

# Vanderbilt Law Review

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Volume 43  
Issue 3 *Issue 3 - Symposium: Reforming RICO:  
If, Why, and How*

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Article 9

4-1990

## RICO Threatens Civil Liberties

Antonio J. Califa

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Antonio J. Califa, RICO Threatens Civil Liberties, 43 *Vanderbilt Law Review* 805 (1990)  
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# RICO Threatens Civil Liberties

Antonio J. Califa\*

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## I. INTRODUCTION

The history of conspiracy, according to Justice Robert Jackson, exemplifies the "tendency of a principle to expand itself to the limit of its logic."<sup>1</sup> This same phenomenon is present today in the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO).<sup>2</sup> RICO has moved beyond logic and intent into areas far removed from racketeering. Originally intended to combat organized crime, RICO is used increasingly in ideological disputes. For example, it has been used against abortion clinic protestors and antipornography groups.

This Article argues that using RICO in ideological disputes is inappropriate and harmful because it results in the chilling of first amendment rights. Indeed, it argues that RICO threatens civil liberties.<sup>3</sup> Part II of the Article describes the legislative history of RICO, shows the intention of Congress to use RICO against organized crime involvement in economic endeavors, and argues that RICO was not meant to encompass noneconomic crimes. Part III examines the key statutory provisions of RICO and the Supreme Court's interpretation of these terms that expands RICO's intended scope. Part IV discusses RICO's predicate acts. After a brief description of techniques used by antiabortion organizations to publicize their views, Part V determines which of these methods the first amendment protects. Part VI reviews three illustrative examples of "mixed" conduct and what happens when RICO clashes with the first amendment. Part VII examines situations in which there is "mixed" conduct, some conduct protected by the first amendment, and some that is not, and how the Court has protected against a chilling effect through use of the doctrines of void for vagueness and precision of regulation. Part VIII argues that RICO should not apply to demonstrators on policy grounds. Part IX analyzes the RICO reform proposals currently before Congress and makes some recommendations for change. Part X concludes that RICO should include an exemption for advocacy activity.

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1. *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quoting B CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

2. Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)) [hereinafter RICO].

3. In 1970 Senator John C. McClellan, a principal sponsor of RICO, wrote a law review article contending that RICO was not a threat to civil liberties, and castigating the American Civil Liberties Union and the Association of the Bar of the City of New York for opposing the bill. See McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 *NOTRE DAME LAW* 55 (1970).

## II. LEGISLATIVE HISTORY

## A. Introduction of the Bill

Senator John L. McClellan, Chairman of the Criminal Law and Procedures Subcommittee of the Senate Judiciary Committee, introduced the Senate bill that became the Organized Crime Control Act of 1970 (OCCA)<sup>4</sup> on January 15, 1969. RICO was title IX of the OCCA. The OCCA contained twelve titles authorizing various special weapons for use against crime. The only party that could pursue civil remedies was the government. At the time of introduction, Senate Bill 30 did not contain a private right of action.

Various national commissions such as the Kefauver, Katzenbach, McClellan, and Brown Commissions had examined the economic activities of organized crime. Their findings highlighted the frustrating problems of controlling organized crime and organized crime's participation in legitimate businesses.<sup>5</sup> Money was considered to be the key to power in the underworld.<sup>6</sup>

In passing the OCCA, Congress clearly focused on organized crime. More specifically, Congress was attempting to stop infiltration of legitimate businesses. By stopping this infiltration, Congress felt it could strike at the "heart" of organized crime—money. The economic base of organized crime was thought to be impervious to old methods of crime-fighting. RICO's new weapons never before had been applied to criminal defendants and were aimed at destroying organized crime's economic base.

In introducing Senate Bill 30, Senator McClellan stated that the

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4. Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter OCCA]. The Senate bill number was S. 30. See S. 30, 91st Cong., 2d Sess., 115 CONG. REC. S279 (1969).

5. The former chief counsel to the Senate Criminal Law and Procedures Subcommittee, Professor G. Robert Blakey traced the origins of the organized crime problem that RICO was meant to solve. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249 (1982).

6. The direct intellectual antecedent of the RICO provision was the Katzenbach Report, which specified how organized crime acquires interests in legitimate businesses. REPORT OF THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter COMM'N REPORT]; see also Lynch, *RICO: The Crime of Being a Criminal* (pts. 1 & 2), 87 COLUM. L. REV. 661, 670 (1987). "Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." COMM'N REPORT, *supra*, at 190.

These methods form the basis of what RICO prohibits. For example, § 1962 lists four prohibited activities: (a) investing illegal proceeds in a legitimate business; (b) acquiring an interest in a legitimate business through a pattern of racketeering activity; (c) participating or conducting the affairs of an enterprise through a pattern of racketeering activity; and (d) conspiracy to commit (a), (b), or (c). See 18 U.S.C. § 1962(a)-(d) (1988).

twenty-four Cosa Nostra groups were the power base of organized crime.<sup>7</sup> The Senator stated that organized crime used illegal money and violence to infiltrate legitimate business and labor unions.<sup>8</sup> Later speeches by the Senator in support of the legislation reemphasized this economic theme.<sup>9</sup>

Later in March of 1969, Senator McClellan and Senator Roman L. Hruska, the ranking Republican on the Subcommittee, introduced other bills aimed specifically at the infiltration of business by organized crime. Senator Hruska introduced Senate Bill 1623, which prohibited investment of "ill gotten gains"<sup>10</sup> and allowed private treble damage actions by businessmen who had been damaged by unfair competition by a "racketeer businessman."<sup>11</sup> In April 1969, Senator McClellan introduced Senate Bill 1861, the Corrupt Organizations Act, for himself and Senator Hruska. This Bill proved to be RICO's predecessor.<sup>12</sup>

This legislation combined elements of both Senate Bills 30 and 1623. Senate Bill 1861 used the same economic rationales for its necessity as Senate Bill 30,<sup>13</sup> specifically the threat to the economy posed by organized crime. The Bill was "designed to attack the infiltration of legitimate business. . . ."<sup>14</sup> It also set forth the forbidden activities, namely to acquire, control, or operate organizations by the use of a pattern of racketeering activity.<sup>15</sup>

During its deliberations, the Senate Subcommittee incorporated Senate Bill 1861 in title IX of Senate Bill 30, popularly known as RICO. On December 18, 1969, the Senate Judiciary Committee reported on

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7. 115 CONG. REC. 827 (1969).

8. *Id.*

9. *See id.* at 5874. Senator McClellan stated that "[organized crime] now dominates the fields of jukebox and vending machine distribution. Laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, the garment industry and a host of other legitimate lines of endeavor have been invaded and taken over." Quoting directly from the Katzenbach Report, the Senator added: "Control of business concerns has been acquired by the sub-rosa investment of profits acquired from illegal ventures, accepting business interests in payment of gambling or loan shark debts, but, most often, by various forms of extortion." *Id.* He went on to state that "[w]ith its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. . . . When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses." *Id.*

10. *See id.* at 6992. This provision later became § 1962(a), part of RICO. *See* 18 U.S.C. § 1962(a) (1988).

11. 115 CONG. REC. 6993 (1969).

12. *Id.* at 956; *see also* A.B.A. SECTION OF CORP., BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 88 (1985) [hereinafter ABA RICO REPORT].

13. *See supra* notes 9-11 and accompanying text.

14. 115 CONG. REC. 9567 (1969).

15. *Id.* Thus, S. 1861 contained the prohibitions in § 1962(b) and § 1962(c). *See* 18 U.S.C. § 1962(b), (c) (1988). S. 1623 foreshadowed § 1962(a). *See id.* § 1962(a). These two Bills eventually became title IX of the OCCA, RICO.

the OCCA.<sup>16</sup> The Statement of Findings and Purpose revealed the Committee's intent to find new ways of combatting organized crime for economic reasons.<sup>17</sup> Organized crime allegedly drained billions of dollars from the economy through illegal acts, such as gambling, loan-sharking, and sale of narcotics.<sup>18</sup> Further, organized crime drew its *power* from money obtained through social exploitation.<sup>19</sup> This money and power were used increasingly to infiltrate and corrupt legitimate business and unions.<sup>20</sup> Organized crime activities were claimed to "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, [and] seriously burden interstate and foreign commerce."<sup>21</sup> The purpose of the Act was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."<sup>22</sup> It is important to note, however, that the Findings of Fact contain no mention of noneconomic crime.<sup>23</sup>

In the Section by Section Analysis portion of its Report, the Committee reiterated that the purpose of RICO was to eliminate the infiltration of organized crime and racketeering into legitimate organizations.<sup>24</sup> New methods were needed to combat organized crime because

16. See SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. (1969).

17. S. REP. NO. 617, *supra* note 16, at 1. The Report stated:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors [sic] as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions . . . .

*Id.*

18. *See id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 2.

23. One commentator defines noneconomic crime as follows:

The term "noneconomic" is used to describe those persons who not only have no commercial interest—i.e., profit—but who also have no prospect of economic gain from their anticompetitive actions. Thus, labor unions or members of professional associations, while not business competitors, may have an economic interest in constraining their target's ability to compete.

Note, *The Scope of Noerr Immunity for Direct Action Protestors: Antitrust Meets the Anti-Abortionists*, 89 COLUM. L. REV. 662, 669 n.47 (1989) (citing Coons, *Non-Commercial Purpose As a Sherman Act Defense*, 56 NW. U.L. REV. 705, 712-13 (1962)).

24. See S. REP. NO. 617, *supra* note 16, at 76.

not a single mob "family" had been destroyed using traditional methods of criminal prosecution.<sup>25</sup> Old methods were inadequate because imprisonment did not reach the source of the mob's power—money.<sup>26</sup>

The Report concluded that it was important "to do all that is necessary to free the channels of commerce from all illicit activity"<sup>27</sup> because organized crime threatened the existence of the free enterprise system.<sup>28</sup> Again, however, the Senate Committee Report makes no mention of using RICO against noneconomic defendants.<sup>29</sup>

### B. Senate Debate

During the three days of Senate debate, Senator McClellan and Senator Hruska continued to examine the economic theme of organized crime's infiltration of legitimate business.<sup>30</sup> Senator McClellan stated that of the "113 major organized crime figures, 98 are involved in 159 businesses."<sup>31</sup> Senator McClellan also maintained that the mob controlled one of the largest hotel chains in the country, dominated a bank with assets in excess of seven million dollars, and operated a twenty million dollar laundry, among other enterprises.<sup>32</sup>

Senator Hruska stressed that the RICO provisions were a novel, promising, and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful emergence into the field of legitimate business and unions.<sup>33</sup> Both of the chief sponsors of the RICO legislation stressed that the Bill was meant to fight infiltration of

25. *See id.* at 78.

26. *See id.* at 79. The Report stated:

What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

*Id.*

27. *Id.*

28. *See id.* at 80-81. The Report stated:

There is no doubt that the common law criminal trial, hedged in as it is by necessary restrictions on arbitrary governmental power to protect individual rights, is a relatively ineffectual tool to implement economic policy. It must be frankly recognized, moreover, that the infiltration of legitimate organizations by organized crime presents more than a problem in the administration of criminal justice. What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself.

*Id.*

29. *See supra* note 23 and accompanying text.

30. *See* 116 CONG. REC. 585 (1970) (statement of Sen. John L. McClellan).

31. *Id.* at 592. Supporters of RICO in both Houses repeatedly used these statistics. Senator Hruska also used these statistics in hearings on Jan. 21, 1970. *See id.* at 602.

32. *Id.* at 592. Senator McClellan referred to an alphabetical list of businesses in which organized crime has been active. The list contains 85 businesses from accounting to wire service, and includes the business of "picnic groves." *Id.*

33. *Id.* at 602.

business by organized crime.<sup>34</sup>

The legislation's key definition of "racketeering activity" specifically included "those crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations," namely "murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotic violations, counterfeiting, usury, mail fraud, bankruptcy fraud, wire fraud and securities fraud, and obstruction of justice."<sup>35</sup> At the point of Senate passage, the Bill still did not contain a private treble damages remedy. The Bill allowed only the government to sue for civil damages and equitable relief.<sup>36</sup>

### C. House Consideration

Consideration of an organized crime bill in the House began in the Judiciary Committee in May 1970. On the first day of hearings, the principal House sponsor, Representative Richard H. Poff, defined organized crime in terms of economic motivation.<sup>37</sup> Senator McClellan, as the first witness to appear before the House, summarized RICO by defining racketeering activity in terms of the criminal statutes characteristically violated by participants in organized crime.<sup>38</sup> He stated that RICO was designed to prevent organized criminals from infiltrating legitimate commercial organizations with the proceeds of their criminal

34. Senator McClellan limited the definition of organized crime. This limitation became clear in a colloquy on title X, which involved enhanced sentences for repeat offenders. Senator Edward M. Kennedy, concerned that the statute would sentence minor or technical repeat offenders to long prison terms offered an amendment that would have enhanced sentences only for those convicted of crimes listed in title IX, serious "racketeering type" offenses. Senator Kennedy argued that if his amendment was rejected, offenders like Dr. Benjamin Spock, who had been charged with conspiracy to violate the selective service laws, might be subjected to repeat offender sentences. Senator McClellan answered, in part, as follows: "What he is supposed to have done would not normally be considered organized crime. It is certainly different from what those people do who perpetrate heinous crimes and live on the fruits of crime." *Id.* at 846.

The question of what kind of criminal was a member of organized crime also would arise in the House. *See infra* note 48 and accompanying text.

35. S. REP. NO. 617, *supra* note 16, at 158.

36. ABA RICO REPORT, *supra* note 12, at 106. RICO passed the Senate on Jan. 23, 1970. 116 CONG. REC. 972 (1970).

37. *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 80 (1970) [hereinafter *House Hearings*]. The Hearings determined that

organized crime . . . was defined as a self-perpetuating, continuing, criminal conspiracy, the goal of which is to gather profits and power, utilizing fear and corruption and seeking to obtain an immunity from the law.

. . . [C]rime can be categorized in two major compartments: One, organized crime; and the other, disorganized crime . . . . [T]here is a demonstrable nexus between the two compartments of crime. Organized crime and its machinations have been and will continue to be the seedbed of disorganized crime, street crime, muggings and the like.

*Id.*

38. *See id.* at 85.



activities or with violent and corrupt methods of operation.<sup>39</sup>

On June 17, 1970, Representative Sam Steiger of Arizona, in a letter to the Committee, proposed amending RICO to provide a treble damages private right of action, similar to a provision in the Clayton Act.<sup>40</sup> The ABA also proposed adding a private right of action modeled on the Clayton Act and allowing treble damages.<sup>41</sup> Both the ABA and Steiger proposals concerned economic factors, not ideological disputes.

