

When Protesters Become "Racketeers," RICO Runs Afoul of the First Amendment

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NOTES

WHEN PROTESTERS BECOME "RACKETEERS," RICO RUNS AFOUL OF THE FIRST AMENDMENT

Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO")¹ as part of the Organized Crime Control Act of 1970,² a comprehensive plan designed to combat organized crime in the United States.³ To accomplish this goal, RICO equips

¹ 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990). The RICO acronym was apparently inspired by "Rico" Bendello, the mobster portrayed by Edward G. Robinson in the movie "Little Caesar." Alito, *Racketeering Made Simple(r)*, in *THE RICO RACKET* 1 (1989).

² Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990)).

³ See *id.* The Statement of Findings and Purposes of the Organized Crime Control Act of 1970 explained 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 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 and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process,

prosecutors with powerful new tools, including stiff criminal sanctions,⁴ property forfeiture provisions,⁵ and equitable relief in the form of injunctions.⁶ RICO also provides civil relief to citizens injured in conjunction with a RICO violation through a private cause of action and permits recovery of both treble damages and litigation costs.⁷ Though initially aimed at curbing organized crime activities,⁸ RICO has been successfully implemented against securities firms,⁹ large corporations,¹⁰ and video dealers as well.¹¹

Recently, in *McMonagle v. Northeast Women's Center, Inc.*,¹² the United States Supreme Court denied certiorari on a decision

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.

Id. at 922-23.

⁴ 18 U.S.C. § 1963 (1988). Section 1963 provides that "[w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment) or both." *Id.*

⁵ *Id.* § 1963(a). "Property subject to forfeiture" includes real property, as well as tangible and intangible personal property. *Id.* § 1963(b)(1), (2).

⁶ *Id.* § 1963(d).

⁷ *Id.* § 1964(c). The private civil suit provision was not an original part of the RICO bill that was passed by the Senate, but was only included in the House bill and was rarely mentioned in the floor debates. See Crovitz, *RICO: The Legalized Extortion and Shake-down Racket*, in *THE RICO RACKET* 26-27 (1989).

The Second Circuit noted that there were few guidelines to determine the scope of the private civil action provided for in RICO. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 488 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985). The court further stated that analogies drawn in the Senate Report to the civil suit provisions of antitrust law could not be applied to the private action section which was added to RICO subsequent to the date of the Senate Report. *Id.* at 489.

During the early days of RICO, the civil action provision was applied in limited situations where "organized syndicates caused identifiable damages to private individuals." Crovitz, *supra*, at 27. However, the use of civil RICO has greatly expanded. *Id.* From 1970 to 1980 there were only nine federal court decisions on civil RICO, but by 1985 there were 300 federal decisions on civil RICO, and up to the present time there have been several thousand. *Id.*

⁸ See *supra* note 3 and accompanying text.

⁹ See *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). Recently, the burden of a large RICO penalty contributed to the collapse and bankruptcy of Drexel Burnham Lambert, one of Wall Street's leading brokerage firms. See *N.Y. Times*, Feb. 14, 1990, at D1.

¹⁰ See Crovitz, *supra* note 7, at 27. A non-exclusive list of corporate civil RICO defendants includes: Aetna Casualty and Surety, Allstate Insurance, Citibank, General Motors, Exxon, Miller Brewing, and Touche Ross. *Id.*

¹¹ See *United States v. Pryba*, 674 F. Supp. 1504, 1506 (E.D. Va. 1987), *aff'd*, 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990). In *Pryba*, the defendants were indicted under RICO for distributing obscene videotapes. *Id.*

¹² 110 S. Ct. 261 (1989).

by the United States Court of Appeals for the Third Circuit that allowed a civil RICO action to be brought against an anti-abortion group that had conducted protest activities against an abortion clinic.¹³ Justice White, however, issued a dissenting opinion in which he asserted that the Court should settle the question of whether RICO liability could be imposed "where neither the 'enterprise' nor the 'pattern of racketeering activity' had any profit making element."¹⁴ Unfortunately, Justice White did not address specifically the potential first amendment problems encountered when civil RICO is applied against social activists attempting to influence public opinion through vigorous protesting.¹⁵

