68}

Regardless of whether an activity is deemed a “sham,” and thus loses \textit{Noerr} immunity, antitrust liability still cannot attach if the First Amendment protects the activity for reasons other than petitioning. The First Amendment does not protect the activities of direct-action protesters who use violence to convey their message.\textsuperscript{69} As the Supreme Court declared, “violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of ‘advocacy.’”\textsuperscript{70} The difficulty in determining the proper degree of First Amendment protection arises when delineating between the aspects of the activity that are violent and unprotected and those that are non-violent and protected.\textsuperscript{71}

C. Precedents Involving Antitrust Claims against Direct-Action Protesters

Courts have only infrequently dealt with antitrust claims against non-profit political organizations. Three sets of cases illustrate the particular conceptual issues that arise when plaintiffs bring antitrust claims against these types of organizations.

1. Competitors and congressional intent.

In \textit{National Organization for Women, Inc, v Scheidler},\textsuperscript{72} the plaintiff (“NOW”) charged abortion foes with violations of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act (“RICO”).\textsuperscript{73} The Seventh Circuit overruled the district court’s finding that \textit{Noerr} exempted the defendants’ protest activity from antitrust liability.\textsuperscript{74} The court announced that “[a]lthough the defendants’ acts generated publicity which they may have hoped would influence government actors, this tangen-

\textsuperscript{68} See \textit{Professional Real Estate Investors}, 508 US at 60 (establishing objectively reasonable standard).
\textsuperscript{69} See Part IV A.
\textsuperscript{71} See Part IV A 2.
\textsuperscript{72} \textit{NOW v Scheidler}, 968 F2d 612 (7th Cir 1992).
\textsuperscript{73} 18 USC §§ 1961–68 (1994).
\textsuperscript{74} See \textit{Scheidler}, 968 F2d at 616. See also \textit{NOW v Scheidler}, 765 F Supp 937, 945 (N D Ill 1991).
tial contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior.\textsuperscript{75}

Though the Seventh Circuit denied \textit{Noerr} immunity, it affirmed the district court’s dismissal of antitrust claims on other grounds.\textsuperscript{76} The court of appeals announced that Congress had not intended antitrust laws to apply to the defendant’s actions.\textsuperscript{77} The court based this conclusion on the Sherman Act’s legislative history—in particular, the legislators’ discussions of temperance activism.\textsuperscript{78}

Enigmatically, the court noted “that all ‘protest’ or non-commercially oriented activities are exempt [from the Sherman Act] because of the First Amendment,”\textsuperscript{79} but then determined that the Congress limited the Sherman Act “to prevent[ing] business competitors from making restraining arrangements for their own economic advantage.”\textsuperscript{80} Thus, the Seventh Circuit rejected NOW’s antitrust claims based upon legislative history that the court interpreted as excluding social causes and non-business competitors.\textsuperscript{81}

Though the Supreme Court later reversed the Seventh Circuit’s decision in \textit{NOW v Scheidler} on other grounds,\textsuperscript{82} the antitrust claims were never reexamined.\textsuperscript{83} As such, no Supreme Court treatment of antitrust claims against anti-abortion protesters exists. The lack of an authoritative pronouncement on the issue warrants reexamination of the Seventh Circuit’s holdings on both \textit{Noerr} immunity and legislative intent.\textsuperscript{84}

\textsuperscript{75} \textit{Scheidler}, 968 F2d at 616.

\textsuperscript{76} \textit{Id} at 621 (“[P]arallels between [anti-abortion] activities and those of the temperance crusaders, which Congress . . . intended to exclude from the operation of the Act, force[ ] us to conclude that the defendant’s activities are not prohibited by the Sherman Act.”).

\textsuperscript{77} \textit{Id}.

\textsuperscript{78} \textit{Id}.

\textsuperscript{79} 968 F2d at 622, relying on \textit{Apex Hosiery v Leader}, 310 US 469, 487 (1940) (rejecting defendant’s argument for blanket antitrust immunity for union organizing).

\textsuperscript{80} \textit{Id} at 621.

\textsuperscript{81} \textit{Id}.

\textsuperscript{82} See \textit{NOW v Scheidler}, 510 US 249, 262 (1994) (holding that RICO did not require showing of economic motive on the part of defendants).


\textsuperscript{84} See Parts II C 2 and IV A–B.
2. Burden of establishing anticompetitive effects.

Another precedent dealing specifically with anti-abortion protest underscores the necessity of proving anticompetitive effects in order to prevail on § 1 claims. In Northeast Women's Center, Inc v McMonagle, a federal district court granted the defendant's motion for a directed verdict due to the plaintiffs' failure to focus on the specific requirements of Sherman Act § 1 liability. The plaintiffs, who had requested treble damages under the Clayton Act, argued that defendants had attempted to destroy the Center's business. While the plaintiffs presented evidence regarding the defendants' destructive intent, they neglected to show how the elimination of their business contributed to a lessening of competition. The district court concluded that "to prove an antitrust violation in this case, the plaintiff had to demonstrate an actual anticompetitive impact on the market for abortion services within the relevant geographic area." Because the plaintiffs failed to clarify or identify the anticompetitive effects, the court dismissed their claims. Northeast Women's Center exemplifies the requirement that in a successful antitrust suit, plaintiffs must show evidence of the anticompetitive effects created by illegal direct-action protest.

3. First Amendment implications of direct-action protest.

Finally, a set of cases dealing with political boycotts illustrates the difficult First Amendment issues that arise when plaintiffs invoke antitrust law to enjoin direct-action protest. Throughout the 1960s and 1970s, courts agreed that the First Amendment did not protect violent behavior; but courts divided over whether violence committed during a political boycott taints

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85 670 F Supp 1300 (E D Pa 1987).
86 Id at 1305.
89 See id at 1037, (noting that the lower court had warned plaintiffs that "proof of injury to the plaintiff's business will be deemed insufficient absent further proof that such injury amounted to an unreasonable restraint on trade").
90 Northeast Women's Center, 670 F Supp at 1305.
91 Id. See also Northeast Women's Center, 1987 US Dist Lexis at 1037.
92 In NOW v Scheidler the District Court also listed the anticompetitive effects sufficient to establish Sherman Act liability, though it rejected the complaint on other grounds: "Plaintiffs have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers." 968 F2d at 622–23 (citations omitted).
the activity enough to make the otherwise protected boycott effort illegal.\textsuperscript{93}

These cases culminated in 1982 with \textit{NAACP v Claiborne Hardware Co.}\textsuperscript{94} The NAACP had been engaged in a continuous attempt to pressure businesses to cease racially discriminatory practices.\textsuperscript{95} The record in \textit{Claiborne} revealed sporadic accounts of violent activity accompanying the boycott.\textsuperscript{96} The Supreme Court refused to declare the entire boycott illegal, however, because “[a] massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts.”\textsuperscript{97} The Court declared that a state “may not award compensation for the consequences of nonviolent, protected activity.”\textsuperscript{98} Nevertheless, it allowed recovery under antitrust for “losses proximately caused by unlawful conduct.”\textsuperscript{99} Thus, \textit{Claiborne} establishes that antitrust liability may indeed be imposed for \textit{illegal} protest activity that proximately causes anticompetitive economic effects.