In September of 1970 the entire House Judiciary Committee favorably reported Senate Bill 30 with amendments to the House.<sup>42</sup> One of the amendments was the treble damages private right of action. Another important amendment related to control of explosives.<sup>43</sup> This amendment, which became title XI of the OCCA, initiated new licensing requirements for users of explosives, enhanced penalties for intentional misuse of explosives, and made it a criminal violation to bomb federal property and the property of recipients of federal financial assistance such as universities, hospitals, and police stations.<sup>44</sup> Title XI provided for capital punishment if the bombing resulted in death. The Committee underscored the need for explosives control as follows: "Bombings and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation. The absence of any effective [s]tate or local controls clearly attest[s] to the urgent need to enact strengthened [f]ederal regulation of explosives."<sup>45</sup>

Because the bombing crimes were part of the same law as RICO, it would have been natural to make bombing a RICO predicate act if the

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39. *Id.* at 106. To support the proposition that S. 30 was urgently needed, Senator McClellan again used the familiar survey results which showed that of 113 major criminal figures, 98 were involved in 159 businesses, including hotels, banks, and laundries. *See supra* notes 31-32 and accompanying text. The Senator advocated passage of RICO on economic terms. *See House Hearings, supra* note 37, at 106. Similarly, Attorney General John Mitchell supported RICO because it "will enable us to use the full panoply of weapons available under the antitrust laws to attack the 'property' of organized crime, and to protect legitimate businesses against the syndicates' infiltration." *Id.* at 157.

Additionally Attorney General Mitchell stated that "[t]he proposal appears to cover most of the methods through which La Cosa Nostra customarily infiltrates and operates legitimate business enterprises." *Id.* at 170.

40. *House Hearings, supra* note 37, at 520. Representative Steiger specifically stated, "Not every businessman . . . will wish to take advantage of such a remedy, but those who have been wronged by organized crime should at least be given access to a legal remedy." *Id.*

41. *Id.* at 543-44. Apart from the written statements of Representative Steiger and the ABA, the hearing record contains no further consideration of the treble damages private right of action.

42. *See H.R. REP. No. 1549, 91st Cong., 2d Sess. 1, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4012.*

43. *Id.* at 24, *reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS* at 4013.

44. *Id.* at 28, *reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS* at 4013-14; *see also OCCA, supra* note 4, tit. XI, 84 Stat. at 952.

45. *H.R. REP. No. 1549, supra* note 42, at 37, *reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS* at 4013.

purpose of RICO were to punish heinous or outrageous crimes. RICO, however, was aimed at economically motivated crime committed by members of organized crime.<sup>46</sup> Bombing, in contrast, was political, and disorganized crime. The bombing that concerned Congress was done by opponents of the Vietnam conflict and urban radicals.<sup>47</sup> Title XI crimes were not made RICO predicate acts, and several members of the House elaborated on the reasons behind the distinction.<sup>48</sup> Thus, Congress clearly indicated RICO's intent was to curb organized crime engaged in for profit. It dealt with the pressing noneconomic crime of terrorist bombings in a separate title of the OCCA.

Any reach of RICO beyond organized crime was incidental at best.<sup>49</sup> Even this incidental reach, however, was limited by an economic factor. The failure to include bombing as a RICO predicate shows that violence with no economic motivation or purpose was not meant to be within either the direct or incidental reach of RICO. People who engaged in bombing were hot-headed anarchists, not the cool-headed businessmen of crime.<sup>50</sup> There is no indication that Congress intended RICO to reach noneconomic crimes. Indeed, the inclusion of bombing in

46. See *supra* note 34 and accompanying text. Senator McClellan said that organized crime was heinous and for profit.

47. 116 CONG. REC. 35,319 (1970) (remarks of Rep. William Roth).

48. During floor debate Representative Fernand J. St. Germain explained the reason: The House version of Senate Bill 30 contains a new Title XI, Regulation of Explosives, which is an antibombing rather than an antiorganized crime law. . . . Hopefully, a major effect of this legislation will be to deter both the cold-blooded businessmen of crime and hot-headed anarchists from further activity.

*Id.* at 35,200. Representative Richard H. Poff, the chief House sponsor of the Bill, also stressed the differences between bombing and organized crime:

The bill contains 13 titles. These can be classified in 5 operative categories—evidence, gambling, racketeer organizations, special offender sentencing, and explosives . . . . The fifth operative category concerning explosives, found in title XI, is not restricted to organized crime. It is prompted by the national emergency of criminal bombings brought into dramatic focus by the recent tragedy at the University of Wisconsin.

*Id.* at 35,200-01. Representative Broomfield said that the bombings were "an area unrelated to organized crime." *Id.* at 35,312. Another congressman noted the political character of bombings:

Student disorders have become a concern for all of us. The activities of a small group of activists are jeopardizing the safety and education of the majority of students . . . . The use of bombs and bombings as a tool of demonstration has instead become a tool of death, as witnessed at the University of Wisconsin.

*Id.* at 35,206 (statement of Rep. Donald D. Clancy).

49. *Id.* at 35,344 (statement of Rep. Richard H. Poff). The incidental reach of RICO was inevitable because Congress did not want to pass an unconstitutional law based on status (membership in the Mafia). See, e.g., *Noto v. United States*, 367 U.S. 290 (1961); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Therefore, Congress had to define organized crime indirectly: functionally by what people did, not by who they were. The functional definition brought in, secondarily, people who were not members of organized crime but who engaged in activities characteristic of organized crime. See ABA RICO REPORT, *supra* note 12, at 90.

50. See *supra* note 48 and accompanying text.

the OCCA, but not as a RICO predicate, strongly indicates that crimes not undertaken for profit were not meant to be covered by RICO.<sup>51</sup>

### III. THE RICO STATUTE

RICO is both a criminal and a civil statute. In trying to forge an effective weapon against organized crime in civil RICO, Congress tilted the adversarial scales toward the plaintiff.<sup>52</sup>

#### A. *Advantages of RICO for Plaintiff*

Civil RICO has several advantages over criminal law. No indictment is necessary before a plaintiff brings an action under the civil provisions of RICO. No prosecutorial discretion is required. To prevail in a civil RICO action, plaintiffs must prove their claims by a preponderance of the evidence, a certainly less demanding level of proof than "clear and convincing" or the normal criminal standard of "beyond a reasonable doubt."<sup>53</sup> RICO denies the defendant criminal law's heightened burden of proof and its procedural protections.<sup>54</sup> For example, the

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51. The OCCA, with the addition of a bombing title and a treble damages private right of action under the RICO title, was passed by the House on Oct. 7, 1970. See 116 CONG. REC. 35,363 (1970). The Bill was sent to the Senate where Senator McClellan, characterizing the House amendments, including the private right of action, as relatively minor, argued that a conference would be too time consuming and urged the Senate to pass the House version of the Bill. *Id.* at 36,295. The Senate passed the Bill, and President Richard M. Nixon signed it three days later on Oct. 15, 1970. See OCCA, *supra* note 4, 84 Stat. at 922.

Justice Thurgood Marshall summarized the legislative history of RICO as follows:

Moreover, if Congress had intended to bring about dramatic changes in the nature of commercial litigation, it would at least have paid more than cursory attention to the civil RICO provision. This provision was added in the House of Representatives after the Senate already had passed its version of the RICO bill; the House itself adopted a civil remedy provision almost as an afterthought; and the Senate thereafter accepted the House's version of the bill without even requesting a Conference. Congress simply does not act in this way when it intends to effect fundamental changes in the structure of federal law.

*Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 507 (1985) (Marshall, J., dissenting) (citations omitted).

52. See *Hearings on H.R. 1046 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *H.R. 1046 Hearings*] (hearings not officially printed as of current date) (statement of Jed S. Rakoff). Mr. Rakoff stated:

RICO does this, primarily, by permitting huge and disproportionate penalties to be predicated upon frequently trivial offenses. For example, on the civil side, it is well known that even minor deviations from the most upright business conduct can satisfy the technical elements of the expansive federal mail and wire fraud statutes and thus form the predicate for private RICO actions demanding huge monetary damages. On the criminal side, the forfeiture and pre-trial seizure provisions of RICO can effectively deprive a defendant not only of his counsel of choice but of the means to fund any effective defense.

*Id.*

53. See CRIMINAL DIV., U.S. DEP'T OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS 16 (1988) [hereinafter *CIVIL RICO MANUAL*].

54. *Id.* at 17.

pleading requirements under civil RICO are more liberal than a criminal law indictment.<sup>55</sup> Also, if a civil RICO defendant invokes the fifth amendment privilege against self-incrimination, a negative inference may be drawn at trial.<sup>56</sup> Furthermore, civil RICO does not require a conviction of the underlying predicate activities.

The RICO statute makes four types of conduct unlawful and subject to civil RICO. Generally, it is unlawful to: (a) use or invest income derived from a pattern of racketeering to acquire an interest in an enterprise; (b) acquire or maintain an interest in any enterprise through a pattern of racketeering activity; (c) conduct or participate in the affairs of an enterprise through a pattern of racketeering activity; or (d) conspire to violate any of the foregoing provisions.<sup>57</sup> The vast majority of both civil and criminal RICO cases involve (c) and (d), above.<sup>58</sup>

To prove a violation of section 1962(c), the most commonly used provision, the following elements must be shown: (1) that an enterprise exists; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant participated either directly or indirectly in the conduct of the affairs of the enterprise; and (5) that the defendant participated through a pattern of racketeering activity.<sup>59</sup> The statute defines pattern of racketeering activity as the commission of at least two racketeering acts.<sup>60</sup>

### B. Court Interpretation of Key Statutory Terms

Legislative history shows that Congress meant to limit the applicability of RICO by using the terms "enterprise," "pattern," and "racketeering activity."<sup>61</sup> Courts, however, have interpreted these terms so expansively that their limitation is slight.<sup>62</sup>

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55. *Id.*

56. *Id.* at 18.

57. 18 U.S.C. § 1962 (1988).

58. See *H.R. 1046 Hearings*, *supra* note 52 (statement of Prof. Gerard E. Lynch).

59. See *United States v. Kopituk*, 690 F.2d 1289, 1323 (11th Cir. 1982).

60. 18 U.S.C. § 1961(5) (1988).

61. ABA RICO REPORT, *supra* note 12, at 71-72. Also, in *Sedima, S.P.R.L. v. Imrex Co.*, Justice Thurgood Marshall concluded:

The statutory language and legislative history support the view that Congress did not intend to effect a radical alteration of federal civil litigation. In fact, the language and history indicate a congressional intention to limit, in a workable and coherent manner, the type of injury that is compensable under the civil RICO provision . . . Congress sought to fill an existing gap in civil remedies and to provide a means of compensation that otherwise did not exist for the honest businessman harmed by the economic power of "racketeers." 473 U.S. 479, 508 (1985) (Marshall, J., dissenting).

62. See, e.g., *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2900 (1989) (for "pattern"); *Sedima*, 473 U.S. at 495 (for "racketeering injury"); *United States v. Turkette*, 452 U.S.

The Supreme Court has had ample opportunity to limit RICO to its intended scope and has declined repeatedly to do so. In each case RICO has been interpreted expansively, and these decisions have discouraged lower courts from limiting RICO. The High Court has interpreted the key statutory terms "enterprise," "racketeering activity," and "pattern" in a way that greatly expands the applicability of RICO, instead of narrowing it. Coupled with the expansion of mail and wire fraud and extortion as RICO predicates,<sup>63</sup> situations far removed from those envisioned by Congress in 1970 now fall within RICO's ambit.<sup>64</sup> If

576, 587 (1981) (for "enterprise").

63. 18 U.S.C. § 1961(1)(B) (1988); see Fasman, *The Proper Application of Civil RICO to Patent Fraud*, 96 YALE L.J. 1323, 1325 (1987).

64. In *Turkette* the Court was presented with the question of what kind of enterprise was covered by RICO. The circuits had been split on the question of whether exclusively criminal groups were covered by the statutory definition of enterprise. See *Turkette*, 452 U.S. at 581-85. The *Turkette* Court held that both legitimate and criminal enterprises were covered. *Id.* at 587.

The Court began its analysis by stating the rule of statutory construction, that when the meaning of the statute's words is clear, the statutory language is conclusive. *Id.* at 580. The Court noted that:

[t]he "enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope.

*Id.* (citation omitted) (quoting 18 U.S.C. § 1961(4) (1988)). *Sedima* involved two corporations that had been partners in a joint venture. One corporation claimed that the other had unjustly enriched itself by overbilling—a fairly typical commercial dispute. Plaintiff corporation, however, alleged mail and wire fraud and conspiracy to violate RICO. *Sedima*, 473 U.S. at 484. The Second Circuit had held that the plaintiff had not shown the requisite "racketeering type" injury under RICO. *Id.* at 485. The Supreme Court, however, declined to limit the statute's scope, and urged lower courts to interpret RICO literally and to refrain from imposing limits on the statute. *Id.* at 495. It reversed the Second Circuit, giving the statutory terms racketeering activity and injury an expansive reading. *Id.* at 500. The Court held:

If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

*Id.* at 495.

Voicing recognition that RICO, in its private civil version, has evolved into something manifestly askew from the original conception of its creators, the Court nevertheless deferred to the wisdom of Congress to correct the statutory inadequacies. *Id.* at 499-500. The Court opined that "this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it. . . ." *Id.* In his dissent, Justice Marshall examined the legislative history carefully and found that RICO was intended to focus on organized crime, not on commercial disputes. See *supra* note 61.

With *Turkette* defining enterprise to mean almost anything and *Sedima* defining pattern of racketeering activity to mean a violation of the predicate acts, only the key statutory definition of "pattern" remained. The Supreme Court addressed the pattern definition in *H.J. Inc.*, 109 S. Ct. at 2893.

The Court started with the assumption that the legislative purpose is expressed by the ordi-

two people commit, attempt, or conspire to commit at least two predicate acts within ten years, RICO applies.<sup>65</sup>

In *Turkette*, *Sedima*, and *H.J. Inc.*, the Supreme Court declined to interpret the legislative history to limit the meaning of the OCCA or to narrow RICO. Because the Court has not been faced with noneconomic defendants, the question of whether noneconomic defendants are subject to RICO still must be considered open. Nevertheless, the general unwillingness to look at legislative history, the reliance on the plain meaning of the terms of the statute, and the denial of certiorari in *Northeast Women's Center v. McMonagle*,<sup>66</sup> do not inspire confidence that the Court will hold that RICO does not apply to noneconomic defendants.