Should RICO continue to be invoked against protest organizations, a conflict could arise between the rights of citizens to express their views and the rights of other citizens to prohibit such expressive conduct through the threat of a RICO civil lawsuit.¹⁶ This Note will explore the possibility that the use of RICO against so-

¹³ *Id.* at 261. The RICO suit was based on four incidents where the defendants entered the plaintiff's facilities unlawfully. See *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1345 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989). The plaintiff, the Northeast Women's Center, Inc., was a gynecological clinic which provided abortions. *Id.* The defendants were 26 anti-abortion protesters, some of whom were associated with the Pro-Life Coalition of Southeast Pennsylvania. *Id.*

¹⁴ *McMonagle*, 110 S. Ct. at 261 (White, J., dissenting). Justice White, in his dissent, noted that the Second and Eighth Circuits have held that they would not uphold RICO liability where there has been no economic motivation behind the racketeering activity. *Id.* (White, J., dissenting). In *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), the Second Circuit ruled that predicate acts must have a financial purpose. See *id.* at 58-65. Similarly, the Eighth Circuit in *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988), determined that the enterprise must be directed toward an economic goal. *Id.* at 1052.

The issue of an "economic motivation" or the requirement of some pecuniary gain by the defendant as a prerequisite to a civil RICO suit has been proposed as a RICO reform. See Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?*, 56 U.M.K.C. L. Rev. 287, 310 (1988); see also Nat'l L.J., May 8, 1989, at 13 (ACLU has joined anti-RICO coalition promoting reforms in statute).

¹⁵ See *McMonagle*, 110 S. Ct. at 261-64 (White, J., dissenting). The Third Circuit discussed the first amendment issue briefly, concluding that "the First Amendment does not offer sanctuary for violators." *McMonagle*, 868 F.2d at 1348-49 (quoting district court's jury instructions).

¹⁶ See Melley, *supra* note 14, at 308-312. The Supreme Court has stated that a massive effort to effect social and political change should "not be characterized as a violent conspiracy simply by reference to the ephemeral consequences of a relatively few violent acts." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982). On the other hand, Patricia Ireland, the executive vice president of the National Organization for Women, believes that "[a]s long as antiabortion extremists continue to behave like gangsters, it is wholly appropriate to treat them as gangsters under the racketeering laws." See *The Washington Post*, July 8, 1989, at A-15.

cial activists may infringe upon the first amendment right of free expression. Part One will examine the RICO statute and its civil suit provision to provide a background for the analysis to follow. Part Two will consider the applicability of RICO to protest groups whose activities arguably fall under the definition of "racketeering" activities contained in the statute. Finally, Part Three will focus on the first amendment issues which arise when RICO is used to sanction protest activities.

I. RICO AND THE CIVIL SUIT PROVISION

In general, RICO makes it a crime to participate in the affairs of an enterprise through a pattern of racketeering activity.¹⁷ Under RICO, "enterprise" is broadly defined as any individual, partnership, corporation, association, or legal entity;¹⁸ a "pattern" is described as two acts of racketeering activity within ten years of each other;¹⁹ and "racketeering activity" is characterized as any criminal act listed in the statute.²⁰ RICO also makes it a crime to invest the proceeds of any racketeering activity,²¹ acquire an interest in an enterprise through racketeering,²² or conspire to violate any of the RICO provisions.²³

As to individuals, RICO permits "[a]ny person injured in his

¹⁷ 18 U.S.C. § 1962(c) (1988). Section 1962(c) is the provision most commonly used in civil RICO suits. See Alito, *supra* note 1, at 11. It reads: "(i)t shall be unlawful for any person employed by or associated with any enterprise engaged in, . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c); see *infra* notes 21-23 and accompanying text (discussion of section 1962).