\section{II. VIOLENT ANTI-ABORTION PROTEST SATISFIES THE REQUIREMENTS OF A SHERMAN ACT SECTION 1 CLAIM}

Certain direct-action protest activities meet all of the requirements for a successful §1 claim.\textsuperscript{100} However, the Sherman Act cannot reach activity that the First Amendment protects.\textsuperscript{101}

\begin{footnotesize}
\begin{enumerate}
\item Compare \textit{Smith v Grady}, 411 F2d 181, 189 (5th Cir 1969) (stating that a boycott receives no First Amendment protection when it is “violent, threatening, menacing, insulting, or clearly calculated to provoke a breach of the peace”), with \textit{Machesky v Bizzell}, 414 F2d 283, 291 (5th Cir 1969) (holding an injunction overbroad for “lumping the protected with the unprotected in such a way as to abridge important public interests” in free expression) and \textit{Kelly v Page}, 335 F2d 114, 119 (5th Cir 1964) (denying injunction against picketing).
\item \textit{Claiborne}, 458 US 866 (1982).
\item Id at 889, 898–900 (boycotting businesses to pressure them to meet demands for desegregation, public improvement in black residential areas, and hiring of black policemen).
\item Id at 904, 923–24 (reflecting ten isolated incidents of violence over a seven-year period). Compare \textit{Milk Wagon Drivers Union of Chicago, Local 753 v Meadowmoo Dairies, Inc}, 312 US 287, 294–95 (1941) (affirming injunction against violent and non-violent activity because of the pervasiveness of the acts of violence reflected in the record).
\item \textit{Claiborne}, 458 US at 933.
\item \textit{Claiborne}, 458 US at 918.
\item See Part I.
\item See Part IV A.
\end{enumerate}
\end{footnotesize}
Unlawful anti-abortion protests offer a prime example of protest activities that meet the elements of a § 1 violation and do not receive First Amendment protection. Thus, antitrust laws can, and should, apply.

A. Reproductive Health Services Can Be Regulated as Objects of Interstate Commerce

An analysis of the potential antitrust liability of direct-action protesters must begin by establishing whether the protest activity affects interstate commerce. Courts have consistently upheld federal regulation of anti-abortion violence in the face of Commerce Clause challenges. Moreover, the Supreme Court has held that the day-to-day business operations of an abortion provider created a sufficient nexus with interstate commerce to permit a cause of action under RICO. The Seventh Circuit held that a plaintiff abortion provider satisfies the interstate commerce requirement by serving out-of-state patients and purchasing supplies from out-of-state companies. Additionally, courts have defined women seeking abortion services as consumers in interstate commerce. Furthermore, courts generally grant a broad jurisdictional scope to antitrust laws and even uphold application in circumstances where only a slight interstate nexus exists.

B. Direct-action Protest Groups May Operate as “Combinations” or “Conspiracies” as Defined by the Sherman Act

An association or organization such as Operation Rescue constitutes a combination of two or more persons with a common

102 See, for example, United States v Bird, 124 F3d 667, 678 (5th Cir 1997) (holding that the Freedom of Access to Clinic Entrances Act (“FACE”) was a legitimate regulation of interstate activity having substantial affect on interstate commerce); United States v Wilson, 73 F3d 675, 680 (7th Cir 1995) (reversing district court ruling that FACE was unconstitutional under the Commerce Clause).


104 See United States v Anderson, 716 F2d 446, 447 (7th Cir 1983) (finding that anti-abortion protests that impede clinic operations affect interstate commerce so as to fall under federal jurisdiction).

105 See Mother & Unborn Baby Care of North Texas, Inc v Texas, 749 SW 2d 533, 538 (Tex App 1988).

106 See Hospital Building Co v Trustees of Rex Hospital, 425 US 738, 744–46 (1976) (holding provision of surgical services constituted interstate commerce even though entirely local in scale).

107 See NOW v Operation Rescue, 726 F Supp 1483, 1487 (E D Va 1989) (describing Operation Rescue as an organization “whose members oppose abortion” and “intentionally
scheme as required by § 1 of the Sherman Act. To establish a conspiracy or combination among the members of an anti-abortion organization, a plaintiff must show the defendant’s knowledge of an organization’s illegitimate goals and illegal tactics.

Anti-abortion organizations such as Operation Rescue and the elusive “Army of God” inform members of common goals and techniques by publishing tactical manuals on topics ranging from instructions for operating misleading pro-life counseling centers to how-to-manuals for building bombs. For example, the facts of NOW v Scheidler reveal that the defendant urged his followers to “stop abortion in every way possible.” To this end, Scheidler, leader of the Pro-Life Action Network, gave members of his organization the manual “Closed: 99 Ways to Stop Abortion.” Acting on the tactics listed in the manual, the defendants invaded a women’s health center in Florida where they “injured the center’s administrator and another woman, the medical procedures room was ransacked, and medical supplies were destroyed.” In another example, Operation Rescue, one of the defendant organizations in NOW v Scheidler, initiated training camps to instruct followers in the group’s aggressive tactics, including blockading clinics and following clinic workers to their homes.

In order to impute members’ acts to their organization, the acts must be within the scope of the members’ authority. 

trespass on the clinic’s premises for the purpose of blockading the clinic’s entrances and exits, thereby effectively closing the clinic”).

108 See Part I B.
109 See Part I B.
110 See Jennifer Gonnerman, The Terrorist Campaign Against Abortion, Village Voice 36 (Nov 10, 1998) (describing the Army of God as a “loosely organized network of terrorists” linked to at least a dozen acts of violence).
111 See Robert J. Pearson, How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Centers 5 (Pearson Foundation).
114 NOW v Scheidler, 968 F2d 612, 615 (7th Cir 1992).
115 Id.
116 Id.
117 See Kim Cobb, How to Grow a Revolution, Houston Chron A16 (Mar 28, 1993).
118 See NAACP v Claiborne Hardware Co, 458 US 886, 933 (1982) (holding that defendants were not liable for economic damages caused by a largely non-violent political boycott under antitrust laws).
borne established the test for finding the umbrella organization liable as conspirators under antitrust claims. Whether an action constitutes an unlawful conspiracy, according to the Court, depends upon the source of incitement for violent action. An organization cannot be held liable for the illegal acts of its members unless the acts were undertaken with the organization's consent or knowledge and were within the scope of activity authorized by the organization. Thus, group liability depends on whether tactical manuals or other sources authorized the group's members to conduct violent or illegal protest activity.

C. Antitrust Liability Does Not Require a Showing of Economic Competition between Protesters and the Target of Protest Activity

If an anti-abortion organization conspires towards illegal ends, it may still be held liable under antitrust laws even though it is not in economic competition with the clinic it targets. Both contemporary case law and legislative intent support the application of antitrust laws to organizations that are not in economic competition.


Applying antitrust laws to interactions between anti-abortion protesters and clinics appears unusual because the two groups do not compete for business. Nevertheless, under the prevailing interpretation of the Sherman Act's scope, the Act does not require that the parties be competitors. Courts have imposed antitrust liability on non-profit universities that set regulations for sporting events and professional organizations that set safety standards. For example, in Goldfarb v Virginia State Bar the
Court held that the bar association’s public service character did not justify immunity from antitrust laws.\textsuperscript{124}

In \textit{Northeast Women’s Center v McMonagle},\textsuperscript{125} the district court rejected the defendant’s motion for dismissal because “the alleged violators are not doctors in direct competition for the plaintiff’s clients.”\textsuperscript{126} Supreme Court cases analyzing antitrust claims against not-for-profit organizations bolster this conclusion.\textsuperscript{127} The Supreme Court declared in 1948 that “[t]he [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”\textsuperscript{128} Thus, in the specific factual context of anti-abortion protest, a plaintiff need not demonstrate that a competitive business relationship existed between direct-action protest groups and the target of their anticompetitive actions.