#### IV. RICO PREDICATE ACTS

Under RICO the plaintiff must establish a "pattern" of "racketeering activity" that requires commission of, or conspiracy to commit, at least two predicate crimes within a ten-year period.<sup>67</sup> Racketeering activity is any act listed in section 1961(1). Commission of two of these crimes or one crime two times by a defendant constitutes a pattern and RICO applies. The crimes are referred to as predicate acts, and RICO has both federal and state predicates. Congress frequently has expanded the number of predicate acts that trigger RICO applicability.<sup>68</sup>

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nary meaning of the words used. In its ordinary meaning pattern means more than a multiplicity of predicate acts. "A 'pattern' is an 'arrangement or order of things or activity.'" *Id.* at 2900 (quoting 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)). Looking at the legislative history, the Court held that a prosecutor must show that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity. *Id.* Continuity plus relationship equals pattern. *Id.* The Court further defined the terms relationship and continuity. Relationship was defined by reference to another part of the OCCA, title X, as "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 2901 (quoting 18 U.S.C. § 3575(e) (1988)).

The Court could not define continuity by reference to contemporaneous legislation. It defined continuity as both a "closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept. . . ." *Id.* at 2902 (citation omitted).

Justice Antonin Scalia, in a concurring opinion, noted the great splits between the circuits after *Sedima* as to the meaning of pattern. He stated that the majority formulation of "continuity plus relationship" in *H.J. Inc.* would be about as helpful to lower courts as the phrase "life is a fountain." *Id.* at 2907 (Scalia, J., concurring).

65. See generally Lynch, *supra* note 6, at 713-14.

66. 868 F.2d 1342 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989); see *infra* note 107.

67. 18 U.S.C. § 1961(5) (1988).

68. In 1978 trafficking in contraband cigarettes was added. Act of Nov. 2, 1978, Pub. L. No. 95-575, § 2346, 92 Stat. 2463, 2465-66 (codified as amended at 18 U.S.C. § 1961(1)(B) (1988)). Also in 1978 the term "bankruptcy fraud" was replaced by "fraud connected with a case under title 11." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 151, 92 Stat. 2549, 2677 (codified as

Predicate acts include such traditional organized crime activities as murder and arson and nontraditional organized crimes such as mail and wire fraud, and fraud in the sale of securities.<sup>69</sup> Attempts and conspiracies to violate these laws can be pleaded as separate RICO predicates.<sup>70</sup> RICO also includes any act or threat involving murder, kidnapping, arson, gambling, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotics or dangerous drugs that is chargeable under state law and is punishable by at least one year in prison.<sup>71</sup>

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amended at 18 U.S.C. § 1961(1)(B) (1988)). Congress added any act indictable under the Currency and Foreign Transactions Reporting Act in 1984. Crime Control Act, Pub. L. No. 98-473, § 5323, 98 Stat. 1838, 2136 (1984) (codified as amended at 18 U.S.C. § 1961(1)(B) (1988)). Congress also added interstate transportation of stolen motor vehicles, trafficking in certain motor vehicles or motor vehicle parts, Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, § 205, 98 Stat. 2754, 2770 (codified as amended at 18 U.S.C. § 1961(1)(B) (1988)), and laundering of monetary instruments, and engaging in monetary transactions in property derived from specified unlawful activities. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1352, 100 Stat. 3207, 3207-20 (codified as amended at 18 U.S.C. § 1961(1)(B) (1988)). Later in 1986 two more predicate acts were added—tampering with a witness, victim, or an informant and retaliating against a witness, victim, or an informant. Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 50, 100 Stat. 3592, 3605 (codified as amended at 18 U.S.C. § 1961(1)(B) (1988)). On Nov. 18, 1988, Congress added use of interstate commerce facilities in the commission of murder-for-hire, sexual exploitation of children, and fraud and related activity in connection with access devices. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7054, 102 Stat. 4181, 4402 (codified as amended at 18 U.S.C. § 1961(1)(B) (1988)).

69. Hobbs Act extortion is a traditional activity of organized crime. Applicability has been expanded greatly to include much activity outside the traditional parameters of extortion. See *infra* notes 79-80 and accompanying text.

Even if the alleged criminal conduct is specifically covered by a law, like the False Claims Act, or the securities law, it can be plead, and often is plead, under a more general RICO predicate, like mail fraud. See, e.g., *United States v. Hartley*, 678 F.2d 961, 990 n.50 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

70. See U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 73 (rev. ed. 1986) [hereinafter DOJ CRIMINAL MANUAL].

71. 18 U.S.C. § 1961(1)(A) (1988). A state offense may be charged as a RICO predicate even if the defendant could not be tried in state court at the time of the RICO indictment. Indeed, prior acquittal in state court does not bar use of the act as a RICO predicate. Attempts and conspiracies to commit the generic state acts can be separate RICO charges. See *United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

The penalties for RICO violations include fines, imprisonment, and forfeiture. The maximum penalty for violation of any provision of § 1962 is imprisonment for 20 years, a fine under the provisions of title 18, or both. 18 U.S.C. § 1963(a) (1988). Furthermore, consecutive sentences for violation of the substantive provisions and the conspiracy provision are allowed. See *United States v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

Several of the predicate acts pose civil liberties problems in their own right. The most prominent are extortion,<sup>72</sup> mail and wire fraud,<sup>73</sup> and obscenity.<sup>74</sup>

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72. Extortion is a federal predicate under the Hobbs Act, 18 U.S.C. § 1951(a) (1988). State extortion laws that call for a maximum penalty of one year are also RICO predicates. These state extortion laws vary greatly in what actions are criminalized. See 2 W. LAFAYE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 8.12(a) (1986).

73. Because the language of the mail and wire fraud statutes are identical, they are analyzed in the same way. See *United States v. Carpenter*, 484 U.S. 19 (1987). To prove fraud, the common law required an affirmative misrepresentation of a material fact made with knowledge of its falsity and with intent to deceive upon which another relied to his or her actual injury. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 727-29 (5th ed. 1984). Mail fraud is much easier to prove. "In general, and in its generic sense, fraud comprises all acts, conduct, omissions and concealment involving breach of a legal or equitable duty and resulting in damage to another." *Isaacs v. United States*, 301 F.2d 706, 713 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962). The damage that must be shown may be intangible loss. A mail fraud based RICO claim would be easy to make. The example is as follows: (1) The defendant recklessly failed to state a fact that might have deceived someone;(2) in furtherance of this deception, the defendant sent two mailings; and (3) this fraud injured plaintiff's business or property. Note that a RICO civil recovery would require a showing of actual damage. See *Fasman*, *supra* note 63, at 1328. For application of mail fraud to abortion clinic protesters, see *infra* notes 125-34 and accompanying text.

The use of mail fraud as an omnibus criminal law to punish various types of behavior repugnant to the government has earned the statute much criticism. The Department of Justice has suggested to federal prosecutors that they must be more selective in using the mail fraud predicate:

Because of legitimate concerns about the possible overuse of mail fraud to generate RICO cases out of relatively minor conduct, some policy limitations have been imposed on its use as a predicate offense. First, the use of mail fraud as a predicate is not generally encouraged, particularly in cases where no other predicate crimes are charged, or where the conduct can be more accurately charged under some other RICO predicate offense, such as a state bribery statute.

DOJ CRIMINAL MANUAL, *supra* note 70, at 13. Civil plaintiffs, however, have no concern with prosecutorial discretion, and have availed themselves of mail fraud's enormous reach. See *infra* notes 125-34 and accompanying text.

74. Dealing in obscene materials was added as a RICO predicate act in 1984. Pub. L. No. 98-473, tit. II, §§ 901(g), 1020, 98 Stat. 2136, 2143 (1984) (codified at 18 U.S.C. § 1961(1)(A)-(1)(B) (1988)). There are serious civil liberties concerns with using obscenity as a RICO predicate act. They are: (1) pretrial seizure of assets; and (2) posttrial seizure of assets. Seizing the assets of an enterprise merely upon an indictment for a RICO violation is now widespread practice. See *Coffee*, *Is Innocence Irrelevant? Under RICO, Trials Have Become Secondary*, *LEGAL TIMES*, Mar. 13, 1989, at 20, col. 1. An indictment is merely an accusation and is supposed to carry no burden of guilt. The accused is presumed innocent, and the government bears the burden of proving guilt beyond a reasonable doubt. RICO turns that basic principle of American justice on its head. A person is indicted and then, before trial, the defendant's assets are seized or frozen. When the defendant is a person who sells material that is otherwise protected by the first amendment, pretrial seizure of assets can be a prior restraint. In *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989), the Supreme Court held that seizure of all of a bookseller's stock on the grounds that some of the books were obscene was a violation of the doctrine of prior restraint and of the first amendment. *Id.* at 927-30. Also, preconviction seizure is especially problematic because it can affect the right to hire an attorney. Title to property obtained as a result of a crime vests in the government at the time of the violation. 18 U.S.C. § 1963(c) (1988). Thus, prior to commencement of a trial, a prosecutor could obtain a restraining order that would deny defendants access to funds with which



Mail fraud provides a good example of the combination of RICO's comprehensive reach with an underlying predicate act that has been expanding exponentially. This expansion has resulted in criminalizing and harshly punishing conduct that would be lightly punishable at best under state criminal law.<sup>76</sup> The Supreme Court narrowed the reach of mail fraud in *United States v. McNally*,<sup>76</sup> but Congress passed legislation restoring mail fraud's original reach.<sup>77</sup>

to defend themselves.

The issue of postconviction seizure has not been settled. Are booksellers to lose all of their books because a few titles are obscene? If one store has some obscene material, will the defendant forfeit his or her interest in all other stores? Do the same standards apply to businesses that sell films or records? The bookseller or other defendant may be subject to two novel remedies authorized by RICO. The first permits forfeiture of interests obtained through violations of RICO, property that gives the defendant a source of influence over the RICO enterprise and any direct or indirect proceeds from the racketeering activity. 18 U.S.C. § 1963(a) (1988). For RICO's application to obscenity, see Melnick, *A "Peep" at RICO: Fort Wayne Books v. Indiana and the Application of Anti-Racketeering Statutes to Obscenity Violations*, 69 B.U.L. REV. 389 (1989).

75. See, e.g., *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980). *Mandel* involved a prosecution of the Governor of Maryland for racketeering. The Governor had accepted money from owners of a racetrack and taken legislative positions that were favorable to the racetrack owners. *Id.* at 1352-53. The government could not prove, and did not have to prove, that there was a connection between the Governor's stand on the issues and receipt of the money. All the government showed was that the Governor had failed to disclose to the people of Maryland all material issues involving state government. This failure to disclose was held to be a scheme to defraud the people. *Id.* at 1361-62. As the Court said: "[T]he mail fraud statute generally has been available to prosecute a scheme involving deception that . . . is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing." *Id.* at 1361; see also *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983). In *Margiotta* the Second Circuit went further, upholding the mail fraud conviction of a Republican Party county chairman who failed to disclose that he had received money from brokers who did business with the county. The chairman used the money for the party, not himself. Nevertheless, the court held that he had breached the fiduciary duty that he owed the public. Margiotta's argument that he never knew that he was in a fiduciary capacity with the public as a whole was not persuasive. *Id.* at 123-26.

Used as a predicate act of RICO, mail fraud is so broad that it punishes under a harsh federal law conduct that the state has declined to criminalize. See *United States v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989). In *Porcelli* defendant filed false tax returns, neglecting to pay \$5 million in state sales tax. At the time Porcelli violated RICO, filing a false state sales tax return was not a felony. The taxpayer most likely would be subject to a civil penalty. In amending the statute after the false filings, the New York legislature declined to make false filing a felony. See *id.* at 1367 & n.1 (Newman, J., dissenting). The United States attorney prosecuted Porcelli under the mail fraud statute. Each tax return was a separate violation, aggregating to a violation of RICO. Porcelli was sentenced to prison, and because of the draconian forfeiture provisions of RICO, forfeited many business interests, for a total loss of approximately \$5 million. *Id.* at 1355.

The Second Circuit affirmed the conviction, and stated:

[T]he prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at the time that the fraudulent returns were filed. We nevertheless affirm the convictions . . . by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute. . . .

*Id.*

76. 483 U.S. 350 (1987).

77. Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (1988). The wire fraud statute prohibits the

Like mail fraud, extortion is a rapidly expanding predicate act that produces troubling results.<sup>78</sup> For example, the Hobbs Act now covers attempts to extort intangible property rights.<sup>79</sup> Because rights involving the conduct of business are property rights, any demonstration that interrupts the normal conduct of business could lead to a RICO allegation of extortion.<sup>80</sup>

## V. FIRST AMENDMENT PROBLEMS WITH RICO

### A. Abortion Clinic Demonstrators and Their Methods

This section will describe some of the methods used by abortion opponents in their activities. If antiabortion demonstrations cause loss of tangible or intangible property, the demonstrators may be subject to a RICO lawsuit. Antiabortion mailings also can lead to RICO lawsuits because mail fraud is a RICO predicate, and mail fraud can be shown by proving deception that causes loss. This section will examine whether such words and deeds are protected by the first amendment, whether these words and deeds violate RICO, and whether the application of RICO to abortion clinic demonstrators violates or impinges upon first amendment rights.

use of interstate wires for the purpose of executing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. § 1343 (1988). Until the Supreme Court's decision in *McNally*, every court of appeals to consider the question had read the language of the wire and mail fraud statutes in the disjunctive; a conviction required proof of either a scheme to defraud or a scheme for obtaining money or property by means of false or fraudulent pretenses. *See, e.g.*, *United States v. Berg*, 710 F. Supp. 438, 440 n.2 (E.D.N.Y. 1989). Proof of a scheme to defraud did not require proof of actual loss of money or tangible property. *Id.* at 441 n.3.

78. *See, e.g.*, *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973). The Fifth Circuit reasoned that:

It has been held that to prove an attempt to extort it is necessary to show an attempt to arouse fear. The threats to Bryan, the breaking of the camera store window, and the assault upon Eggers have all the earmarks of a design to instill fear in both men.

Obviously the extortion here involved was concerned with business accounts and with unrealized profits from those accounts. Such intangible property has been held to be included within those rights protected by the Act.

*Id.* at 343-44.

79. The Hobbs Act was passed in 1946 to curb labor racketeering that had been widespread in the 1930s. *See United States v. Brecht*, 540 F.2d 45 (2d Cir.), *cert. denied*, 429 U.S. 1123 (1976). The Hobbs Act reads, in part, as follows:

Whoever in any way . . . obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . . or imprisoned . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear. . . .