¹⁸ 18 U.S.C. § 1961(4) (1988). The list of entities set out in section 1961(4) is illustrative and clearly not exhaustive. See *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir.), *cert. denied*, 456 U.S. 1008, *cert. denied*, 458 U.S. 1109 (1982), *cert. denied*, 459 U.S. 825 (1984).

¹⁹ 18 U.S.C. § 1961(5) (1988). At least one of the acts in the pattern has to have occurred after the effective date of the statute. *Id.* The Senate Report explains that "(t)he target of [RICO] is thus not sporadic activity [and] [t]he infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. REP. NO. 617, 91st Cong., 158 (1969). The proof of two acts of racketeering activity, without more, does not establish a pattern for purposes of RICO. 116 CONG. REC. 18940 (1970) (statement of Sen. McClellan); see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1984).

²⁰ 18 U.S.C. § 1961(1) (1988). The criminal acts delineated in section 1961(1) are also referred to as "predicate acts." See Alito, *supra* note 1, at 4.

²¹ 18 U.S.C. § 1962(a) (1988). Under certain circumstances, the purchase of securities on the open market for investment purposes only is exempted. *Id.*

²² *Id.* § 1962(b).

²³ *Id.* § 1962(d).

business or property by reason of" a RICO violation to sue the racketeering individual or enterprise and recover treble damages plus attorney's fees.²⁴ While some lower federal courts initially attempted to restrict civil suits under RICO,²⁵ the Supreme Court rejected these limitations in *Sedima, S.P.R.L. v. Imrex Co.*²⁶ In *Sedima*, the Court overturned a Second Circuit ruling which held that a civil RICO claim could only be brought against a defendant who had previously been convicted under the criminal provisions of RICO, and that a private RICO claimant must allege a "racketeering injury," separate and apart from the injury inherent in the predicate offense.²⁷

Federal courts have broad discretion when fashioning a civil

²⁴ *Id.* § 1964(c). "To state a claim for damages under RICO, a plaintiff has two pleading burdens. First, he must allege that the defendant has violated" section 1962. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). Secondly, he must allege injury to his business or property as a result of the section 1962 violation. *Id.* To satisfy the first burden, a plaintiff must plead seven elements: (1) that the defendant; (2) committed two or more acts; (3) comprising a pattern; (4) of racketeering activity; (5) and invests in, has an interest in, or participates in; (6) an enterprise; (7) involved in interstate commerce. *Id.*

Although there is no provision for an award of attorneys' fees to a defendant in a civil RICO action, fees have been awarded where a plaintiff was found to have commenced a RICO action in bad faith. *See Financial Fed'n, Inc. v. Ashkenazy*, 1984 Fed. Sec. L. Rep. (CCH) ¶ 91,489 (C.D. Cal. May 9, 1983).

²⁵ *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 483 (2d Cir.), *rev'd*, 473 U.S. 479 (1984). Four significant judge-made restrictions on civil RICO existed before the *Sedima* decision; (1) the defendant must have been connected with organized crime; (2) the plaintiff must have suffered a competitive or indirect injury; (3) the enterprise must have existed separately from the pattern of racketeering activity; and (4) the plaintiff must have suffered a racketeering enterprise injury. *See Moran, Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma*, 57 TEMP. L.Q. 731, 746-47 (1984). The Seventh Circuit, however, chose not to limit civil RICO to convicted members of organized crime enterprises. *See Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). In *Haroco*, the predicate act was mail fraud allegedly committed by a bank scheming to defraud by overstating the prime rate. *Id.* at 385.

While a prior criminal conviction requirement has been proposed as a reform to RICO, *see Lacovara & Aronow, The Legal Shakedown of Legitimate Business People: The Run-away Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1, 28 (1988), there are others who believe that requiring a criminal conviction as a prerequisite to a civil suit would "leave victims of business fraud at the mercy of federal prosecutors in bringing their suits," *The ACLU's Bad Bargain*, NAT'L L.J., May 8, 1989, at 13, col. 1.

²⁶ 473 U.S. 479, 500 (1984).