2. Legislative intent with respect to non-profit liability under the Sherman Act.

Just as an absence of economic competition between the parties does not bar antitrust liability, interpretations of legislative intent do not forbid courts from applying antitrust laws to direct-action protest. In \textit{NOW v Scheidler},\textsuperscript{129} the Seventh Circuit dismissed antitrust claims based on the court’s interpretation of the Sherman Act drafters’ intent.\textsuperscript{130} During the Senate debate on the Sherman bill, Senator James Wilson introduced an amendment that would exempt organizations “intended to promote the execution of the laws of that state.”\textsuperscript{131} Senator Wilson was particularly concerned with the Women’s Christian Temperance Union, a

\textsuperscript{123} 421 US 773.
\textsuperscript{124} Id at 787.
\textsuperscript{125} 624 F Supp 736 (E D Pa 1985).
\textsuperscript{126} Id at 740 (“[I]t is not dispositive for the defendants to argue that an antitrust injury has not occurred because the alleged violators are not doctors in direct competition for the plaintiff’s clients.”)
\textsuperscript{127} See notes 119–22.
\textsuperscript{128} \textit{Mandeville Island Farms, Inc v American Crystal Sugar Co}, 334 US 219, 226 (1948).
\textsuperscript{129} 968 F2d 612 (7th Cir 1992).
\textsuperscript{130} Id at 620 (announcing that the legislative history “provides a fair indication that Congress did not intend to reach every activity that might effect [sic] business”).
\textsuperscript{131} 21 Cong Rec 2639, 2658 (1890).
group that discouraged the manufacture and use of alcohol, then illegal in Iowa.  

Senator Sherman responded that he had no objection to the amendment, stating, "I do not see any reason for putting in [an exclusion for] temperance societies any more than churches or school-houses or any other kind of moral or education associations that may be organized."  Sherman continued, arguing that "such an association is not in any sense a combination or arrangement made to interfere with interstate commerce."  In Scheidler, the Seventh Circuit interpreted this interchange as an indication that because of their similarity to temperance activists, anti-abortion activists could not properly be held liable for antitrust violations.

Though Congress considered amendments to the bill that gave charitable or non-profit business activities explicit exemptions, none passed.  Despite the Seventh Circuit's interpretation, Sherman's statement may not be an indication that Congress intended to exempt non-profit charitable organizations from antitrust scrutiny.  Instead, Sherman may have been expressing a normative judgment about what types of activities would affect the marketplace.  As one author argues, Senator Sherman and his supporters "seem to have convinced the Fifty-First Congress that the boundaries imposed by the 'trade or commerce' language of the Act were a sufficient prophylactic."

While charitable organizations in the late nineteenth century probably had little if any commercial effect on the economy, mod-
ern non-profits may be as commercial in character and effect as any for-profit business. Interstate commerce in the past century reveals "rapid sophistication of the American... econom[y] [that] has undermined previously sturdy and visible distinctions between commercial enterprise and noncommercial or not-for-profit endeavor[s]." Recent case law illustrates this shift in the economic involvement of non-profit or charitable organizations. Since the Sherman Act's inception, courts have identified several circumstances in which charitable or educational associations have impermissibly restrained interstate commerce. Once a plaintiff satisfies the interstate commerce requirement, holding anti-abortion protesters liable for any anticompetitive effects they may cause is not inconsistent with legislative intent.

D. Violent Protest Activities Impose Anticompetitive Restraints on the Market

Congress enacted antitrust laws to prevent the harms that unfair anticompetitive behavior inflicts upon consumers. While anti-abortion protest is by no means the only type of illegal protest capable of causing anticompetitive harms, it offers a prime

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141 See NCAA v Board of Regents of the University of Oklahoma, 468 US 85, 101 n 23 (1984) ("[G]ood motives will not validate an otherwise anticompetitive practice"); American Society of Mechanical Engineers, Inc v Hydrolevel Corp, 456 US 556, 576 (1982) (holding that non-profits can be held liable under antitrust laws); Blue Shield of Virginia v McCreary, 457 US 465, 472 (1982) (describing the Sherman Act as "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated"); quoting Mandeville Island Farms, Inc v American Crystal Sugar Co, 334 US 219, 236 (1948); Goldfarb v Virginia State Bar, 421 US 773, 787 (1975) ("[C]ongress intended §1 of the Sherman Act to embrace the widest array of conduct possible.").
142 See Standard Oil Co v United States, 221 US 1, 58 (1911) ("treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions... entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce."). See also Bork, 9 J Law & Econ at 7 (cited in note 51).
143 For example, typical environmental direct-action campaigns reveal the anticompetitive goal of hindering or halting business operations. In Huffman & Wright Logging Co v Wade, 317 Ore 445, 857 P2d 101 (1993), protesters chained themselves to logging equipment, causing shutdown of operations for most of the day. Id at 105. Environmental activist groups engage in restraints of trade by "tree-sitting... chaining protesters to construction equipment, damaging roads, and tree-spiking," all with the ultimate goal of causing the company to cease operations. Tree-spiking, a common practice among eco-terrorists, involves driving metal spikes into trees, creating possibility of dangerous injury from chainsaws if a worker subsequently encounters them when attempting to cut down the tree. See Highland Enterprises, Inc v Barker, 133 Idaho 330, 335, 986 P2d 996, 1001 (1999).
example of the devastating economic consequences these activities can pose to consumers and businesses.

1. Methods of restraints on competition.

Between 1977 and 1999, protesters perpetrated over 39 bombings, 99 acid attacks and 153 arsons against abortion providers.\textsuperscript{1} Seven physicians and clinic workers have been killed since 1994, with sixteen attempted murders since 1991.\textsuperscript{2} Each trespass or act of violence adversely affects the availability and cost of medical services to consumers.

Other common anti-abortion activities that can operate as restraints on commerce include the following:

[P]hysical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; . . . false appointments to prevent legitimate patients from making them; and direct interference with [a] center['s] business relationships with landlords, patients, personnel and medical laboratories.\textsuperscript{3}

Operation Rescue professes that its goal is to "'[p]hysically close down abortion mills' by encircling them with thousands of protesters and blocking access to facilities."\textsuperscript{4} While blockades and intimidation can be addressed through the tort system, anti-abortion protesters often resort to more violent and often criminal tactics. Bombings\textsuperscript{5} and assassinations,\textsuperscript{6} for example, regularly

\textsuperscript{1} See Kim Murphy, A Civil Action Becoming Doctors' Defense Weapon, LA Times A1 (Jan 13, 1999).
\textsuperscript{2} Id.
\textsuperscript{4} Women's Health Center, 626 S2d at 667 (quoting organization's literature).
\textsuperscript{6} See Michael A. Fletcher, Sniper Kills Abortion Doctor Near Buffalo: Police Had Warned of Possible Attack, Wash Post A1 (Oct 25, 1998) (discussing murder of New York abortion doctor). See also Carol J. Castaneda, Abortion Providers 'In a War': Fatal Shootings Raise Level of Fear, USA Today 6A (Jan 5, 1995) ("In the wake of . . . fatal shootings . . . owners and operators across the USA are rushing to install metal detectors, bullet-proof windows, and security cameras.").
threaten the lives of employees and clients at clinics. Such acts of violence also threaten the clinics’ livelihood since the pervasive atmosphere of fear makes retaining employees and attracting clients difficult.\footnote{150}

Beyond the extensive economic damage incurred from loss of business due to the atmosphere of fear caused by these violent acts, anti-abortion activists also utilize unique tactics to close down clinics’ business operations for long periods of time. For example, activists have recently begun to use butyric acid to shut down reproductive health providers.\footnote{151} After a protester leaks the chemical through a clinic’s vents or doorways, the acid emits a pungent odor.\footnote{152} The chemical causes severe respiratory distress and, in many cases, the employees and clients of the clinic require hospitalization.\footnote{153} Clinics frequently close for weeks to undergo expensive cleaning, yet in many cases the odor lingers permanently in the building.\footnote{154} Another tactic designed to cause extended shut-downs of clinics and deter clients is the “lock and block” technique, where protesters pour glue in clinic locks and chain themselves to clinic doors.\footnote{155}