18 U.S.C. § 1951(a), (b)(2) (1988).

80. *See infra* notes 135-41 and accompanying text.

Many abortion opponents believe that abortion is murder, and some believe that they are doing God's will by trying to stop abortion. Because they believe they are following a higher law,<sup>81</sup> and because they believe they are saving human life, some lawlessness is condoned by antiabortion groups.<sup>82</sup> One antiabortion leader explicitly approves of trespass in demonstrations at abortion clinics.<sup>83</sup> Antiabortion demonstrators also write letters to newspapers and publish circulars, newsletters, and books stating their views. Leaders of the movement make videotapes expressing their views. They also form organizations to promote the antiabortion cause. Opponents of abortion picket outside abortion clinics; make speeches outside clinics; and engage in "sidewalk counseling." Sidewalk counseling involves approaching patients of the clinics (often women seeking abortions) offering information about abortions and attempting to persuade them not to get an abortion. This discussion can contain utterances that are offensive and obnoxious to the patients.<sup>84</sup> Phrases such as "please don't kill your baby today," make patients nervous and uncomfortable. Sidewalk counseling can be delivered in a loud and harassing way at close proximity to the patient.<sup>85</sup> Antiabortion demonstrators also chant sayings at regular intervals, chants that often can be heard inside the clinics. Demonstrators may make offensive comments to clinic staff and demonstrators.

Demonstrators also make many hang-up calls, occupying the phone lines and not allowing patients to contact the clinic.<sup>86</sup> They have made appointments at clinics to receive medical treatment with no intention of receiving treatment, but rather to make the times unavailable for legitimate patients.<sup>87</sup> Demonstrators block entrances and exits from clinics and from clinic parking lots.<sup>88</sup> Abortion foes have tried to deny hospital privileges to doctors who perform abortions. They talk to landlords of clinics trying to persuade them not to rent to clinics. Abortion activists trespass on clinic property,<sup>89</sup> destroy or steal medical equip-

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81. *Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. & 2d Sess. 61, 63 (1987) [hereinafter *Clinic Violence Hearings*].

82. *See id.* at 66 (statement of Joseph Scheidler, Executive Director of the Pro-Life Action League). Mr. Scheidler testified "when the laws allow the killing of innocent human beings, we will change those laws. And until we change those laws, we will find ways to get around them." *Id.*

83. *Id.* at 61. Although trespass is condoned by Mr. Scheidler, other forms of lawlessness are not. He testified that he tells his members, "Never touch anybody, never stop anybody, never stand in front of anybody." *Id.*

84. *See infra* note 122 and accompanying text.

85. *See infra* note 122 and accompanying text.

86. *See infra* note 130 and accompanying text.

87. *See infra* note 130 and accompanying text.

88. *See infra* note 129 and accompanying text.

89. *See infra* note 114 and accompanying text.

ment from the clinic,<sup>90</sup> and set clinics on fire and bomb them.<sup>91</sup>

### B. Protected Activities and Unprotected Activities

The Constitution protects peaceful assembly, even if members of the assembly commit crimes in other contexts.<sup>92</sup> Assembly is an integral part of the freedoms guaranteed by the first amendment, and association as part of that freedom also is protected.

Picketing is a protected first amendment right. This activity may not be punished even when its purpose is to encourage others to take action that is harmful to the target of the picketing.<sup>93</sup> Marches and demonstrations are quintessential first amendment activities.<sup>94</sup> Even when state officials tell demonstrators that they have no right to demonstrate on the grounds of the state capitol, and that it is unlawful to do so, such activity is protected under the first amendment.<sup>95</sup>

Obnoxious and harassing speech is protected.<sup>96</sup> Indeed, the Court repeatedly has held that statutes which punish speech or conduct solely because it is offensive or unseemly are constitutionally overbroad.<sup>97</sup> Coercive speech also is protected. In *Organization for a Better Austin v. Keefe*<sup>98</sup> the Supreme Court held that the first amendment protected a community organization which distributed handbills criticizing the business practices of a real estate broker engaged in blockbusting.<sup>99</sup> Similarly, in *NAACP v. Button*<sup>100</sup> the Court overturned a Virginia state

90. See *infra* note 115 and accompanying text.

91. See *infra* notes 125-26 and accompanying text.

92. U.S. CONST. amend. I; see, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

93. See *Thornhill v. Alabama*, 310 U.S. 88 (1940). But see *Frisby v. Shultz*, 487 U.S. 474 (1988) (upholding a town ordinance prohibiting mass picketing at one particular house).

94. See *Edwards v. South Carolina*, 372 U.S. 229 (1963).

95. This activity is demonstrating in a public forum. Demonstrating on private property lacks constitutional protection. Indeed, such demonstrating may violate the Constitution's guarantees of privacy. Recently, demonstrations in quasi-public forums have been curtailed. See L. TRIBE, *CONSTITUTIONAL LAW* § 12-24 (2d ed. 1988).

96. See *Street v. New York*, 394 U.S. 576 (1969). The Supreme Court stated: "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 592.

97. See, e.g., *Houston v. Hill*, 482 U.S. 451 (1987).

98. 402 U.S. 415 (1971).

99. The Court specifically held:

In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to "force" respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the first amendment. Petitioners plainly intended to influence respondent's conduct by their activities. . . .

*Id.* at 419.

100. 371 U.S. 415 (1963).

statute that prohibited the solicitation of legal business, holding that vigorous advocacy was a right guaranteed by the first amendment.<sup>101</sup>

In summary, the antiabortion protestors say that they are engaged in vigorous advocacy, protected by the first amendment. Some activities plainly are not covered by the first amendment, no matter the expressive political content of those acts. Acts of bombing and arson are not protected.<sup>102</sup> Similarly, activities like hang-up calls and making false appointments are not protected by the first amendment.<sup>103</sup> Trespass is not constitutionally protected although it can be a powerful expressive vehicle.<sup>104</sup> Trespass is often a public flouting of authority meant to show that the trespasser is so fervent that he or she is willing to risk legal sanctions. Is RICO properly applicable to the spectrum of demonstrator activities? At one end of the spectrum is pure speech, to which RICO cannot apply. At the other end is conduct unprotected by the first amendment like bombing.<sup>105</sup> In the middle, there is mixed conduct. This category includes both protected and unprotected conduct. Should civil RICO apply to mixed conduct? The answer is no. Civil RICO would chill protected speech.

## VI. THREE EXAMPLES OF RICO AND ABORTION PROTESTORS

Private plaintiffs use RICO against defendants who are protesting against plaintiffs' businesses. Thus far, the use of RICO against political protestors has been mainly in the abortion area. Recently, however, an expansion of RICO's use has occurred. *Playboy* and *Penthouse* magazines have brought separate suits against the American Family Association, an antipornography group.<sup>106</sup>

### A. Northeast Women's Center, Inc. v. McMonagle

The abortion area, however, remains the most controversial. The most completely litigated case is *Northeast Women's Center, Inc. v.*

101. The Court stated: "We meet at the outset the contention that 'solicitation' is wholly outside the area of freedoms protected by the First Amendment. . . . [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429.

102. See *infra* notes 125-26 and accompanying text.

103. These activities have little of the expressive content traditionally at the center of the first amendment.

104. See *infra* note 184 and accompanying text.

105. See *infra* note 177 and accompanying text.

106. *Penthouse Int'l, Ltd. v. American Family Ass'n of Fla., Inc.*, No. 89-2526 (D. Fla. filed Nov. 14, 1989); *Walden Book Company, Inc. v. American Family Ass'n of Fla., Inc.*, No. 89-2426 (D. Fla. filed Oct. 31, 1989). The suits are nearly identical. They charge the American Family Association with federal and state extortion violations for threatening to label the magazines publicly as obscene.

*McMonagle*,<sup>107</sup> which upheld the use of RICO against abortion protesters. In their amended complaint, plaintiffs accused defendants of violating RICO by engaging in mail and wire fraud, extortion, and robbery.<sup>108</sup> The complaint named forty-two defendants.<sup>109</sup> At the close of the three-week trial, the district court directed a verdict in favor of defendants on the Sherman Act charge, but sent the remaining RICO trespass<sup>110</sup> and intentional interference with contract claims<sup>111</sup> to the jury. The trial court found that patients and employees had been put in

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107. 624 F. Supp. 736 (E.D. Pa. 1985) (*McMonagle I*), vacated and remanded, 813 F.2d 53 (3d Cir. 1987), on remand, 665 F. Supp. 1147 (E.D. Pa. 1987) (*McMonagle II*); 670 F. Supp. 1300 (E.D. Pa. 1987) (*McMonagle III*); 689 F. Supp. 465 (E.D. Pa. 1988) (*McMonagle IV*), modified, 868 F.2d 1342 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989).

108. Plaintiffs also alleged violation of the antitrust provisions of the Sherman Act. *McMonagle I*, 624 F. Supp. at 738. Specifically, plaintiffs claimed that a trespass on Aug. 10, 1985, had resulted in thirteen acts of robbery, a crime punishable by imprisonment for over one year in Pennsylvania, and therefore a RICO predicate act. Second, plaintiffs alleged that defendants had engaged in a conspiracy to destroy plaintiffs' business by putting plaintiff, its employees, and patients in fear. In the plaintiff corporation's case, the fear was of economic injury from unlawfully inducing plaintiff to curtail its business. *Id.*

Plaintiffs claimed that such conduct violated the Hobbs Act, another RICO predicate. Because two predicates had been committed, robbery and Hobbs Act extortion, plaintiffs concluded that defendants were participating or conducting an enterprise through a pattern of racketeering activity in violation of RICO. *Id.*

109. Plaintiffs charged all 42 defendants with violation of the Racketeer Influenced and Corrupt Organizations Act. All 42 plaintiffs moved to dismiss the RICO claim under Fed. R. Civ. P. 12(b)(6). In October 1985 the Court denied the motions stating "it cannot be said that no set of facts proven in relation to the plaintiff's complaint could result in liability for the defendants under RICO, thus, the plaintiff's RICO count will not be dismissed." *McMonagle I*, 624 F. Supp. at 738. All 42 defendants had to go through the discovery process. Of these 42 defendants, 11 were dismissed by plaintiffs shortly before and shortly after the start of the trial. See *McMonagle II*, 665 F. Supp. at 1150 n.1.

Thirty-one defendants went through the entire trial. At the end of the trial in May 1987, four of the 31 defendants were granted a directed verdict because the only reasonable conclusion was that these four defendants had not violated RICO. See *id.* The remaining 27 defendants were found by the jury to have violated RICO. In March 1988 the court granted one defendant judgment notwithstanding the verdict, because the evidence did not support the jury verdict finding this sole defendant liable. See *McMonagle IV*, 689 F. Supp. at 476. Of the total of 42 defendants named in the complaint, 15 were found to have been innocent of racketeering charges. See *id.* at 467. Stricter pleading requirements would have prevented the naming of many of these 15 as defendants.

110. The four extortions alleged were robbery, extortion of the Center's right to do business, extortion of employees' contract rights to employment, and extortion of patients' rights to receive medical services from the Center. *McMonagle III*, 670 F. Supp. at 1303.

111. The court submitted plaintiff's RICO claim to the jury only with respect to those defendants who had trespassed on at least one occasion (with the exception of Patricia Walton and Linda Corbett) on the basis that all of the other activities in which petitioners had engaged were protected by the first amendment and could not form the basis for civil RICO liability. *Id.* at 1309-10. Four defendants who had engaged extensively in protest activities at the clinic but were found not to have trespassed were dismissed from the case as to all claims, including RICO, regardless of whether they had participated in the other activities that plaintiff claimed had comprised Hobbs Act extortion. *Id.* at 1310. Thus, the gravamen of plaintiff's RICO claim was simply an action for trespass.

fear during the trespasses, and that this activity amounted to a cause of action under RICO.<sup>112</sup>

In *McMonagle* the jury found that twenty-seven defendants were associated with or employed by an enterprise engaged in or affecting interstate commerce; that twenty-two defendants had personally committed at least two acts of extortion with respect to the clinic and its employees and thus had violated RICO by conducting an enterprise through a pattern of racketeering activity; and that five other defendants had conspired with those found to have committed extortion of the plaintiff corporation and extortion of the employees of the corporation.<sup>113</sup> The jury did not find that the defendants had committed robbery or that there had been extortion of patients.

The facts show that on four different occasions protestors trespassed on clinic property. After one of the trespasses, the court found that "certain medical tubes, bottles, and knobs were missing."<sup>114</sup> The jury found that 887 dollars worth of equipment had been destroyed or stolen as a result of this trespass and awarded that amount in damages to the clinic on the RICO violation.<sup>115</sup>

Defendants appealed to the Third Circuit on the grounds that civil RICO should not apply to their activities. The Third Circuit rejected the defendant's arguments.<sup>116</sup> The Third Circuit did not take an independent look at the record below as is traditional for appellate courts in cases involving fundamental rights.<sup>117</sup> Instead, it relied heavily on the

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112. *Id.* at 1309.

113. See *McMonagle IV*, 689 F. Supp. at 467, 476. The 22 who were found to have violated 18 U.S.C. § 1962(c) (1988) trespassed at least twice. The five who violated *id.* § 1962(d), had only trespassed once and had blocked an entrance to the clinic. See Petition for Certiorari at 7, n.7, *Northeast Women's Center, Inc. v. McMonagle*, 689 F. Supp. 465 (E.D. Pa. 1988) (*McMonagle IV*), modified, 868 F.2d 1342 (3d Cir. 1989).

114. *McMonagle III*, 670 F. Supp. at 1308.

115. This amount was trebled. Also, attorney's fees of \$65,000 were awarded to the plaintiffs. Petition for Certiorari, *supra* note 113, at 7.

Two defendants, Patricia Walton and Linda Corbett, had never been inside the clinic. Ms. Walton had blocked the front door of the clinic, and Ms. Corbett had blocked the only open entrance to the parking lot. Ms. Corbett had also blocked the path of a doctor's car while the doctor was trying to get to work. The court held that this evidence was sufficient to allow the extortion claims against these two women to go to the jury. *McMonagle III*, 670 F. Supp. at 1309 nn.13 & 14.

The jury found both women liable for extortionate activity. The court then granted Ms. Corbett a judgment notwithstanding the verdict because no evidence was presented as to the existence of any agreement whereby Ms. Corbett would conduct or participate in the activities of the enterprise through the commission of predicate offenses as defined under RICO. *McMonagle IV*, 689 F. Supp. at 475.