²⁷ *Id.*; *see also*, McArthur & White, *Civil RICO After Sedima: The New Weapon Against Business Fraud*, 23 Hous. L. Rev. 743, 767 (1986) (RICO provides treble damages for "garden variety" business fraud); Comment, *The RICO Pattern After Sedima—A Case for Multifactor Analysis*, 19 SEON HALL L. REV. 73, 83 (1989) (special racketeering injury does not have to be plead and proven by plaintiff in civil RICO suit).

remedy to a RICO violation.²⁸ In addition to awarding damages and attorneys' fees, a court may impose restrictions on the future operations of the enterprise, enjoin certain individuals from future participation in the enterprise, or dissolve and reorganize the racketeering enterprise.²⁹ However, while RICO's broad scope and stringent penalties make it an effective weapon against organized criminal activity, it also increases the potential for its abuse.³⁰

II. APPLYING RICO TO THE PROTEST ORGANIZATION IN *McMonagle*

In *McMonagle*, the Northeast Women's Center ("the Center") alleged that it suffered injury to its property and business when the defendant protesters entered the Center during an anti-abortion protest.³¹ Initially, the Third Circuit determined that the in-

²⁸ See 18 U.S.C. § 1964(a) (1988). Initially, there was debate as to whether a private plaintiff could petition the court for the equitable remedies outlined in section 1964(a). See *Sedima*, 741 F.2d at 488-90. However, it should be noted that Professor Blakey, formerly Chief Counsel to the Senate Subcommittee on Criminal Laws and Procedures, has written that:

[a] congressional grant of the right to sue in the absence of statutory limitations, conveys the availability of all necessary and appropriate relief. Significantly, the treble damage clause of § 1964(c) is preceded by "and" and not "to." Consequently, the availability of comprehensive civil relief should prove of particular significance, for example, in the area of government fraud at the state and local level.

Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1038 n.133 (1980) (citations omitted).

²⁹ 18 U.S.C. § 1964(a) (1988). The list of remedies contained in the statute is illustrative and not exhaustive. *Id.*

³⁰ See Boucher, *Civil RICO: A Statute Out of Control*, in THE RICO RACKET 44-46 (1989). A bill was introduced in the 101st Congress by Representative Boucher (Dem.-Va.) and Senator DeConcini (Dem.-Az.) which contains a number of amendments to the civil RICO suit provision. See H.R. 1046, 101st Cong., 1st Sess. (1989); S. 438, 101st Cong., 1st Sess. (1989). The major changes proposed include the elimination of automatic treble damages, except when the defendant has been convicted of a felony. See H.R. 1046, 101st Cong., 1st Sess. § 4(5) (1989). Under the bill, most government plaintiffs would also recover double the damages suffered as a punitive remedy. *Id.* § 4(2)(c). The bill also provides for double damages for personal injuries suffered as a result of racketeering activity. *Id.* § 4(3). Finally, the bill adds several new crimes to the list of "racketeering activity" contained in section 1961(1). *Id.* § 2(2).

Another bill has been introduced into the House of Representatives by Representative LaFalce (Dem.-N.Y.). See H.R. 3522, 101st Cong., 1st Sess. (1989). This less complex bill simply eliminates "any conduct consisting of nonviolent protest" from the list of crimes in section 1961(1). *Id.*

³¹ See *McMonagle*, 868 F.2d at 1345-47. The first incident cited by the plaintiff occurred on December 8, 1984 when approximately 50 protesters, 12 of whom were defendants

jury suffered by the Center need not be competitive in nature to entitle the Center to seek redress under RICO.³² Instead, the court stated that the damage inflicted on the Center's medical equipment "was sufficient to meet RICO's injury requirement."³³ The Center structured its argument to fit within RICO by contending that the defendants had caused injury by conducting the affairs of their enterprise through a pattern of racketeering activity in that the defendant's protest activities were in violation of the Hobbs

in this lawsuit, entered the Center, knocked down the Center's employees who tried to stop them, blocked access to the examining rooms, and scattered medical supplies around the Center. *Id.* There was testimony that during this incident a Center employee was injured. *Id.* A total of 30 demonstrators were arrested and the Center responded by hiring security guards to control future demonstrations. *Id.* at 1345.