Anti-abortion protesters also use their relationships with other businesses to harm abortion providers. For instance, the defendants in Scheidler contacted medical and office supply companies that serviced abortion providers and “threatened to disrupt and harass them if they continued to transact business with the centers.”\footnote{156}

Finally, anti-abortion activists attempt to dissuade women from entering abortion clinics. The National Right to Life Com-
mittee reports that approximately three thousand “Crisis Pregnancy Centers” exist in the U.S., as an alternative to abortion, “providing pregnancy tests and counseling . . . offer[ing] a full range of services, helping women obtain housing, maternity and baby clothes . . . information about adoption, and even advice on how a woman in school can continue her education.” In this capacity, anti-abortion protesters appear to be in direct competition in the market for reproductive health services.158

2. Anticompetitive effects of illegal direct-action protests.

The many tactics utilized by the anti-abortion movement have produced sustained anticompetitive effects on the market for abortion services. In Northeast Women’s Center159 the district court issued a directed verdict against the plaintiffs’ antitrust claim because they did not explicate any anticompetitive effects caused by the protesters.160 However, the court provided a roadmap for what effects would sufficiently maintain a Sherman Act § 1 claim, stating that “[a]n injury to competition within an industry may be proven by an appreciable reduction in the number of competitors or by some other outward sign of adverse effects on competitive conditions.”161 Examining anti-abortion protest activities through an economic lens reveals heightened barriers to entry, increased costs of operation, and decreased numbers of competitors.

Anti-abortionists often explicitly announce their intent to raise clinics’ costs above the natural price determined by the marketplace. An example can be found in the “Army of God Manual,”162 the seminal work of the anti-abortion movement in the 1990s. The editor, known only by the alias “the Mad Gluer,” suggests the use of locks, chains, glues, and acids as a part of “Op-

158 Case law supports the contention the direct competition between plaintiffs and defendants in an antitrust suit is not required. See II C 1.
159 670 F Supp 1300 (E D Pa 1987).
160 Id at 1305.
161 Id at 1304–05 (emphasis added).
eration B.R.I.C.K.,” or “Babies Rescued Through Increased Cost of Killing.”

Barriers to entry for small firms may be imposed by the added costs of providing security or paying for damages caused by these incidents. Due to anti-abortion violence,

Clinics are spending thousands of dollars on bulletproof glass, armed guards, security cameras, metal detectors, and other security measures. Doctors are wearing bulletproof vests and arming themselves . . . . Some have even purchased armored vehicles.

Due to the skyrocketing costs of maintaining a clinic, the only abortion providers that may be able to survive are large hospitals with financial resources to invest in expensive security measures. Smaller, less well-established abortion providers will be most vulnerable to the anticompetitive effects of protest.

3. Anticompetitive effects in the relevant market.

In order to bring a successful claim a plaintiff must not only show the anticompetitive effects of the defendants’ behavior, he must also prove that that behavior reduced competition in the relevant market.

First, the product market must be defined. Here, the relevant product market consists of abortion services

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166 Id. See also Pearson, How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Centers at 5 (cited in note 111) (advising entrepreneurs to rent office space in the same building as clinics so “if the girl who would be going to the abortion chamber sees your office first with a similar name, she will probably come into your center”; that way “the abortion chamber is paying for advertising to bring the girl to you”).
167 Some debate exists as to whether plaintiffs in a Sherman Act § 1 suit need to distinguish the relevant geographic market. See SCFC ILC Inc v Visa USA, Inc, 36 F3d 957, 965 n 10 (10th Cir 1994) (holding that § 1 involves conduct that does not alter the market structure); United States v Yellow Cab Co, 336 US 218, 225-26 (1947) (stating that § 1 claims only require proof that some appreciable part of intrastate commerce was subject to the effects of the conspiracy). But see Coniglio v Highwood Services, Inc, 495 F2d 1286, 1292 (2d Cir 1974), concurring with American Aloe Corp v Aloe Creme Laboratories, Inc, 420 F2d 1248 (7th Cir 1970), cert denied, 398 US 929 (1970) (“Before there can be a conclusion as to whether there has been . . . a contract in restraint of trade, a determination must be made as to what are the relevant product markets within which to gauge a firm’s power or the effect of its activities.”). See generally Kirtner, 2 Federal Antitrust Law § 16.4 (Anderson 1980) (cited in note 19) (describing difference between market definition in § 1 and § 2 actions).
provided mostly by clinics and hospitals. However, the product market may be expanded to include “reasonably interchangeable” services.\footnote{168} The recent FDA approval of RU-486\footnote{169} may broaden the relevant product market. The drug’s potential as a substitute for surgical abortion depends on the availability and cost of the drug—factors which are yet to be determined.\footnote{170} Further, violent anti-abortion protest might also detrimentally affect the availability of the abortion pill. Regardless, a court faced with an antitrust claim will need to account for RU-486 when analyzing the relevant product market definition. Since the drug may only be used through the seventh week of pregnancy,\footnote{171} abortion services provided after the seventh week—surgical abortions conducted in clinics or hospitals—remain a distinct product market.

After identifying the relevant product market, a plaintiff must demonstrate anticompetitive effects on the product in the relevant geographic market. In United States v Philadelphia National Bank,\footnote{172} the Court noted that in market definition analysis the proper question is “not where the parties ... do business or even where they compete, but where, within the area of competitive overlap, the effect ... on competition will be direct and immediate.”\footnote{173} The Court cited inconvenience and high transportation costs as factors limiting the geographic scope of the relevant market.\footnote{174}

Whether or not this reduction sufficiently constitutes reduced competition in a particular market will depend on the circumstances of individual cases.\footnote{175} Protest activities at an urban clinic,
where consumers can easily find several other providers, may not constitute an anticompetitive effect under § 1. In contrast, protest activities that eliminate a rural abortion provider may create a significant reduction in the availability of abortion services to consumers.176

A plaintiff that establishes reduced availability of abortion services in their relevant market satisfies Northeast Women's Center's requirement of demonstrating anticompetitive effects.177 Plaintiffs will likely be able to meet their burden of showing anticompetitive effects in relevant geographic markets, as the last decade reveals an appreciable reduction in the overall number of abortion providers.178 In 1982, 2,908 doctors offered abortion services in the United States.179 By 1996 there were only 2,042—a 30 percent drop. As a result, citizens in over 80 percent of the counties in the United States do not currently have access to abortion services.180 Across the United States, 95 percent of non-metropolitan counties lack an abortion provider.181 Medical students electing not to practice abortions for fear of violent reprisals exacerbate the current shortage of abortion service providers.182 As a result, "it is now harder to get an abortion than it has been at any time in the last 20 years."183

176 See Philadelphia National Bank, 374 US at 357.
177 670 F Supp 1300, 1304 (E D Pa 1987). See note 89 and accompanying text.
178 This is accompanied by a marked decline in the occurrence of abortion. See The Alan Guttmacher Institute, Induced Abortion, available online at <http://www.agi-usa.org/pubs/fb_induced_abortion.html> (visited Oct 8, 2000) (noting that in 1990 an estimated 1.61 million abortions took place, while 1.37 million occurred in 1996). In determining the viability of a plaintiff's antitrust claim, courts should analyze whether the decline in abortion occurrence resulted from anticompetitive conduct that reduced the number of abortion providers or simply a lessened demand for abortion services in the relevant geographic market.
181 Id (citing 86 percent); 139 Cong Rec S 15655 (Nov 16, 1993) (statement of Senator Kennedy) (citing eighty-three percent).
183 Gonnerman, Terrorist Campaign Against Abortion, Village Voice at 36 (cited in note 110) (reporting that Head of Life Dynamics Inc., Texas businessman Mark Crutcher published and mailed a "joke" book to medical students and doctors, which included the
As outlined above, anti-abortion activity meets the formal legal requirements for Sherman Act § 1 liability. Though courts can apply antitrust laws, the more important issue is whether they should.