116. *McMonagle IV*, 868 F.2d 1342, 1343 (3d Cir. 1989).

117. *Id.* at 1345. The Third Circuit gave too much deference to the trial court's opinion. It did not make an independent evaluation of the record below. Such an independent evaluation is standard for appellate courts in first amendment cases. See *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964).

*Sedima* admonition to look no further than the plain meaning of the statute.<sup>118</sup> Initially, the Third Circuit stated that civil RICO was being applied in contexts far beyond those originally intended. Quoting *Sedima*, however, the court stated that “this defect—if defect it is—is inherent in the statute as written” and placed the burden of correction on Congress.<sup>119</sup> The Third Circuit held that it was not free to read additional limits into RICO once a plaintiff has made out all of the elements required for a finding of liability under the statute’s explicit provisions.<sup>120</sup>

118. See *supra* note 64 and accompanying text.

119. *McMonagle IV*, 868 F.2d at 1348 (quoting *Sedima*, *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985)).

120. *Id.* at 1348. The Third Circuit followed the methodology of statutory interpretation used by the Supreme Court in *Sedima*, yet reliance on *Sedima* was inappropriate. *Sedima* is factually distinguishable from *McMonagle* in that the two corporations in *Sedima* were clearly economic entities. The Third Circuit should have examined carefully the legislative history of RICO. They would have found that Congress never intended for organizations that lacked an economic purpose and that were engaged in patterns of activity which were not undertaken primarily for economic reasons be subject to RICO. See *supra* Part II. Further, reliance on the command in *Sedima* to read RICO as written stifles any true analysis. The *Sedima* command undermines any opportunity to limit RICO judicially, to make RICO consistent with legislative intent. The Second Circuit has construed properly the legislative history to limit the applicability of RICO to noncommercial organizations and activities. See, e.g., *United States v. Bagarac*, 706 F.2d 42 (2d Cir. 1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); see also *infra* note 229. Compare this finding with the Supreme Court’s decision in *United States v. McNally*, 483 U.S. 350 (1987), in which it looked to the legislative history to circumscribe the reach of the mail fraud statute despite unanimous Circuit Court precedent, with its refusal to look at legislative history in RICO.

In *McNally* the Court held that the mail fraud statute could not be used to secure intangible property rights, because the legislative history of the statute showed an intent only to protect property rights. *McNally*, 483 U.S. at 356. The Court was applying the rule of lenity, which is commonly expressed as penal statutes must be strictly construed. One of the reasons for this strict construction is said to be that criminals should be given fair warning, before they engage in a course of conduct, as to what conduct is punishable and how severe is the punishment. The Court was faced with the question of whether the mail fraud statute was limited to property rights or covered intangible rights as well. The Court responded:

[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. . . .

Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights.

If Congress desires to go further, it must speak more clearly than it has.

*Id.* at 359-60 (citations omitted).

Congress spoke on Oct. 21, 1988 with passage of the Anti-Drug Abuse Act of 1988, which added a new section to the mail fraud chapter of the criminal code. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (1988)). The statute provides that “[f]or purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346 (1988). This law expressly overturned *McNally* and returned the law to its prior condition, namely that loss of intangible rights was cognizable under the mail fraud statute.

The *McMonagle* opinion would make all ideological disputes involving protests, phone calls, and letters crossing state lines subject to RICO civil and criminal penalties. Prosecutorial discre-



The Third Circuit also rejected the argument that civil RICO was inapplicable because the defendants' actions were motivated by political beliefs: "Defendants' description of their conduct as 'civil disobedience' does not thereby immunize it."<sup>121</sup> The court concluded that the jury's award of damages under RICO was based on the destruction of the plaintiff's medical equipment during one of the forcible entries and established that the jury found the defendants' actions beyond mere dissent or publication of their political views.<sup>122</sup>

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tion might be some bar to the filing of RICO criminal indictments. As discussed earlier, however, the Department of Justice often has used the expanded mail fraud statute to file criminal complaints against individuals who would not have been charged before. *See supra* note 75. The same result could occur under a vastly expanded predicate of extortion. Especially troublesome would be the possibility of prosecuting unpopular groups involved in demonstrations under RICO using the extortion theories developed in *McMonagle*.

121. *McMonagle IV*, 868 F.2d at 1348. Citing cases like *United States v. Dickens*, 695 F.2d 765 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983), in which bank robberies had been committed to finance a religious organization, the Third Circuit concluded that the first amendment did not shield from government scrutiny practices which imperil public safety, peace, or order. *McMonagle IV*, 868 F.2d at 1348.

122. *McMonagle IV*, 868 F.2d at 1349. The facts in *McMonagle* are much different from the facts in *Dickens* and other cases cited by the Third Circuit for the proposition that the first amendment cannot serve as a sanctuary for law breakers. *Dickens* involved a gang of bank robbers who used the proceeds of their 17 bank robberies to finance land purchases for their Black Muslim religion. *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983), involved a defendant who kidnapped a doctor and his wife at gunpoint, took money from them, and twice threatened to kill them if the doctor did not stop performing abortions. The expressive content present in these two cases is minimal. In *McMonagle*, by contrast, protestors had been involved for nine years in peaceful demonstrations outside the abortion clinic. The overwhelming amount of their time was spent in protected activity.

Extortion is another example of a principle expanding beyond the scope of its logic. Consider *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), in which a "civil rights activist" wanted a business to hire a black employee. Mitchell threatened to picket, boycott, advertise against and sue the company if his demand for the hiring of a black manager was not met. When a black employee refused Mitchell's command to refuse to work, Mitchell warned the employee to arm himself. Mitchell also demanded a \$1000 payment from the business. Mitchell threatened to blackmail the businesses' lawyers and managers and to kill those who did not follow his suggestions. *Id.* at 189.

Cases like *Mitchell* and *United States v. Nadaline*, 471 F.2d 340 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973), involve direct threats communicated to the subject. There was an overriding profit motive and very little expressive content in the speech of the extorters. In *McMonagle*, however, the remarks noted by the Third Circuit were not threats. They may have been predictions, or wishful thinking, but they lacked the imperative quality present in *Mitchell* and *Nadaline*. Most importantly, they lacked a profit motive.

In *McMonagle* the extortionate threats were remarks noted by the Third Circuit: "I bet you ten to one this place doesn't last six months," and "[t]his place is going to be shut down." *McMonagle IV*, 868 F.2d at 1346. These remarks and the four trespasses were extortion of the Center and its employees. The Court stated that "[t]he 'right' on which the Center's case was predicated was the right to continue to operate its business. The Center's extortion claim was that Defendants used force, threats of force, fear and violence in their efforts to force the Center out of business." *Id.* at 1350.

Coercive and offensive speech is protected by the first amendment. Thus, a law that made it a crime for a civil rights activist to say to a restaurant owner "if you don't desegregate this restaurant I am going to organize a boycott" would be overbroad and unconstitutional. *See Wurtz v.*

Defendants also argued that the Center had not shown an injury to business or property as required by RICO. The Third Circuit held that the showing of injury to medical equipment during the trespass satisfied RICO, because the trespass was part of the pattern of extortionate acts designed to drive it out of business.<sup>123</sup>

Finally, defendants contended that economic injury is an essential element of extortion when it is used as a RICO predicate offense. They argued that reliance on intangible rights was not enough. The court ruled that the Center's right to continue to operate its business was a property right. Further, the court found that defendants attempted and conspired to extort (1) from the Center, its property interest in continuing to provide abortion services; (2) from its employees, their property interest in continuing employment; and (3) from patients, their property interest in entering into contracts with the Center.<sup>124</sup>

### B. Feminist Women's Health Center v. Roberts

In the recent abortion clinic protestor case, *Feminist Women's Health Center v. Roberts*,<sup>125</sup> the trial court followed the *McMonagle* precedent faithfully. In July 1984 defendant Beseda was arrested for setting fire to the plaintiff clinic on three occasions. The clinic closed after the third fire. Beseda was tried and convicted in November 1984 and sentenced to a twenty-year prison term. In a civil RICO suit, the clinic accused the defendants of aiding and abetting arson, and committing extortion, mail fraud, trespass, and violations of the Travel Act.<sup>126</sup> Taken together, these acts constituted conducting the affairs of an enterprise through a pattern of racketeering activity and conspiracy to violate RICO.

The clinic based the mail fraud count on defendant Roberts sending out a leaflet that said the clinic did not have agreements with local

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Risley, 719 F.2d 1438, 1442 (9th Cir. 1983). In *McMonagle* there was more than threatening speech. Defendants each trespassed at least twice. The combination of coercive speech and trespass produced Hobbs Act extortion and a violation of RICO.

123. *McMonagle IV*, 868 F.2d at 1349. The Third Circuit cited *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1986), *aff'd on other grounds*, 483 U.S. 143 (1987) (holding that delay, added expenses, and inconvenience caused by defendants' interference with a lawsuit satisfied the injury requirement under RICO).

124. *McMonagle IV*, 868 F.2d at 1350. The court erred in that it did not examine whether legitimate protest would be chilled by the imposition of treble damages, attorney's fees, and the label racketeer. The court did not examine whether those guilty of committing the predicate acts were punished so severely that the punishment infringed upon first amendment guarantees. See *infra* notes 170-76 and accompanying text.

125. *Feminist Women's Health Center v. Roberts (Roberts II)*, No. C86-1612 (W.D. Wash. May 5, 1989) (LEXIS, Genfed library, Dist file); *Feminist Women's Health Center v. Roberts (Roberts I)*, No. C86-161(V)D (W.D. Wash. Mar. 11, 1988) (LEXIS, Genfed library, Dist file).

126. 18 U.S.C. § 1952(a)(3) (1988); see *Roberts I*, at 2-4.

hospitals to treat medical emergencies.<sup>127</sup> The chief allegation of extortion was that the defendants had formed a gauntlet outside the clinic and forced patients and employees to walk through it.<sup>128</sup> The clinic also accused the defendants of stealing aborted fetuses to use in a publicity campaign, putting posters where people in the clinic could see them, and blocking ingress and egress to the clinic.<sup>129</sup> The final count of extortion was the allegation that defendants had made thousands of hang-up calls to the clinic.<sup>130</sup>

The court rejected defendants' arguments that a series of misdemeanors like trespass and harassing phone calls should not be a RICO predicate. Misdemeanors could constitute extortion.<sup>131</sup> As in *McMonagle* the right extorted was the intangible right of doing business. The political or noneconomic motivation of the defendants was irrelevant, as was the fact that the extorter gained nothing and the victim lost nothing.

The court also rejected an attempt to distinguish *McMonagle*. According to the court, the fact that there was no forcible entry or destruction of medical equipment did not distinguish the case legally from *McMonagle*. The court refused the motion to dismiss and denied the motion for summary judgment, holding "it is for the jury to decide, based on these principles, whether the defendants' activities in fact went beyond protected speech or conduct."<sup>132</sup> The court held that the clinic need only demonstrate that defendants caused them to part with property through the use of fear, and that this deprivation adversely affected interstate commerce.<sup>133</sup>

The jury found that only defendant Beseda was guilty of a violation of section 1962(c). It found that two defendants were innocent of section 1962(c), but guilty of conspiracy under section 1962(d), and liable for 11,000 dollars for that conspiracy. The mail fraud count survived two motions to dismiss, but subsequently was withdrawn.<sup>134</sup>

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127. *Roberts I*, at 21.

128. *Id.* In effect, the court directed the plaintiffs to plead their action with particularity. Particularity of pleading is one of the RICO reform proposals presently under consideration by Congress. See *infra* note 224 and accompanying text.

129. *Roberts I*, at 20.

130. *Id.*

131. *Id.* at 22.

132. *Roberts II*, at 31.

133. *Roberts I*, at 20.

134. *Roberts* is important because it shows the potential for using conspiracy and mail fraud against political protestors. One can be brought in as a coconspirator without having agreed personally to commit the predicate acts. See Comment, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 TUL. L. REV. 1399 (1988). It is sufficient if the agreement contemplated that any member of the conspiracy would commit the predicate act. This conspiracy rule would tend to make one careful of associating with others. Mail fraud could be accomplished

## C. Town of West Hartford v. Operation Rescue

The Town of West Hartford filed a far-reaching RICO complaint against demonstrators in June 1989.<sup>135</sup> The town claimed that the defendants had caused it to incur added expenses because of continued demonstrations against abortion clinics. The town named as defendants the entire leadership of Operation Rescue, some of whom never had demonstrated in West Hartford. They were liable, according to the town, because they had played an advisory role to the demonstrators. The town named Operation Rescue and Randall Terry<sup>136</sup> as defendants even though Terry was not present at either protest in West Hartford. The town claimed that Terry was liable under RICO because of his publications, videotapes, and founding of Operation Rescue and other organizations.<sup>137</sup>

Indeed, West Hartford claimed that Operation Rescue was the enterprise which functioned in a corrupt manner by trying to close abortion clinics.<sup>138</sup> As part of the facts supporting their claims for relief, the town cited every national convention of the antiabortion movement, as well as books and speeches by its leaders.<sup>139</sup> Other defendants included a group called Faithful and True Roman Catholics that had paid for a newspaper advertisement claiming that a priest had been beaten at a demonstration, that police officers were violent, and urging readers to demand investigations.<sup>140</sup> According to the town, these statements were deliberately, falsely, and maliciously uttered. The town also named a newspaper publishing company as a defendant along with its editor and an employee. The newspaper employees were alleged to have published maliciously a defamatory account of the protest.<sup>141</sup>

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by recklessly omitting information that could do damage to another. If treble damages are imposed for this behavior, people will be very careful not to say anything about businesses. Of course, *Roberts* also clarifies extortion. If defendants cause a loss of property through the use of fear, RICO applies if the pattern and interstate commerce elements are met.

135. See *Town of West Hartford v. Operation Rescue*, H89-400PCD (D. Conn. 1989). An amended complaint was filed on Sept. 22, 1989 [hereinafter Amended Complaint]. In the amended complaint, the Summit Women's Center West, Inc. was a plaintiff along with the Town of West Hartford. The Amended Complaint kept the parties and allegations cited in notes 136-41 *infra*, and added allegations that Joseph Scheidler violated RICO through his publications.

136. Amended Complaint, *supra* note 135, ¶ 11. Randall Terry, one of the most prominent antiabortion activists, is the founder of Operation Rescue, an organization that uses direct action against abortion clinics.

137. *Id.* ¶ 3. Defendant Scheidler also was cited for one of his publications, *J. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION* (1985), in the Amended Complaint, *supra* note 135, ¶¶ 34-35, which allegedly encouraged illegal methods to close abortion clinics.