On August 10, 1985, 12 of the defendants reentered the Center and locked themselves in an operating room. *Id.* at 1346. An employee of the Center testified that she saw one of the defendants leave the center with an object under his coat. *Id.* In addition, during the protest, some of the machinery in the operating room was dissembled and damaged. *Id.*

The third incident occurred on October 19, 1985 when the defendants again attempted to enter the clinic. *Id.* Twenty-four of the defendants were arrested and three were convicted of defiant trespass. *Id.* The fourth and final demonstration occurred on May 23, 1986 when the protesters entered the clinic, sat down on the waiting room floor, and reprimanded patients awaiting treatment. *Id.* There was also evidence presented of other occasions when demonstrators conducted protests outside of the Center during which they chanted with bullhorns, blocked the entrance of the Center, and pounded on employees' cars. *Id.*

Two Center employees testified that they resigned from their positions because of the repeated harassment by the protesters. *Id.* Further, in July of 1986, the Center lost its lease and moved to a new location equipped with a sophisticated security system, which thwarted a fifth demonstration.

A jury awarded the Center \$887.00 in damages under the RICO claim, \$42,087.95 in compensatory damages for trespass, and \$48,000.00 in punitive damages (\$2,000.00 per defendant). *Id.* at 1347. The United States District Court for the Eastern District of Pennsylvania also enjoined the defendants from protesting on the Center premises or the parking lot adjacent to the Center, but set aside the punitive damages award. *Id.* Upon review on appeal, the Third Circuit affirmed the damages award, and remanded the issue of additional injunctive relief back to the district court. *Id.* at 1357.

³² See *id.* at 1349; see also *supra* notes 25-27 and accompanying text (discussion of judicial attempts to restrict RICO). The Third Circuit further stressed that it did not recognize the requirement that there be an economic motivation behind the "racketeering activity." See *McMonagle*, 868 F.2d at 1349-50. The plaintiff argued that even if an economic motive was required, there was sufficient economic motivation based upon *McMonagle's* testimony that he raised \$120,000 a year for the Pro-Life Coalition of Southeast Pennsylvania which coordinated the protests and was paid \$32,000 a year as its director. *Id.* at 1349 n.7.

³³ *McMonagle*, 868 F.2d at 1349. Since the medical equipment was damaged during one of the allegedly extortionate acts designed to drive the Center out of business, the Third Circuit concluded that RICO's injury requirement was satisfied. *Id.* at 1350. The Hobbs Act extortion claim was based on the interference with the intangible right to conduct business. *Id.* The Third Circuit pointed to the fact that the Hobbs Act protects intangible as well as tangible property rights. *Id.*

Act, one of the predicate acts enumerated in RICO.³⁴

The Hobbs Act prohibits the obstruction of interstate commerce through extortion,³⁵ and defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear."³⁶ The Hobbs Act's proscription against obstructing commerce through extortion is very broad.³⁷ For example, a company's right to make "a business decision free from outside pressure" is a property right under the Hobbs Act.³⁸ The fear wrongfully instilled by extortionists which induces the target to relinquish its property can even be merely fear of economic loss.³⁹

In *McMonagle*, in order for the Center to recover treble damages under RICO, the Center's injury had to have been caused by the violation of the Hobbs Act.⁴⁰ In satisfaction of this requirement, the Center claimed that the defendants used "force, threats

³⁴ *Id.* at 1348.