III. FAILURE OF OTHER REMEDIES TO ADDRESS ANTICOMPETITIVE EFFECTS OF DIRECT-ACTION PROTEST

The primary purpose of the Sherman Act is to protect consumers from the evils of an anticompetitive, monopolistic market. As the Supreme Court stated in *Northern Pacific Railway v United States*, the Sherman Act "was designed to be a comprehensive charter of economic liberty, aimed at preserving free and unfettered competition ... [which] will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress." Keeping these goals in mind, "there is no reason to believe that as a rule morally or religiously motivated trade restraints will damage consumer welfare to a lesser degree than economically motivated ones." The failure of other laws to account for the systemic loss of revenues and devastating anticompetitive effects borne by consumers and abortion providers necessitates antitrust liability for anti-abortion protest.

Direct-action protest can be divided into three categories, each with varying degrees of First Amendment protection and social value. "Category 1" protest activities—such as peaceful picketing and leaflet distribution—receive complete First Amendment protection. "Category 2" includes illegal but non-violent actions such as trespass, blockades or verbal threats. These activities may possess some degree of social value as forms

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185 See *Standard Oil Co v FTC*, 340 US 231, 248–49 (1951) (stating that Congress intended to protect consumers with the Sherman Act).
186 *356 US 1, 4–5 (1958).*
of civil disobedience, but they do not receive First Amendment protection. Finally, "Category 3" activities—organized efforts to intimidate others by violent or otherwise unlawful means—enjoy no First Amendment shield from regulation. Due to the systemic economic damages generated by anti-abortion groups, none of the existing criminal or civil remedies sufficiently compensates businesses and consumers for anticompetitive harms that Category 2 and 3 activities inflict on the market.

A. Application of Criminal Statutes

Criminal laws directed at specific acts of violence offer some relief from the damage caused by illegal direct-action protesters. However, criminal sentences for arsons, bombings and murder punish only the individual actor, not the umbrella organization culpable for orchestrating the crime. Additionally, in many instances state police forces lack the resources to prosecute all of the legal violations that occur at large protests.

While an arsonist or bomber would likely receive a substantial penalty, the small fines typically imposed for such crimes as trespass prove largely ineffective in deterring resolute anti-abortion activists. Furthermore, many anti-abortion protesters hide their assets to avoid paying large monetary judgments. As one defendant quipped: "All you gotta do is keep closing [P.O.] boxes and opening new ones, and cash your checks at places other than banks." Collecting monetary damages proves equally difficult against individuals who make themselves judgment proof by declaring bankruptcy. Furthermore, mere criminal punishment

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190 Id. See also Bruce Ledewitz, Civil Disobedience, Injunctions, and the First Amendment, 19 Hofstra L Rev 67, 67-68 (1990) ("Civil disobedience . . . is expressive conduct even the participants admit is not protected by the First Amendment.").
191 See Part IV A 1.
192 See Egan, The Roots of Terror, NY Times at 1 (cited in note 112) ("While Federal officials have been frustrated in trying to prove a criminal conspiracy, lawsuits against some of the same people who have been Federal targets have had more success in persuading juries of a civil conspiracy.").
194 See Kim Cobb, How to Grow a Revolution, Houston Chron at A16 (cited in note 117) ("Most arrests at Operation Rescue events result from trespass charges.").
195 Egan, Roots of Terror, NY Times 1 (cited at note 112).
196 Id (quoting one of the leaders of Operation Rescue in Texas, ordered to pay Planned Parenthood $1 million for civil conspiracy).
197 See NARAL, Enforcing Clinic Protection Laws to Their Fullest Potential, available online at <http://www.naral.org/pressresources/fact/bankruptcy.html> (visited Oct 8,
of individual actors will fail to fully compensate damaged businesses. Without a solvent organization as a codefendant, generating an amount commensurate to the harm inflicted by anticompetitive tactics becomes impossible. However, an antitrust suit against an organization that is guilty of inflicting anticompetitive effects on the abortion services market could reach the larger pool of an organization’s funding.

B. RICO

Under the Racketeering Influenced and Corrupt Organizations Act198 ("RICO"), a plaintiff can recover treble damages, attorney’s fees,199 and injunctive relief, including the right of the court to order the dissolution or reorganization of any enterprise.200 The government may also prosecute the defendant to impose criminal penalties.201 Since NOW v Scheidler, substantial opposition has arisen in response to the Supreme Court’s elimination of an economic motive requirement for RICO violations.202 The House of Representatives considered a bill in 1998, the Civil RICO Clarification Act, that would have effectively reversed Scheidler by eliminating the extortion predicate for RICO.203 Professor Robert Blakely, RICO’s original drafter, contends that the statute was “never intended to have any impact on any kind of demonstrations, pro-abortion or anti-abortion, pro-war or anti-war, pro-trees or anti-trees,” concluding that “RICO doesn’t belong in those areas.”204 The application of RICO to anti-

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199) (arguing that Bankruptcy Code should be amended to make debts resulting from clinic violence non-dischargeable).
199 See 18 USC § 1964(c).
200 See 18 USC § 1964(a).
abortion activists has also sparked lively scholarly dialogue. Despite this contentious debate, courts continue to apply RICO.

RICO, a law designed to root out the insidious underbelly of organized crime, can reach only a limited amount of anticompetitive protest activity. Because of RICO’s emphasis on criminal conspiracy, the statute may only apply to violent and constitutionally indefensible Category 3 activity. Further, trespass cannot serve as a predicate offense to substantiate RICO liability. Since the most common type of anti-abortion protest involves trespass and blockades, this limitation on RICO poses a substantial impediment to the recovery of economic losses.

Civil RICO claims offer treble damage remedies, similar to antitrust laws. But because antitrust law mandates a more sophisticated damage calculation involving economic analysis, it could more accurately identify the harm protesters cause to the plaintiff’s business and to the market as a whole. Furthermore, it is unlikely that private plaintiffs could overcome RICO’s crimi-

205 See Matt Moore, Note, RICO Run Amok: The Supreme Court Sends a Message, 63 UMKC L Rev 185, 186 (1994) (arguing that the Supreme Court sabotaged the statute in order to force the legislature to narrow the statute to original intent of organized crime); Peter Burke, Note, Application of RICO to Political Protest Activity: An Analogy to the Antitrust Laws, 12 J L & Pol 573, 574 (1996) (contending that RICO should receive only limited application in context of political and social protest).

206 See Planned Parenthood of the Columbia/Willamette, Inc v American Coalition of Life Activists, 945 F Supp 1355 (D Oregon 1996) (holding that FACE and RICO claims were properly brought).


208 Feminist Women’s Health Center v Roberts, 1988 US Dist Lexis 16325, 14 (“Plaintiffs have failed to show that trespass may serve as a predicate offense under § 1961(1) since defendant could not have been charged with a trespass offense carrying a penalty of more than one year.”).

209 See Kim Cobb, How to Grow a Revolution, Houston Chron at A16 (cited in note 117).

210 18 USC § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.”).