138. Amended Complaint, *supra* note 135, ¶ 4.

139. *Id.* ¶¶ 26-54.

140. *Id.* ¶ 80.

141. *Id.* ¶ 66.

## VII. THE CHILLING EFFECT ON FREE SPEECH

A. *The Transcendent Importance of the First Amendment*

The most sacred of constitutional rights, protected by the Bill of Rights, and of paramount importance in the minds of the drafters of the Constitution, are those embodied in the first amendment—the rights of free speech, of assembly, and of association. “Public-issue picketing,” specifically, occupies the highest rung in the hierarchy of values protected by the first amendment.<sup>142</sup> Freedom of speech is a “transcendent” value.<sup>143</sup> It is “the matrix, the indispensable condition, of nearly every other form of freedom.”<sup>144</sup> The first amendment protects the freedom to petition and freedom of assembly as well as free speech.<sup>145</sup> By implication, the freedom of association also is protected by the first amendment.<sup>146</sup>

B. *Theory*

The rights protected by the first amendment are of profound importance to our society. Free speech is a transcendent value in that other values and rights are subordinated. In effecting the primacy of the first amendment, the Court has developed the doctrine of chilling effect, which recognizes that our legal system is imperfect and mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech.<sup>147</sup>

The degree of chilling will vary according to a number of factors, and “may be likened to the product of the probability of an erroneous verdict times the harm produced by such a verdict.”<sup>148</sup> The probability of an erroneous verdict becomes greater as the legal concepts become more complex.<sup>149</sup> The second factor, magnitude of harm, is related

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142. *Carey v. Brown*, 447 U.S. 455, 467 (1980).

143. *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

144. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

145. *Thomas v. Collins*, 323 U.S. 516 (1945).

146. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981). The Court states that “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . [B]y collective effort individuals can make their views known when, individually, their voices would be faint or lost.” *Id.* at 294; see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.” *Id.* at 460.

147. See Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U.L. Rev. 685 (1978). Schauer further states that “chilling effect may be seen not as the non-conceptual generalization. . . but rather as a specific substantive doctrine lying at the very heart of the first amendment.” *Id.* at 688 (footnote omitted).

148. *Id.* at 695.

149. *Id.*

closely to the harshness of the penalty. Stigma is also important. If there is injury to reputation, such as damage to social standing, then the "magnitude of the potential harm is significantly increased, with a proportionate increase in the degree of fear."<sup>150</sup> Litigation costs and the specter of such expenses are also important in chilling speech.<sup>151</sup>

The doctrine of chilling effect reflects the view that the harm caused by the chilling of free speech is comparatively greater than the harm resulting from the chilling of other activities. The logical mandate of the chilling effect doctrine is that legal rules should be formulated to allocate the risk of error away from the preferred value, thereby minimizing the occurrence of the most harmful errors.<sup>152</sup>

The doctrine of chilling effect was applied in *Speiser v. Randall*<sup>153</sup> which involved a property tax preference for veterans, available to those who signed a form that stated they belonged to no organization that advocated violent overthrow of the government. The Court ruled that the statute was invalid because it impinged on speech.

[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. . . . There is always in litigation a margin or error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof. . . .

. . . [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone . . . . This is especially to be feared when the complexity of the proofs and the generality of the standards applied, provide but shifting sands on which the litigant must maintain his position.<sup>154</sup>

### C. RICO and Chilling Effect

Because of treble damages, other significant sanctions, and the ease with which it is applied to fact situations far removed from organized crime, civil RICO has become the weapon of choice for the private liti-

150. *Id.* at 697.

151. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 266 (1982).

152. Schauer, *supra* note 147, at 705.

153. 357 U.S. 513 (1958).

154. *Id.* at 525-26 (citations omitted). RICO fits this description perfectly. Because of the statute's great complexity, the reach of predicate acts like extortion and mail fraud make RICO applicable to many different kinds of behavior. The imposition of RICO's harsh penalties rests on plaintiffs' desire to invoke the statute.

gator and a way to chill first amendment rights. The mere threat of treble damages and being labeled a racketeer can intimidate defendants into settlement in nonmeritorious suits. As Justice Thurgood Marshall wrote in dissent in *Sedima, S.P.R.L. v. Imrex Co.*: "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. . . . [C]ivil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat."<sup>155</sup> This intimidation may occur not only in ordinary commercial litigation, but also in disputes involving ideological beliefs. Use of RICO against advocacy organizations chills the individuals who might join the organizations but are afraid of being sued under RICO. It also hurts the political advocacy organizations and chills first amendment rights of individuals who are already members.

The instant a complaint is filed, the adverse party is labeled a racketeer under the statute. This labeling is harmful to an organization that already may be espousing views not shared by the entire community. The prohibitive cost of litigation alone may be enough to cause a group to cease what should be protected first amendment behavior. Intrusive discovery proceedings, which may prove particularly damaging to political advocacy groups, soon follow.<sup>156</sup>

Civil RICO can allow the criminal acts of one person to cause innocent organizations and individuals with which the criminal is associated in lawful activity to be brought into a RICO suit.<sup>157</sup> Facile pleading requirements readily subject an organization or individuals, with little relation to the predicate acts or enterprise, to the threat of federal treble

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155. 473 U.S. 479, 506 (1985) (Marshall, J., dissenting).

156. For example, in *Northeast Women's Center, Inc. v. McMonagle*, 689 F. Supp. 465, 470 (E.D. Pa. 1988) (*McMonagle IV*), modified, 868 F.2d 1342 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989), the court allowed the plaintiffs to discover the fundraising, expenditure, and corporate record of the Pro-Life Coalition of Southeast Pennsylvania, which was not a party to the action. The court also allowed discovery as to fundraising, expenditure, and corporate records of any other antiabortion organizations to which defendant McMonagle belonged. Plaintiffs successfully introduced the Pro-Life Coalition's evidence as minutes of the Board of Directors meetings. *Id.*

In *Town of West Hartford v. Operation Rescue*, H89-400PCD (D. Conn. 1989), the town is trying to collect treble damages and costs from someone who advocated action against abortion, and associated himself with other people who were antiabortion to try and effectuate their political agenda. By naming Randall Terry and organizations he founded as defendants, plaintiffs can engage in discovery of Mr. Terry's associational ties and the finances and membership lists, and even minutes of the organizations named. See *supra* notes 135-41 and accompanying text. These discovery proceedings in and of themselves chill first amendment rights. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

157. For example, in *Feminist Women's Health Center v. Roberts*, No. C86-161(V)D (W.D. Wash. Mar. 11, 1988) (LEXIS, Genfed library, Dist file), three defendants were accused of RICO violations. One admitted to bombing the abortion clinic. The other two were protestors who had been associated with the bomber while he was engaged in lawful activity. The two protestors were held liable for conspiracy to violate RICO, even though the jury cleared them of the substantive charges against them. *Id.* at 28-30.

damages.<sup>158</sup>

A judgment is not necessary to affect adversely the civil RICO defendant. On the contrary, bringing the suit often accomplishes the objective of threatening an ideological opponent. The mere onset of litigation can provide a serious affront to first amendment privileges. Indeed, plaintiffs intolerant of a group's opinions may file suit, realizing that their allegations will be very difficult to prove, with the sole intention of inhibiting the activities that they consider to be an imposition.<sup>159</sup> Our system cannot tolerate such casual use of the courts to achieve political ends through litigation, especially when these ends are not grounded in legitimate allegations.<sup>160</sup>

While courts should sanction the group or individuals responsible for the criminal activities, this goal must not be allowed to impugn the associational rights of related parties. Liberal pleading requirements allow a plaintiff to include a loosely associated array of defendants in a RICO claim. Under RICO's expansive provisions and vague language, plaintiffs can survive a motion to dismiss, even on strained allegations.<sup>161</sup> Federal Rule of Civil Procedure 11 does not protect against the

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158. In *McMonagle* 42 defendants were named and 16 were dismissed. *McMonagle IV*, 868 F.2d at 1345 n.2.

159. In *West Hartford* allegations were made concerning prominent antiabortion leaders who had not been present at the demonstration. See Amended Complaint, *supra* note 135, ¶¶ 34-37.

160. RICO is especially dangerous because so much depends on enterprise and pattern, concepts that focus on associations between individuals. The conspiracy provision, 18 U.S.C. § 1962(d) (1988), is also dangerous for the same reason. The liberal pleading and discovery rules can allow plaintiffs to name as defendants people who may not have committed predicate acts but who are prominent opponents of the plaintiffs. As a possible example of this phenomenon, see *West Hartford's Post Hearing Memorandum In Support of Plaintiff's Application For A Preliminary Injunction Town of West Hartford v. Operation Rescue*, H89-400 PCD (D. Conn. 1989), which reads, in part, "As to the defendants Joseph Scheidler and Maria D. Garvey, it is conceded that the plaintiff has, thus far, proffered no evidence of their involvement. Nevertheless, the plaintiff continues to assert their involvement in the enterprise, and will continue to pursue the present action against them." *Id.* at 37. Mr. Scheidler is president of one of the most prominent antiabortion groups.

161. In *Roberts*, for example, one defendant was sued under a mail fraud predicate because she had circulated a newsletter saying that the clinics had no emergency treatment agreements with hospitals. 1988 U.S. Dist. Ct. LEXIS 16,325, at 21 (Mar. 11, 1988). The District Court refused defendant's motion to dismiss. *Id.* at 25. The District Court twice held that the mail fraud allegation stated a RICO cause of action before being withdrawn by plaintiffs. *Id.* Thus, as a matter of law, plaintiffs could have recovered for the statement made by Roberts in the newsletter that the clinics had no back up emergency agreements with local hospitals. This result is a clear and basic impingement of the first amendment commitment to free and robust debate on public issues. Even if this statement ultimately would be held to be covered by the first amendment, and thus that no liability could attach, the fact that it survived two summary judgment motions underscores the breadth of RICO.

When a defendant moves to dismiss under Fed. R. Civ. P. 12(b)(6), he faces formidable obstacles. A complaint will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In deciding whether to grant a motion to dismiss, "factual allegations of the complaint are to be accepted as true," and "[r]easonable factual inferences will be drawn to aid



use of RICO in these circumstances.<sup>162</sup> With enterprise and pattern of racketeering activity defined loosely, liberal pleading requirements, implication by association, the specter of treble damages, costly defense, intrusive discovery, and the racketeer label, civil RICO threatens first amendment rights.

#### D. *Methods of Preventing Chilling Effect*

The Supreme Court has formulated rules to guard against chilling first amendment rights. Generally, these rules can be categorized as precision of regulation and void for vagueness. In *NAACP v. Button*<sup>163</sup> the Court used both vagueness and precision of regulation language to guard against chilling effect by striking down a Virginia statute making solicitation of legal business a crime.<sup>164</sup> The Court noted that standards of permissible statutory vagueness are strict in the area of free expression.<sup>165</sup>

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the pleader." *D.P. Enter. v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir. 1984). Under these standards, it is difficult for a defendant to prevail at this stage. If a defendant is a member of a political advocacy organization, some of whose members are alleged to have engaged in RICO predicate acts, mere membership in the association might be enough to enable plaintiff to survive a motion to dismiss under rule 12(b)(6).

162. FED. R. CIV. P. 11, which requires that attorneys sign only those pleadings that they believe in good faith to be true, is supposed to guard against frivolous lawsuits. Rule 11, however, is inadequate protection for civil liberties that are threatened by RICO. Rule 11 is useful in imposing sanctions on lawyers who have flagrant misrepresentations in their complaints. *See, e.g., Rubin v. Buckman*, 727 F.2d 71 (3d Cir. 1984) (plaintiff falsely alleged Hong Kong citizenship to establish diversity of citizenship with a New Jersey defendant and revealed the misrepresentation only after the defendant won the summary judgment motion). Rule 11 also has been used to sanction attorneys who have "not done their homework" in preparing a complaint. *See, e.g., Albright v. Upjohn Co.* 788 F.2d 1217 (6th Cir. 1986) (plaintiff sued Upjohn because drug products she was using caused stains to her teeth but Upjohn did not manufacture the products she had used). Rule 11, however, does not provide enough protection to people who could, because of their associational ties, be named in a RICO complaint even though they have not committed any RICO predicate acts. The pleading with particularity provision in the proposed legislation would help ameliorate this injustice. *See infra* note 223 and accompanying text. Lawyers would have to stop and think before naming someone as a RICO defendant and would have to be able to allege specific facts about each defendant's involvement in the predicate offenses.

163. 371 U.S. 415 (1963).

164. *Id.* at 438. The Court stated that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.*

165. *Id.* at 432. Specifically, the Court held:

The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

*Id.* at 432-33 (footnote & citations omitted).

In *New York Times v. Sullivan*<sup>166</sup> the Court considered the constitutionality of a state libel law “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>167</sup> The Court struck down the Alabama libel law that was based on a negligence standard because such a standard, when applied to comments about public officials, would chill speech. The Court stated that “[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship.’”<sup>168</sup> The Court concluded that the constitutional guarantees required a rule that prohibits a public official from recovering damages for a defamatory falsehood unless the official proves that the statement was made with actual malice.<sup>169</sup>

### 1. Precision of Regulation

Precision of regulation is a method for protecting against chilling of first amendment freedoms. This method requires that when both protected and nonprotected conduct occur (mixed conduct), the nonprotected conduct and those engaged in it be carefully separated from those engaged in protected first amendment activity. In borderline cases, in which it is difficult to tell whether the activity or the actor is protected, the Court will extend first amendment protection to the activity. The actor will not be held liable.

#### a. NAACP v. Claiborne Hardware Co.

The controlling case is *NAACP v. Claiborne Hardware Co.*<sup>170</sup> The case involved a boycott of white merchants by black residents of Claiborne County, Mississippi, meant to force civil rights changes in the county. The boycott had elements of pure speech, of other activities protected by the first amendment, and of violence.<sup>171</sup> Violent acts were committed against some blacks who did not honor the boycott. Shots were fired at homes, windshields were broken, real property was damaged, personal property was taken, and people were beaten.<sup>172</sup> There were also threats of violence.<sup>173</sup> The first amendment, however, does not

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166. 376 U.S. 254 (1964).

167. *Id.* at 270.

168. *Id.* at 279.

169. *Id.* at 279-80.

170. 458 U.S. 886 (1982).

171. *Id.* at 916.

172. *Id.* at 904.