³⁵ 18 U.S.C. § 1951(a) (1988). The Hobbs Act provides that "whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both." *Id.* This was not the first application of the Hobbs Act to anti-abortion protesters. See *United States v. Anderson*, 716 F.2d 446, 447 (7th Cir. 1983). In *Anderson*, the defendants were members of an anti-abortion group called the Army of God. *Id.* After kidnapping a doctor who performed abortions, the defendants threatened to kill him if he did not promise to cease performing abortions and close his clinic. *Id.* at 448. Found to be guilty under the Hobbs Act of conspiracy and attempting to obstruct, delay, and affect interstate commerce through extortionate means, the defendants were convicted and sentenced to jail for 30 years. *Id.*

³⁶ 18 U.S.C. § 1951(b)(2) (1988). Extortion is commonly defined as the wrongful use of economic fear to obtain property. See, e.g., *United States v. Robilotto*, 828 F.2d 940, 944 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (defendant attempted to force victim with threats of costly labor shortages to pay union members for doing nothing); *United States v. Burke*, 781 F.2d 1234, 1244 (7th Cir. 1985) (defendant told victims only way to avoid indictment that would bankrupt them was to pay him).

³⁷ See *United States v. Mattson*, 671 F.2d 1020, 1023 (7th Cir. 1982). The Hobbs Act covers all extorsive acts affecting interstate commerce, not merely those involving racketeering. See *United States v. Frazier*, 560 F.2d 884, 886 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

³⁸ See *McMonagle*, 868 F.2d at 1350; *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

³⁹ See *United States v. Billups*, 692 F.2d 320, 330 (4th Cir. 1982), *cert. denied*, 464 U.S. 820 (1983). "A threat of economic harm—unlike the threat of physical harm—is not per se wrongful; a legal right to the funds or property at issue may therefore justify the threat of pecuniary harm, depending on the sort of harm threatened." *United States v. Kattar*, 840 F.2d 118, 123 (1st Cir. 1988). "Wrongful" means without lawful claim or right. *Id.* at 124. Fear of economic loss is not always an inherently "wrongful" means; however, when employed to achieve a wrongful purpose its use is unlawful. See *United States v. Clemente*, 640 F.2d 1069, 1077 (2d Cir. 1981), *cert. denied*, 454 U.S. 820 (1987).

⁴⁰ 18 U.S.C. § 1964(c) (1988).

of force, fear and violence in their efforts to force the [plaintiff] out of business."⁴¹ The Center also asserted that since the protesters trespassed on the Center's property and damaged its equipment, the activity was "wrongful."⁴² Upon review, the Third Circuit agreed, finding that the Center had a property right in the continuation of its business and that the defendants' "wrongful" protest activities, which were aimed at closing the Center, violated the Hobbs Act.⁴³ Finally, the court concluded that since the Center's property was injured during this Hobbs Act violation, the protesters were also liable under RICO.⁴⁴

It would appear that if the reasoning used by the Third Circuit in *McMonagle* is adopted by other circuits, it would be possible to silence protesters through the use or threat of a RICO suit. Also, since the *McMonagle* decision was based on a low threshold of "wrongful" activity, it seems that a group which opposed the activities or policies of a business would face potential RICO liability whenever it took steps which could be considered "wrongful." Thus, the *McMonagle* decision highlights the problem of allowing the target of protest activity, who has suffered only minimal damage, to allege as the predicate act for maintaining a RICO suit that the protest activity was "wrongful" and violated the Hobbs Act.

To illustrate the problems which could result from the low threshold of "wrongful" activity established by the Third Circuit, it is important to consider first that in *McMonagle*, the Center claimed that the defendants "used force, threats of force, fear and violence" to try to drive the Center out of business.⁴⁵ However, the "acts of violence" amounted to alleged injuries to one Center employee who attempted to block the protesters,⁴⁶ and damage to the

⁴¹ *McMonagle*, 868 F.2d at 1350. *McMonagle* had written a fundraising letter which stated:

[o]ur organization is encouraging and organizing increasingly effective protests at these abortion chambers In March, 1985 we received the welcome news that the Northeast Women's Center abortion chamber . . . would not have its lease renewed [T]his abortion chamber lost its lease because of the persistent prayers and protests of Pro Life citizens.

Id. at 1346 n.3.