211 15 USC § 15 (1994) (“[A]ny person who shall be injured in his business or property by reasons of anything forbidden by the antitrust laws may sue therefore . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

212 See Kintner, 1 Federal Antitrust Law § 1.16 at 38 (citing greater influence of economists and economic theory resulting in “[i]ncreasingly sophisticated” antitrust application) (cited in note 26).
nal emphasis\textsuperscript{213} and achieve broad recovery for marketplace injuries. As one author notes, "RICO is more concerned with compensating victims than it is with maintaining a competitive economy."\textsuperscript{214}

C. Freedom of Access to Clinic Entrances (FACE)

In response to anti-abortion violence, Congress enacted the Freedom of Access to Clinic Entrances (FACE) Act in 1994 to provide civil and criminal remedies for "violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services."\textsuperscript{215}

FACE's power to remedy the economic damages caused by anti-abortion protest is limited. In \textit{United States v Unterburger},\textsuperscript{216} the Eleventh Circuit Court of Appeals affirmed the conviction of two defendants who chained themselves to the main entrance of a clinic, causing it to shut down for several hours until police removed them.\textsuperscript{217} Although they faced a maximum of six months in prison and a $10,000 fine under FACE, the defendants were sentenced to time served.\textsuperscript{218} In another case, eleven defendants were convicted for blocking a clinic entrance.\textsuperscript{219} The court sentenced two defendants to four months' imprisonment, two others to two months' imprisonment, and the remaining seven to time served and community service.\textsuperscript{220} Each of the defendants paid $105 restitution for the value of damaged doors.\textsuperscript{221} Neither conviction compensated for larger economic damages likely caused by the loss of business revenues and consumer goodwill.

However, FACE does not rule out the use of other statutory remedies, as "nothing in this section shall be construed . . . to limit any existing legal remedies for such interference."\textsuperscript{222} If used in conjunction with antitrust laws, remedies imposed under

\textsuperscript{213} See note 207.
\textsuperscript{214} Kalish, 47 Emory L J at 804 (cited in note 207).
\textsuperscript{215} 18 USC §248(2) (1994) (containing congressional statement of purpose).
\textsuperscript{216} 97 F3d 1413 (11th Cir 1996).
\textsuperscript{217} Id at 1415.
\textsuperscript{218} Id. See also \textit{United States v Bird}, 1997 US App Lexis 33988 *52 (5th Cir) (upholding defendant's sentence of one year's imprisonment and $820.67 restitution for repeated death threats and throwing a bottle through the window of a car being driven by an abortion doctor).
\textsuperscript{219} See \textit{United States v Weslin}, 156 F3d 292, 298 (2d Cir 1998) (upholding convictions).
\textsuperscript{220} See id.
\textsuperscript{221} See id.
\textsuperscript{222} See 18 USC § 248(d)(2) (1994).
FACE can more accurately approximate the financial injury inflicted on individual business owners and the anticompetitive harm wreaked on the market.

D. Antitrust Remedies

Regardless of the availability of other remedies, nothing precludes supplementary use of antitrust laws.\textsuperscript{223} Section 4 of the Clayton Act\textsuperscript{224} authorizes the provision of attorney's fees and treble damages for injuries suffered by reason of violation of the antitrust laws. These provisions allow ample opportunity for companies to recover the monetary damages incurred from these attacks and for the government to protect the public interest by deterring perpetrators from continuing to distort the market through illegal and coercive tactics.\textsuperscript{225}

IV. NOERR-PENNINGTON IMMUNITY AND FIRST AMENDMENT CONCERNS DO NOT BAR APPLICATION OF ANTITRUST LAWS TO DIRECT-ACTION PROTEST

The First Amendment guarantees "the freedom of speech... and [the right] to petition the government for redress of grievances."\textsuperscript{226} This guarantee provides the basis of Noerr-Pennington immunity from antitrust liability.\textsuperscript{227} Recognizing the need to preserve citizens' right to petition, the Supreme Court inferred this exemption from the legislative history of the Sherman Act.\textsuperscript{228} Antitrust regulation of direct-action protest thus implicates the First Amendment's general protection for freedom of speech.

Both Noerr and the First Amendment prohibit antitrust application to Category 1 protest—peaceful picketing—as it constitutes both a "reasonably" directed attempt to petition the gov-

\textsuperscript{223} See Joseph P. Bauer, 11 Kintner, Federal Antitrust Law § 78.4 at 14 (1998) ("As long as the Defendant's conduct in violation of the antitrust laws has given rise to 'material' harm to the plaintiff, causation is shown and antitrust relief will be available, even though that conduct might also give rise to a state law claim."); Mulvey v Samuel Goldwyn Prods, 433 F2d 1073, 1075–76 (9th Cir 1970) (holding that where conduct in violation of antitrust laws harmed other party, the fact that the plaintiff might also have sued for breach of contract is irrelevant).

\textsuperscript{224} 15 USC § 15 (1994).

\textsuperscript{225} See Part V A–B.

\textsuperscript{226} US Const Amend I.

\textsuperscript{227} See Part I C.

\textsuperscript{228} See Eastern Railroad Presidents' Conference v Noerr Motor Freight, Inc, 365 US 127, 144–45 (1961) (holding that railroad companies' conspiracy to place restraints on trucking did not violate antitrust laws because their actions were designed to prompt government action).
and a monumentally important form of speech in our democracy. Neither doctrine immunizes Category 3 protest—violent activities such as bombings, assaults, or murders. However, Category 2 protest—admittedly illegal activity that arguably possesses some First Amendment value—can and should be reached by antitrust laws in some circumstances.

A. Noerr Does Not Immunize Certain Direct-action Protests from Antitrust Liability

1. Noerr immunity and violent “Category 3” activity.

Category 3 acts do not fall within the Noerr exception because the First Amendment offers no protection for violent activities. The Supreme Court has differentiated between valid and invalid forms of petitioning, asserting that “violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.” The Court recently affirmed this distinction, announcing that “[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.” For these cases, when violence operates as a “restraint of trade” that creates anticompetitive effects, courts should prescribe antitrust liability.

2. Noerr, civil disobedience and “Category 2” protest activity.

Category 2 protests may or may not receive Noerr immunity. Blockades and trespass are the most common forms of anti-abortion protest; they have never received absolute First Amendment protection merely because of their political

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230 See note 68.
231 See Part II D 1.
234 See Fischel, 45 U Chi L Rev at 100 (cited at note 16) (arguing that activity should be constitutionally defensible to fall under Noerr).
235 See Cobb, How to Grow a Revolution, Houston Chron at A16 (cited in note 117).
content. However, potential chilling effects on free speech give rise to a strong argument against the use of antitrust laws to enjoin protest activities. Several authors reject stringent regulation of protest activities because civil disobedience has historically contributed to free speech. Important historical forms of civil disobedience include the abolitionist movement, the campaign for women's suffrage, the civil rights movement, and the anti-Vietnam War protests.

Civil disobedience is illegal, non-violent, open conduct such that "the participant intend[s] . . . the community to take notice of the illegal action . . . [and] the participant . . . [is] willing to accept punishment." In the anti-abortion context the activity usually only amounts to trespass, blockades, property damage, noise violations, or verbal assaults for which courts impose fines. Despite their possible expressive value, Category 2 protest activities that accompany violent Category 3 acts constitute illegitimate and predatory conduct that antitrust laws should condemn. Further, a protest consisting solely of illegal but non-violent Category 2 activity ameliorates concerns about chilling legitimate Category 1 protest.

See Cameron v Johnson, 390 US 611, 617 (1968) (upholding against a First Amendment challenge a prohibition on picketing that "obstructs or unreasonably interferes with ingress or egress to or from the courthouse"); Cox v Louisiana, 379 US 536, 555 (1965) (holding that a group of demonstrators had no First Amendment "right to cordon off . . . [an] entrance to a public . . . building, and allow no one to pass who did not agree to listen to their exhortations"); New York State National Organization for Women, Inc v Terry, 886 F2d 1339, 1364 (2d Cir 1989) ("[B]locking access to public and private buildings has never been upheld as a proper method of communication in an orderly society.").