173. *Id.* at 906.

protect violence or the threat of violence.<sup>174</sup>

The Court held that only those defendants who had participated in violence could be held liable for business losses, and they could be held liable for only those damages that were proximately caused by their violent acts. The Court found that coercive speech does not lose its protected character simply because it may embarrass others or coerce them into action.<sup>175</sup> Because speech to protest racial discrimination is political speech lying at the core of the first amendment, the *Claiborne* Court held that the first amendment protected the nonviolent elements of the activities engaged in by the black citizens of Claiborne County.<sup>176</sup>

The first amendment does not prohibit a state from imposing tort liability for business losses that are caused by violence and by threats of violence.<sup>177</sup> When violence and threats of violence occur in the context of constitutionally protected activity, however, "precision of regulation" is demanded.<sup>178</sup> The presence of activity protected by the first amendment imposes restraints on the grounds that may give rise to liability and on the persons who may be held accountable for damages.<sup>179</sup> The *Claiborne* Court turned to the grounds that give rise to damages liability by discussing *United Mine Workers v. Gibbs*.<sup>180</sup> The Court held that in cases involving first amendment activities, only damages for the consequences of violent conduct could be imposed.

The *Claiborne* Court also held that the first amendment restricted the States' ability to impose liability on individuals solely because of association. Reviewing its decisions in the area of association, the Court found:

174. "Certainly 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.'" *Id.* at 916 (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglass, J., concurring)).

175. "[S]o long as the means are peaceful, the communication need not meet standards of acceptability." *Id.* at 911 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). The *Claiborne Hardware* Court also cited *Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961). *Noerr* involved the question of whether the Sherman Act prohibited railroads from entering into anticompetitive acts against the trucking industry. The railroads had engaged in a publicity campaign designed to result in the adoption of laws destructive to the trucking industry and to impair the relationships between truckers and their customers. The truckers had suffered injury as a result of the publicity campaign. Nevertheless, the *Noerr* Court held that the railroad's publicity campaign was protected by the first amendment, despite the Sherman Act prohibitions against anticompetitive activity. *Id.* at 144-45.

176. *Claiborne Hardware*, 458 U.S. at 915.

177. *Id.* at 916.

178. *Id.*

179. *Id.* at 916-17.

180. 383 U.S. 715 (1966). In this labor-management dispute, violence and threats of violence occurred, followed by nine months of peaceful picketing. Limiting the union's liability, the Court held that "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." *Id.* at 729.

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>181</sup>

The *Claiborne* Court concluded that those individuals who committed the violent acts were liable for the damages proximately caused by those acts.<sup>182</sup> Precision of regulation demanded that only those who committed the violent acts be held liable for the amount of damages caused by their violent acts.

b. *RICO and Precision of Regulation*

In *McMonagle* it is clear that those individuals who trespassed and caused damage are liable for those damages. The twelve protestors who trespassed and damaged medical equipment in August 1985 in the amount of 887 dollars were liable for that amount. The right to exclude others is a fundamental element of private property ownership, and the first amendment does not create a right to trespass on private property.<sup>183</sup> Indeed, the question is settled in the general area of abortion clinic protests and the specific facts involving the Northeast Women's Center.<sup>184</sup>

The protestors in *McMonagle* were held to have violated RICO by engaging in extortion. Trespass is not a predicate offense, but extortion is. Trespass, however, was the method used to delineate the defendants that violated RICO. This reasoning is the only way that the *Claiborne Hardware* test could be met. The test is that for liability to be imposed by reason of association alone, it must be established that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.<sup>185</sup>

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181. *Claiborne Hardware*, 458 U.S. at 920 (footnote omitted) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). This holding was violated in *McMonagle*, in which all those who held the goal of trespass were said to hold the goal of extortion. See *Northeast Women's Center Inc. v. McMonagle*, 370 F. Supp. 1300, 1308-09 (E.D. Pa. 1987) (*McMonagle III*), *modified*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S.Ct. 261 (1989).

182. *Claiborne Hardware*, 458 U.S. at 921-23.

183. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 566-67 (1972).

184. In *Armes v. City of Philadelphia*, 706 F. Supp. 1156 (E.D. Pa. 1989), a federal district court was faced with a trespass of the Northeast Women's Center that occurred two months after the August 1985 trespass in *McMonagle*. The court cited a dozen holdings stating that antiabortion protestors do not have the right to express their views on the private grounds of medical clinics. *Id.* at 1165 n.7. Indeed, the district court in *McMonagle* had made the same holding. See *McMonagle II*, 665 F. Supp. at 1160.

185. The Judgment Notwithstanding the Verdict given to Linda Corbett, a defendant in *McMonagle*, shows that this standard is the rule. *McMonagle IV*, at 475-76. The judge set aside

In *McMonagle* RICO resulted in an 887 dollar judgment turning into a nearly 68,000 dollar judgment. Twelve trespassed when somebody damaged property. Only those demonstrators who were involved in violent activities should have been held liable for the damages proximately caused. The use of RICO destroyed the careful attempts of *Claiborne Hardware* to protect the first amendment in mixed conduct situations. The group of defendants liable was expanded. Only twelve caused damages, but fourteen others were held liable because they trespassed. In effect, the Court found all trespassers guilty of extortion.

Second, *Claiborne Hardware's* precision of regulation rule is violated in the amount of damages for which defendants are liable. RICO mandatorily trebles damages and awards attorney's fees, which are otherwise unavailable.<sup>186</sup> Thus, defendants who legitimately were liable for 887 dollars were held liable for nearly 68,000 dollars because of RICO. Such a result is untenable and chills first amendment rights.<sup>187</sup>

c. *New York Times v. Sullivan and Other Libel Cases*

In a series of libel cases the Supreme Court has regulated precisely the amount of damages available under libel laws. The Court has held that enhanced damages must be closely scrutinized, especially when they arise in the context of protected activity. In these cases, the Court has considered the limitations upon state libel laws imposed by the constitutional guarantees of freedom of speech. It has held that tortious activity may be accorded special exemption if the regulation would impinge on first amendment rights. *New York Times v. Sullivan*<sup>188</sup> is the seminal case. A group seeking financial support for the civil rights movement had paid for an advertisement in the Times. The statement contained allegations of police misconduct. The plaintiff was in charge of police at the time the incidents related in the advertisement occurred. He proved that some of the statements were inaccurate and was awarded a judgment under Alabama state law against the Times.<sup>189</sup> The

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the jury's decision because no evidence existed which showed that Corbet had trespassed. The judge further held that to hold Corbett liable would impinge on her first amendment rights. *Id.* at 476. The court's reasoning must have been that those who trespassed had illegal purposes and that those who trespassed had specific intention to further the association's illegal goals. Therefore, the association could be held liable.

186. 18 U.S.C. § 1964(c) (1988).

187. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974); see also *infra* notes 188-200 and accompanying text (discussing *New York Times v. Sullivan* and other libel cases). Defendants in *McMonagle* also were held liable on the state law claim of trespass. See *infra* notes 221 and accompanying text. This Article does not examine that holding.

188. 376 U.S. 254 (1964).

189. *Id.* at 256-62. Prior to 1964, the law of defamation was not viewed as falling within the ambit of the first amendment and was primarily left to state law. Emphasizing the "profound

Supreme Court held that a public figure could not recover for negligently false statements made about him. To recover the public official had to prove that the statement was made with actual malice, with knowledge that it was false or with reckless disregard of whether it was false.<sup>190</sup>

The advertisement normally enjoyed first amendment protection because it was expression about an important public issue, and the question was whether it forfeited that protection by the falsity of some of its statements. The Court was concerned that the effect of such a rule would be to deter critics of official conduct from criticizing because of doubt whether their statements “[could] be proved in court[,] or fear of the expense of having to do so.”<sup>191</sup> Because holding newspapers liable for negligently false statements would dampen the vigor and limit the variety of public debate, a result inconsistent with the first amendment, the Court adopted the maliciously false standard.<sup>192</sup> It is important to note that the Court could have relied on precedent that libel enjoyed no constitutional protection and allowed the Alabama holding. Instead, the Court held that the first amendment and freedom of expression are to have the “breathing space that they need to survive.”<sup>193</sup>

In *Gertz v. Robert Welch, Inc.*<sup>194</sup> the Court allowed private defamation plaintiffs to prevail on a less demanding showing than actual malice, “in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation.”<sup>195</sup> Such a plaintiff could recover only such damages as are sufficient to compensate for actual injury.<sup>196</sup> The Court, however, limited the damages on

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” the Supreme Court extended first amendment coverage to defamation concerning the conduct of public officials. *Id.* at 270.

190. *Id.* at 279-80. The Court reached this decision in the face of strenuous arguments well founded in precedent, that the Constitution does not protect libelous statements. The Court said that “libel” was a “mere” label of state law like

insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, [thus] libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

*Id.* at 269 (footnotes omitted).

191. *Id.* at 279.

192. *Id.* at 279-80.

193. *Id.* at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended the actual malice standard from public officials to public figures. In *Gertz* the Court further refined the concept by creating categories of all purpose public figures and limited purpose public figures. 418 U.S. at 323.

194. 418 U.S. 323 (1974).

195. *Id.* at 348-49.

196. *Id.* at 349.

first amendment grounds.<sup>197</sup> The attempt to reconcile state law with a competing interest grounded in the constitutional command of the first amendment made it appropriate to require that state remedies for defamatory falsehood reach no further than necessary to protect the legitimate interest involved.<sup>198</sup> Because it feared the chilling effect such a rule would produce, the Court held that when public officials were concerned, only damages from libelous statements maliciously made would be recoverable. Therefore, even when the speech involved was entitled to less protection, when malice need not be shown to recover, the amount of damages still was limited to actual damages.<sup>199</sup> *Gertz* recognizes that "the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct."<sup>200</sup>

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197. The Court stated:

Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. . . . States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.

*Id.* at 349.

198. *Id.*

199. *Id.* at 350. The *Gertz* holding with respect to damages exceeding actual damage has been extended to other areas of the law. In the labor area, an award of punitive damages was given to a union member, who claimed that his union was liable for unfair representation because it had missed a filing deadline. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 (1979). The Court reversed the award of punitive damages for several reasons. First, the financial danger of punitive damages could imperil the very existence of unions. Second, punitive damages could be employed to punish unpopular defendants. Third, the prospect of punitive damages might "chill" unions. The Court specifically stated:

In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members.

*Id.* at 52. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), punitive damages against a municipality for the actions of its employees were disallowed because they "may create a serious risk to the financial integrity of these governmental entities." *Id.* at 270.

200. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985), allowed punitive damages, absent a showing of actual malice, in a matter involving a credit report. The report did not involve a matter of public concern and was entitled to less stringent protection under the first amendment. *Id.* at 759. There are some situations in which the nature and context of defamation have allowed the Court to apply a lower standard. Thus, publication of credit ratings that were recklessly but not maliciously false were held to allow punitive damages. *Id.* at 763. For example, statements by protestors to licensing authorities about a doctor who performs abortions not involving matters of public concern could be subject to the *Dun & Bradstreet* rule.

## 2. Void for Vagueness

In addition to precision of regulation, the Court also has used the void for vagueness doctrine to invalidate laws that impinge on the first amendment while protecting against harmful conduct. Due process requires that laws be reasonably definite as to persons and conduct within their scope.<sup>201</sup> In determining whether a law is void for vagueness, the following inquiries are appropriate: (1) Does the law give fair notice to those persons potentially subject to it? (2) Does the law adequately guard against arbitrary and discriminatory enforcement? (3) Does the law provide sufficient breathing space for first amendment rights?<sup>202</sup> The classic formulation of the notice requirement is found in *Connally v. General Construction Co.*<sup>203</sup> The *Connally* Court held that a statute violates the first essential of due process of law if it either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application.<sup>204</sup> A law that provides a rule of conduct in unambiguous, understandable terms also will be voided for vagueness if it lends itself to arbitrary enforcement. For example, in *Kolender v. Lawson*<sup>205</sup> the California law being challenged was a requirement, written in clear terms, that a citizen provide identification to a police officer.<sup>206</sup> The Court voided for vagueness not because of notice but because of the possibility of arbitrary enforcement, specifically that the law might be used against undesirables at the sole and unreviewable discretion of police officers.<sup>207</sup>

Vagueness doctrine has a special resonance in the first amendment area.<sup>208</sup> In the seminal commentary on vagueness, Professor Tony Amsterdam argues that vagueness doctrine is used "almost invariably for the creation of an insulating buffer zone of added protection at the pe-

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201. See generally W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 90-92 (2d ed. 1986).

202. *Id.* at 92.

203. 269 U.S. 385 (1926).

204. *Id.* at 391.

205. 461 U.S. 352 (1983).

206. The statute stipulated that police could arrest any person

[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

*Id.* at 353 n.1 (quoting CAL. PENAL CODE § 647(e) (West 1970)).

207. See *id.* at 357-61. See generally Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

208. *Smith v. California*, 361 U.S. 147, 151 (1959) (stating that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser").



ripheries of several of the Bill Of Rights freedoms,"<sup>209</sup> most prominently the first amendment.

RICO should fit into that category of laws that have been held void for vagueness for lack of ascertainable standards to guide those who implement them. Anyone who participates in the affairs of an enterprise<sup>210</sup> by means of a vaguely defined pattern of racketeering<sup>211</sup> is guilty of a RICO violation. Violation of RICO carries with it greatly enhanced criminal penalties. These penalties are available to prosecutors and plaintiffs whenever they choose to use them. These penalties chill first amendment rights.<sup>212</sup> Professor Gerard Lynch testified before Congress that "The one pervasive problem in RICO is that the vagueness of its terms make extremely serious penalties available virtually whenever prosecutors choose to invoke them, without the identification of genuine aggravating circumstances justifying the more serious penalties."<sup>213</sup>

RICO, however, already has survived challenges that it is void for vagueness. *Fort Wayne Books, Inc. v. Indiana*<sup>214</sup> challenged the use of the obscenity predicate on vagueness grounds. Defendant argued that the definition of enterprise was vague. Justice Byron White, writing for the majority, stated that if the underlying obscenity law was not vague, then RICO was not vague.<sup>215</sup> Justice John Paul Stevens, writing for himself, Justice William Brennan, and Justice Thurgood Marshall, pointed out that RICO was not the same as obscenity because RICO also used the statutory term "pattern." Use of "pattern" compounded the "intractable vagueness" of obscenity.<sup>216</sup>

Justice Antonin Scalia, writing for himself, Chief Justice William Rehnquist, Justice Sandra Day O'Connor, and Justice Anthony Kennedy in a concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*,<sup>217</sup> noted that litigation over pattern in RICO has led to the greatest split among the circuits in history. According to Justice Scalia, because the majority opinion in *H.J. Inc.* did not lead to greater clarity,

209. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960) (authored by Anthony G. Amsterdam); see also Jeffries, *supra* note 207, at 216-17.

210. See 18 U.S.C. § 1961(4) (1988). "[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.*

211. Basically the commission of two crimes over ten years. See *id.* § 1961(5).

212. RICO also may provide insufficient notice, thereby violating all three of the basic rules to determine vagueness. See *supra* note 201 and accompanying text.

213. *H.R. 1046 Hearings*, *supra* note 52 (statement of Prof. Gerard E. Lynch).

214. See 109 S. Ct. 916 (1989).

215. *Id.* at 925.

216. *Id.* at 934 (Stevens, J., concurring in part and dissenting in part).

217. See 109 S. Ct. 2893, 2906 (1989) (Scalia, J., concurring in judgment). Vagueness had not been argued by the defendants in *H.J. Inc.*

a strong possibility exists that RICO could be held void for vagueness.<sup>218</sup> Thus, seven members of the Court substantially question RICO's constitutionality with regard to its vagueness.

#### VIII. POLICY CONSIDERATIONS

The kind of behavior engaged in by the twenty-six defendants found liable in *McMonagle* should not be punishable by the extraordinary sanctions found in RICO. Congress did not have this kind of activity in mind when it passed RICO in 1970. It is wrong to have a federal treble damages statute that applies to political advocates who engage in generally peaceful conduct. Some protestors did trespass, and there was some damage to medical equipment. The wrongdoers responsible for these acts should be punished under state civil and possibly state criminal law. To use, however, a punitive and sweeping federal statute against this behavior is an abuse of RICO and the legal process.

Other protestors also use direct action.<sup>219</sup> With the precedent established by *McMonagle*, RICO now can be applied to antinuclear protestors, antiapartheid protestors, and animal rights protestors who occasionally have acted in the same way as the abortion clinic protestors did in *McMonagle*. They trespass and damage property. Historically, many anti-Vietnam war protests would have been actionable under RICO. Undoubtedly, many universities and arms manufacturers could have claimed that they and their employees had been put in fear by antiwar protests. This type of extortion would have resulted in treble damages and costs being assessed against the protestors. Similarly, civil rights protestors could be sued under RICO by cities and towns that had to pay additional money to policemen as a result of these protests. Use of RICO—because of trebled damages and the racketeer label—unnecessarily would have chilled expressive and associational conduct. State remedies are adequate to protect against this kind

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218. *Id.* at 2909.

219. Direct action tactics have been used by other groups besides abortion protestors. See Feder, *Pressuring Perdue*, N.Y. Times, Nov. 26, 1989, § 6, at 32, col. 1 (describing the animal rights movement's use of direct action tactics).

Antinuclear demonstrators have attacked nuclear plants because they perceive an imminent threat to public health and safety. In *State v. Warshow*, protestors prevented workers from entering a plant that was shut down for repairs. In *Commonwealth v. Berrigan*, the Berrigan brothers entered a nuclear plant and caused over \$28,000 worth of damage to missile components. Environmental and animal-rights groups have also organized direct intervention campaigns. See *Environmental Militancy is Alive and Thriving in the U.S.*, *Christian Science Monitor*, Oct. 21, 1988, at 3 (National section); *Four Sentenced to Jail for Animal Protest*, U.P.I. BC Cycle, Oct. 8, 1986 (members of Animal Rights Direct Action Coalition claim to be the first animal rights activists arrested for civil disobedience). *Id.* (citations omitted); see also Note, *supra* note 23, at 664 n.15 (cataloging different groups and their uses of direct action protests).

of illegality.<sup>220</sup> The use of mail and wire fraud, while not as fully developed in the political protest context, is potentially more harmful. Any false statement that hurts business or property could lead to a RICO lawsuit.

#### IX. PROPOSALS BEFORE CONGRESS FOR RICO REFORM

Senator Dennis DeConcini and Representative Rick Boucher have introduced bills that correct some of the deficiencies in existing RICO law.<sup>221</sup> The proposed changes include stricter pleading requirements, narrowing of the availability of treble damages by requiring conviction in certain instances of underlying predicate activity, changing the level of proof from preponderance to clear and convincing with regard to punitive damages, and elimination of the pejorative term racketeer.<sup>222</sup> The reform bill will curb some of the first amendment abuses engendered in current RICO law while preserving its ability to carry out its intended purpose, namely the eradication of organized crime's infiltration of legitimate business. The reform bill would discourage the filing of groundless suits by circumscribing the situations under which a legitimate action may be brought.

An amendment to RICO's liberal pleading requirement is crucial. The proposed legislation would require a plaintiff, seeking redress under RICO, to aver with particularity the facts that support the plaintiff's claim against each defendant named in the action. The reform bill would require that all RICO predicate acts be plead with particularity. The extraordinary remedies available under RICO, the need to protect a defendant's reputation, and the prevention of politically motivated suits all justify this stricter pleading requirement.<sup>223</sup>

In suits brought by private litigants, the reform bill would require a conviction of an underlying unlawful activity in order to obtain treble damages. Under the bill, a plaintiff suing several defendants could only obtain automatic treble damages against the particular defendant convicted of a predicate offense. Without such a measure, defendants are subject to severe remedies for criminal acts without the procedural protections afforded by criminal law, nor its heightened burden of proof.

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220. For example, in *Northeast Women's Center Inc. v. McMonagle*, 868 F.2d 1342, 1347 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989), the jury award for trespass was \$42,974.95.

221. Representative Rick Boucher introduced H.R. 1046 in the House. H.R. 1046, 101st Cong., 1st Sess. (1989). Senator Dennis DeConcini introduced S. 438 in the Senate. S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1653 (daily ed. Feb. 23, 1989). These bills were identical when introduced. The analysis will focus on the Senate reform bill.

222. See S. 438, *supra* note 221. The Senate reform bill requires pleading with particularity. See S. 438, *supra* note 222, at § 8, 135 CONG. REC. at S1654; see also H.R. 1046, *supra* note 221.

223. See S. 438, *supra* note 221, § 4(c)(8), 135 CONG. REC. at S1654; see also *supra* note 159 and accompanying text.

This provision grants needed protection against the drastic remedy of treble damages.<sup>224</sup>

Additionally, a litigant seeking punitive damages against an unconvicted defendant first must meet certain statutory conditions. One of these conditions is that the plaintiff must show by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied.<sup>225</sup>

To alleviate the stigmatization suffered by the party against whom a RICO action is brought, the reform bill changes the term "racketeer" and variants thereof to "unlawful activity." This practice, however, is allowed only in complaints that do not allege a crime of violence.<sup>226</sup>

The reform bill attempts to prohibit RICO suits that are based on facts like those in *McMonagle*.<sup>227</sup> This addition would improve present RICO law but leaves some problems unresolved. For example, some persons would characterize *McMonagle* as a violent case. Further, it is unclear whether mail fraud allegations like those made in *Roberts* would be exempt from reformed RICO.

Although the reform bill is a good beginning in reforming RICO, it is not enough. For more complete protection, it is necessary to exempt all noneconomic activity from RICO.<sup>228</sup> This task could be accomplished by adoption of a primary economic purpose test for racketeering activity. The deterrence of treble damages, costs, and attorney's fees is not appropriate for noneconomic organizations and activities.<sup>229</sup>

224. See S. 438, *supra* note 221, § 4(c)(5), 135 CONG. REC. at S1654; see also *supra* notes 170-76 and accompanying text.

225. See S. 438, *supra* note 221, § 4(c)(3)(D), 135 CONG. REC. at S1654; see also *supra* notes 188-93 and accompanying text.

226. See S. 438, *supra* note 221, § 4(c)(10), 135 CONG. REC. at S1654; see also *supra* note 142 and accompanying text.

227. Section 1962 of title 18 of the United States Code is amended by adding the following at the end thereof:

"(e) For purposes of this chapter, the term 'racketeering activity' shall not include participation in, or the organization or support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage, and no action may be maintained under this chapter based on such activities."

S. 438, *supra* note 221, § 3(c) (amended version).

228. This exemption should apply to noneconomic as defined in Note, *supra* note 23, at 669 n. 47.

229. Courts have recognized this concept in holding that noneconomic crimes should not be cognizable under RICO. See *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). The Second Circuit relied on the legislative history of § 1962(d) in holding that "when an indictment does not charge that an enterprise or the predicate acts have any financial purpose, it does not state a crime under § 1962(c)." *Id.* at 65. Not only is the term "enterprise" used in subsections (a) and (b) to refer to the "sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money," *id.* at 60, but Senator McClellan himself, "the principal sponsor of the Organized Crime Control Act of 1970, [has] made clear on

One solution would be to add a new subsection (e) to United States Code section 1962. This subsection would stipulate that "[t]o show a violation of this section, plaintiffs must prove that either the enterprise or the pattern of racketeering activity had an economic or profit-making purpose."

Such language would correct the finding in *McMonagle*. Considerable legislative history supports the proposition that only commercial entities or activities were intended to be covered.<sup>230</sup> The term "pattern of racketeering activity" appears in the new subsection to ensure that non-profit entities which engage in economic crimes still would be covered.<sup>231</sup>

In its RICO law, the State of Washington has a provision requiring that the "pattern" be for financial gain.<sup>232</sup> The language of the Washington statute defines "criminal profiteering" as any act "committed for financial gain."<sup>233</sup> Thus, inserting similar language into the federal definition of racketeering activity would lessen substantially the civil liberties misapplications of RICO. Political groups that engage in predicate acts would not be shielded. For example, an environmental group that

several occasions that the purpose of Title IX is 'economic' and that the only crimes included in § 1961(1) are those adapted to 'commercial exploitation.'" *Id.* at 63; see also 116 CONG. REC. 18,940 (1970) (statement of Sen. John L. McClellan); McClellan, *supra* note 3, at 161-62. The defendants in *Ivic* were charged with participating in an enterprise that used "terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs.'" *Ivic*, 700 F.2d at 58 (quoting *Ivic* Indictment Count 1, ¶ 2). Because, however, no charges were made of any economically motivated activities, the judgment against the enterprise under RICO was dismissed. *Id.* at 65.

See also *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). Although *Bagaric* was factually very similar to *Ivic* in that it involved a terrorist enterprise charged with murder, bombings, and related crimes, an important fact distinguishes the cases. In *Bagaric*, unlike in *Ivic*, the "core of the enterprise was the commission of more than fifty acts of the classic economic crime of extortion . . . [that] were carried out either to compel payment or in retaliation for refusal to meet appellants' extortionate demands." *Id.* at 57-58. The defendants sent letters to wealthy Croatians demanding the payment of between \$5000 and \$20,000 and warned that if payment was not made reprisals would soon follow. The money was to be used in preparing for the violent overthrow of the Belgrade government. *Id.* at 48-49. Only because this particular terrorist enterprise had an underlying economic core did the *Bagaric* court find the defendants liable under civil RICO. For a case involving similar facts, see *Republic of Philippines v. Marcos*, 818 F.2d 1473 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1933 (1989) (holding that conduct under RICO must have a harmful effect on the economy of the United States).

230. See *supra* notes 43-48 and accompanying text.

231. See, e.g., *Bagaric*, 706 F.2d at 42 (involving an extortion scheme whereby a Croatian nationalist group could obtain money to further its political objectives). Under the proposed RICO reforms, members of the group would be covered. Even though the nationalist group did not have a profit making purpose, the pattern of racketeering activity in which they engaged—obtaining money through force or the threat of force—did have a profit making purpose.

232. WASH. REV. CODE ANN. § 9A.82.010(14) (Supp. 1989). California also has this requirement. See CAL. PENAL CODE § 186.2 (West 1988).

233. WASH. REV. CODE ANN. § 9A.82.010(14) (Supp. 1989).

committed bank robberies to finance its political activities still would be subject to RICO.

A requirement that RICO allegations be plead with particularity also must be included. Even if all political organizations were exempt from RICO, there would be danger that liberal pleading would allow plaintiffs to name as defendants innocent people who were associated with those who had committed predicate acts.

#### X. CONCLUSION

There is a pressing need for the prompt reform of civil RICO. Congress passed RICO to ameliorate the pervasive effects of organized crime upon society. It was drafted broadly to enable society to reach mobsters who are notoriously well insulated from the normal processes of criminal justice. Civil RICO was meant to help stop infiltration of legitimate businesses by organized crime. Civil RICO was not meant to reach noneconomic defendants.

RICO has strayed from its intended goal and become a dangerous tool, sometimes employed in derogation of first amendment rights. Although the intended target was organized crime, the language of RICO is functional, not status oriented. Because organized crime does anything to make money, the list of predicate acts was long and since has been expanded by Congress. Extortion and mail and wire fraud are predicates that cover the loss of intangible rights. The right to do business is an intangible right. Ideological protestors inevitably cause businesses delay and inconvenience and thus interfere with the right to do business. These losses are cognizable under RICO, and plaintiffs have begun using RICO against protestors.

RICO's structure facilitates its use for such a purpose. The statute focuses on associations. The key statutory terms, "enterprise," "pattern," and "racketeering activity" all allow a plaintiff to inquire into a defendant's associational history and activity. RICO allows plaintiffs to name various defendants as members of an enterprise, even when these defendants have little to do with substantive wrongdoing. RICO's draconian penalties are not used only in cases of outrageous or heinous conduct. Indeed, RICO's harsh penalties are invoked at the whim of the plaintiff, as long as the increasingly expansive statutory conditions are met.

It is wrong to use RICO against protestors. The stigma of being labeled a racketeer and the threat of treble damages and attorney's fees make RICO an ideal tool for chilling speech. RICO is a complex statute incorporating hundreds of federal and state laws in its definition of racketeering activity. In defining RICO's own statutory terms, like pattern, the Supreme Court has encountered substantial difficulty.

RICO is used increasingly in ideological disputes. Using RICO in this way is a perversion of the original congressional intent. It is also unwise on policy grounds. First amendment rights are of paramount importance. When other rights conflict with the first amendment, the Court traditionally has overcompensated to protect first amendment rights. The doctrines of chilling effect, void for vagueness, and precision of regulation are all methods that the Court has used to create breathing space to allow first amendment rights to survive. Recent statutory interpretations by the Supreme Court make it unlikely that the Court will read RICO consistently with original congressional intent. The remedy for this defect lies with Congress. The reform proposal before Congress is a significant step toward resolving RICO's misapplication to political protestors. Congress should amend RICO to ensure that protestors never again face treble damages, attorney's fees, and the racketeer label for engaging in activity from which they will not profit economically.