See generally Bryn K. Larsen, Note, RICO's Application to Non-economic Actors: A Serious Threat to First Amendment Freedoms, 14 Rev Litig 707, 708 (1995) (predicting that holding anti-abortion groups and other political organizations liable under RICO may lead to infringements of free speech); John P. Barry, Note, When Protesters Become 'Racketeers,' RICO Runs Afoul of the First Amendment, 64 St John's L Rev 889 (1990) (arguing that RICO application will chill free speech); Ledewitz, 19 Hofstra L Rev at 68–69 (cited in note 190).

See for example Ledewitz, 19 Hofstra L Rev at 73–82 (cited in note 190) (discussing history of civil disobedience and concluding that "civil disobedience is justified at least some of the time"), and Brian T. Murray, Note, Protesters, Exortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms, 75 Notre Dame L Rev 691, 694 (1999) (arguing that the "line between protected and unprotected protest is vague" and needs to be preserved).


See Parts IV A 1–2.

It is unlikely this will occur, since the majority of anti-abortion protests involve peaceful picketing.
One ground on which Category 2 behavior may receive Noerr immunity arises from the facts of Noerr itself. In Noerr, the Court granted immunity despite the fact that both parties had engaged in a fraudulent publicity campaign. Though the publicity campaign constituted an illegal act, the Court denied antitrust liability because of countervailing First Amendment concerns. Under the same principle, non-violent Category 2 activity, such as tortious interference with a clinic’s business relationships, could not alone support antitrust liability when outweighed by First Amendment interests in protecting Category 1 peaceful protests.

Courts should also consider whether protesters exclusively practicing Category 2 tactics may be held liable for antitrust violations. For example, suppose an anti-abortion organization conducted no blockades, vigils or demonstrations outside clinics. Instead, it directed its campaign against abortion through harassing telephone calls to the clinic and the clinic’s medical suppliers. Without any legitimate petitioning activity in need of protection, do the First Amendment concerns embodied in Noerr remain?

An easier case for antitrust liability arises when Category 2 and Category 3 protest activities combine. This type of protest is not “reasonably directed” at attaining government relief and thus would fall under the “sham” exception to Noerr. In NOW v Scheidler the Seventh Circuit explicitly disallowed the anti-abortion defendant’s claim to Noerr immunity, stating that “[a]lthough the defendants’ acts generated publicity which they may have hoped would influence government actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior.”

Where illegal Category 2 and Category 3 protest activities are only “tangentially” related to legitimate petitioning, courts should find that the protest constitutes a “sham” petition. In California Motor Transport Co v Trucking Unlimited, the Court identified four unethical means of obtaining government redress which made the defendants ineligible for Noerr immunity, including: perjury of witnesses; using fraudulent patents; conspir-

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243 Noerr, 365 US at 129-30 (“[D]efendants utilized the so-called third-party technique ... the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared ... and paid for by the railroads.”).
244 See Professional Real Estate Investors, Inc, 508 US at 60 (establishing objectively reasonable standard).
245 NOW v Scheidler, 968 F2d 612, 616 (7th Cir 1992).
ing with licensing authorities; and bribery of public agents.\textsuperscript{247} Trespass, blockades, and threats—activities fitting squarely within Category 2 protest—present far more serious dangers than the activities the Court found to negate petitioning immunity in \textit{California Motor Transport}.\textsuperscript{248} Indeed, the Court noted that the four-item list is not exclusive, as “many other forms of illegal and reprehensible practice . . . may corrupt the administrative or judicial processes, [and] which may result in antitrust violations.”\textsuperscript{249} Bombings, sabotage and acid attacks—activities falling within Category 3—pose heightened dangers and thus should also rule out the availability of the petitioning doctrine.

Summarily, Category 1 activity should never be used as a basis for antitrust liability. Category 2 behavior, however, may be actionable if no Category 1 protest exists to raise First Amendment concerns. Finally, Category 3 activity is always unprotected, and alone or in combination with Category 2 protests, it should be fully actionable under antitrust laws.

B. Applying the Antitrust Laws to Certain Anti-Abortion Protests Comports with First Amendment Principles

While \textit{Noerr} remains the relevant test for determining petitioning immunity from the antitrust laws, the punishment of combined Category 2 and Category 3 protests must also pass constitutional muster under the First Amendment.\textsuperscript{250} The anti-abortion protest activities that are not precluded from First Amendment protection by their violent nature can still be proscribed if a regulation “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restric-
tion on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{251}

Antitrust laws present a type of content-neutral regulation that, when applied to the conduct of anti-abortion protesters, would not infringe upon First Amendment rights. First, application of antitrust laws would further an important governmental interest by assuring a fair and competitive marketplace.\textsuperscript{252} Second, the governmental interest of antitrust regulation lies in the realization of a fair and competitive marketplace. Any restrictions on speech are unrelated to the overarching purpose of the law. In \textit{United States v O'Brien},\textsuperscript{253} the Court found the government's interest in preventing draft-card burning to be "unrelated to suppression of expression because it applied to the destruction of the cards for any reason or for no reason."\textsuperscript{254} Similarly, the government's stake in suppressing anticompetitive behavior remains the same whether a group attempts to force an abortion provider out of business because the group is morally opposed to abortion or because the group wishes to be the only abortion provider in a particular market. Finally, an antitrust action would not apply to purely non-violent, peaceful protest.\textsuperscript{255} As such, incidental restrictions on free speech would not be any greater than necessary to protect competitive interests.

Thus, the paramount importance of free speech and civil disobedience to our political culture can still be reconciled with the attachment of antitrust liability to certain direct-action protests. As noted above, the First Amendment does not shelter violent protest activities from regulation.\textsuperscript{256} Though civil disobedience may be an important method of addressing sociopolitical concerns, victims should not be required to shoulder the damages. Courts can both remedy antitrust violations and at the same time preserve activities of protected status. Achieving these goals simultaneously involves carefully parsing out the illegitimate

\textsuperscript{252} See \textit{United States v Topco Associates, Inc}, 405 US 596, 610 (1972) (describing the Sherman Act to be as "important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms").
\textsuperscript{253} 391 US at 377.
\textsuperscript{254} Id at 375.
\textsuperscript{256} See Part IV A 1.
forms of protest (Category 3 + Category 2) from the protected forms of protest (Category 2 alone and Category 1).

V. A PROPOSAL FOR EFFECTIVELY APPLYING ANTITRUST LAWS IN LIGHT OF FIRST AMENDMENT CONCERNS

Whether violent acts so pervasively corrupt protest activity as to eliminate all First Amendment protection is a fact-driven inquiry which courts must undertake on a case-by-case basis. Supreme Court precedents offer guidance to test the degree of violence that will subject a direct-action protest to antitrust liability.

A. Using Claiborne as a Litmus Test to Discern Protected Activity

While the political boycott at issue in Claiborne was largely peaceful, the record reveals that ten incidents of violence occurred over the course of the seven-year boycott.\(^{257}\) The Claiborne holding provides a useful measure for determining the degree of First Amendment protection courts should grant to protest activity. Activities "cannot be characterized as a violent conspiracy simply by reference to... relatively few violent acts."\(^{258}\) For a boycott to be declared illegal, a plaintiff must demonstrate that violence corrupted the entire boycott effort. The Court announced that "[t]he burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy."\(^{259}\) Ten acts over the course of seven years did not meet this burden of proximate cause.\(^{260}\) Under the Claiborne rule, then, anti-abortion protest consisting only of peaceful protests and occasional trespass would not lose First Amendment protection from antitrust liability.

\(^{257}\) 458 US at 904, 924.
\(^{258}\) Id at 933.
\(^{259}\) Id.
\(^{260}\) Id at 923 ("[R]espondents' losses were not proximately caused by violence or threats of violence."). Consistent with Claiborne, courts have held other peaceful boycotts exempt from antitrust liability. See, for example, Missouri v NOW, 620 F2d 1301, 1319 (8th Cir 1980) (holding Sherman Act inapplicable to peaceful boycott with goal of passing the ERA).
B. Using *Milk Wagon* to Gauge Whether an Activity is Unprotected

The facts of *Milk Wagon Union of Chicago, Local 753 v Meadowmoor Dairies, Inc*[^261] offer another metric with which to determine the degree of constitutional protection a protest should receive. In *Milk Wagon*, a dispute arose when milk vendors departed from union standards for distribution.[^262] The state issued an injunction against the union's violent activity, as well as the accompanying peaceful picketing.[^263] Unlike *Claiborne*, this case involved considerable violence, including over fifty instances of window smashing,[^264] bombings of plants and stores,[^265] arsons to vendors' stores,[^266] destruction of vehicles,[^267] and beatings of workers.[^268]

Because of the multiple violent and illegal acts, the Court concluded that the activists had forfeited First Amendment protection for the entire protest.[^269] Justice Frankfurter, delivering the opinion of the Court, announced that "[t]he picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."[^270] Frankfurter concluded that even the peaceful picketing did not receive constitutional protection from regulation because "violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation."[^271]

[^261]: 312 US 287 (1941).
[^262]: See id at 291.
[^263]: See id.
[^264]: See id at 292. For similar tactic of antiabortion protesters, see Army of God, 99 Ways (cited in note 162) (advocating use of pellet guns on thin glass and .22 caliber on thick glass: "The best . . . is that which does the most damage with the least amount of noise and other kinds of exposure.").
[^265]: See *Milk Wagon*, 312 US at 292.
[^266]: Id. Compare Army of God, 99 Ways (cited in note 162) (describing how to light a propane fire inside buildings while bypassing fire prevention systems).
[^267]: See *Milk Wagon*, 312 US at 292.
[^268]: Id (reporting in several other instances where "carloads of men followed vendors’ trucks, threatened the drivers, and in one instance shot at the truck and driver").
[^269]: Id.
[^270]: Id.
C. A Proposed Test for Applying Antitrust Laws to Anti-Abortion Protest

On a case-by-case basis, courts should determine whether anti-abortion protest operates through coercion and violence so as to exceed the boundary set by Milk Wagon. Several of the tactics utilized by the modern anti-abortion movement appear strikingly similar to those reported in Milk Wagon. If violence and coercion sufficiently dominate a particular anti-abortion protest to meet Claiborne's heavy burden, the activity would fall outside of the First Amendment's shelter and beyond the protective ambit of Noerr immunity. In these situations, courts should impose antitrust liability to compensate businesses and the public for the anticompetitive harms caused by both Category 2 and Category 3 direct-action protest activities.

With Claiborne and Milk Wagon at either end of the spectrum between protected and unprotected activity, courts can determine on a case-by-case basis whether the particular circumstances of an anti-abortion protest cross into the territory of unprotected activity and thus forfeits First Amendment protection. According to this precedent, when violence is so prevalent in an anti-abortion protest, such that its coercive effects permeate the protest's peaceful aspects, the organization should receive no constitutional protection. Taking into account our modern First Amendment jurisprudence, Milk Wagon should not be applied to its fullest extent and damages should not be assessed for Category 1 activities. However, liability can clearly be constitutionally assessed against Category 2 and Category 3 activities without violating First Amendment interests. Further, Claiborne's requirement of proximate cause will adequately protect activists from liability for Category 1 activity and prevent any potential chilling effects.

272 See Part II D 1.
273 See Brandenburg v Ohio, 395 US 444, 447 (1969) (per curiam) (holding that First Amendment rights do "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and it likely to incite or produce such action"). But see S. Elizabeth Wilborn Malloy and Ronald J. Krotoszynski, Jr, Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg, 41 Wm & Mary L Rev 1159, 1170 (2000) (advocating creation of a new category of speech, "Harm Advocacy," which "would permit courts to better analyze the conflict between society's need to protect its citizens from violence and the First Amendment value of free expression and democratic deliberation").
274 See Parts IV A–B.
275 See note 260 and accompanying text.
An example will aid in illustrating the proper functioning of this test. A hypothetical anti-abortion protest, a month in duration, involved peaceful picketing 80 percent of the time. Ten percent of the protesters’ activities involved blockading the clinic and making threatening phone calls to the clinic’s medical suppliers and business contacts. Protesters devoted the remaining ten percent of the protest to butyric acid attacks and violent assaults on clinic employees. Unlike the facts of *Claiborne*, where only ten acts were documented over the course of seven years, here the illegal acts—blockades, threats, acid attacks and violent assaults—occurred frequently over the month-long protest.

Eighty percent of protest activity is fully protected and should not be assessed under antitrust liability, lest First Amendment freedoms be violated. The Category 2 illegal activities, accounting for ten percent of the protesters’ time, attain a “coercive effect” when combined with the 10 percent of Category 3 activities. Such coercive effect loses First Amendment protections under *Milk Wagon*. Further, protesters engaging in Category 2 and Category 3 activities cannot claim *Noerr* immunity because they constitute “objectively unreasonable” sham attempts of indirect petitioning. Thus, First Amendment principles and *Noerr* do not bar antitrust regulation of these activities.

Additional constraints of this test and the general requirements of antitrust law lessen the danger to anti-abortion protesters’ constitutional rights. First, these protesters need to have acted in a conspiracy and within the scope of the authority granted by their organizations. Second, federalism concerns are alleviated by the requirement that the clinic participate in interstate commerce. Finally, the “proximate cause” requirement of *Claiborne* will limit antitrust damages to only those anticompetitive effects caused by Category 2 and Category 3 behavior. As with any damage calculation, this will be difficult, though the complexity of liability does not provide an adequate reason to neglect applicable law.

In the hypothetical protest, damage calculations will involve: (1) assessing the effects of peaceful protests on customers’ unwillingness to enter the clinic and the clinic’s subsequent decline

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276 458 US at 904, 924.
277 312 US at 928.
278 Id.
279 See notes 118–20 and accompanying text.
280 See Part II A.
in business; (2) assessing the effects of violent and illegal protest activities on clients' access to the clinic and the damages done to the clinic's revenues; and (3) comparing the degree of effectiveness each type of protest has in detrimentally affecting clinic business. Once a ratio is established between the permissible and impermissible types of protest, the monetary damages necessary to compensate injured businesses and the public for anticompetitive harms to the market can be assessed accordingly.

Thus, guided by the test, courts can identify where antitrust can constitutionally apply to redress anticompetitive harms.

CONCLUSION

Direct-action protest comes in many forms. While peaceful picketing and civil disobedience lie at the very heart of our democratic government, violent and illegal protests threaten to contravene the democratic privileges of businesses providing abortion services and consumers seeking abortions in a competitive market. When such protests cause anticompetitive injury to the marketplace, the law should provide a mechanism to restore the marketplace to equilibrium. That mechanism is antitrust. Recent facts about the devastating economic effects of violent and illegal protest warrant reexamination of antitrust laws as viable remedies for anticompetitive distortions to the market for abortion services. While other remedies criminally punish individuals or address only the damage caused by acts of extreme violence, none sufficiently compensates abortion providers and consumers for the disruptive effects to the market.

The rights of protesters must be respected when they act within the boundaries of the law, but the rights of citizens to competitive markets, undisturbed by illegal threats and coercion, remain a revered aspect of our capitalist democracy. When anti-abortion protesters act outside the law's parameters and forfeit First Amendment rights, antitrust can and should intercede to protect other citizens' rights to a competitive economy.

Plaintiffs will also need to assert empirical evidence about the anticompetitive effects on clinic business, perhaps supported by data collected from potential clients who were deterred from entering the clinic due to fears of violent protests. Further, plaintiffs must also assert factual evidence of anticompetitive effects in the relevant geographic market. See Part II D 3.