⁴² *Id.* at 1349.

⁴³ *Id.* at 1350. The fact that the Center did not go out of business, as was the goal of the defendants, is not a relevant factor in the RICO analysis. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1345-47.

Center's equipment worth less than nine hundred dollars.⁴⁷ This is, indeed, a very low threshold of "wrongfulness" to give rise to RICO liability. Since protests often involve minor property damage, trespass, disturbing the peace, and empty threats,⁴⁸ it is inappropriate to subject protesters to RICO liability in addition to prosecution by the local authorities.⁴⁹

Secondly, it is also important to note that a plaintiff in a RICO suit does not have to show that the defendant's actions actually constituted a violation of a criminal statute in order to prove that the conduct was "wrongful," and that the defendant extorted his property through the "wrongful use of fear."⁵⁰ It is sufficient merely to demonstrate that the defendant acted without a lawful claim or right.⁵¹ Furthermore, the plaintiff is given the benefit of only having to prove the "wrongfulness" of the defendant's conduct by a "mere preponderance" standard as opposed to the more stringent "beyond a reasonable doubt" standard as is required in criminal trials.⁵² Finally, even though civil RICO is being used to punish the defendant's "wrongful" conduct, the defendant is not

⁴⁷ *Id.*

⁴⁸ See Melley, *supra* note 14, at 309-10. The defendants urged the court to consider the consequences of applying civil RICO in this context: "[i]f two sit-ins at an abortion clinic trigger federal jurisdiction and RICO applicability, the federal courts will play host to a variety of social causes: animal rights activists at furriers, antinuclear activists at nuclear power plants, fundamentalists at adult bookstores, antiapartheid activists at businesses and universities." *Id.* at 309-10 n.153 (quoting from defendants' summary judgment memorandum).

Under this view:

many other individuals and groups would have been guilty of racketeering activity [according to *McMonagle*]. Martin Luther King Jr. was guilty of trespassing and even of harming the property of those against whom he was demonstrating The National Organization for Women, which issued a statement supporting the [*McMonagle*] case would be a racketeering enterprise for encouraging civil disobedience. NOW might find that RICO is a two-edged sword if ever anyone wanted to turn the political tables.

Crovitz, *supra* note 7, at 28.

⁴⁹ See Melley, *supra* note 14, at 309-10. State criminal statutes and tort law already address the unlawful behavior of protesters. See *infra* text accompanying notes 70-74. RICO could also subject those who support and contribute to protest organizations to liability for the wrongful acts of protesters. See *infra* note 92 and accompanying text.

⁵⁰ Note, *The Hobbs Act and RICO: A Remedy for Greenmail*, 66 TEXAS L. REV. 647, 660 (1988). This result flows from the Supreme Court's decision in *Sedima*, 473 U.S. at 479. See *supra* notes 26-27 and accompanying text. In *Sedima*, the Court eliminated any requirement of proving criminal activity to maintain a civil RICO suit. *Id.*

⁵¹ See Note, *supra* note 50.

⁵² See *id.* at 679.

safeguarded with any criminal procedural protections.⁵³

A plaintiff can successfully plead a violation of the Hobbs Act under *McMonagle* by maintaining that a right to conduct business without "wrongful" interference from protest groups exists, and by asserting coercion based on such "wrongful" protest activity.⁵⁴ By further claiming minor property damage due to the Hobbs Act violation, a plaintiff can successfully plead a civil RICO case and sue for treble damages, injunctive relief, and attorneys' fees.⁵⁵

It is clear that RICO was intentionally written broadly to encompass the myriad of businesses infiltrated by organized crime.⁵⁶ However, it seems equally apparent that Congress did not intend to extend civil RICO liability to concerned citizens who protest against what they perceive to be unjust. It is important to note that serious constitutional issues are raised when RICO is extended into areas for which it was not intended.⁵⁷

III. CONSTITUTIONAL PROBLEMS WITH ALLOWING RICO SUITS AGAINST PROTEST ORGANIZATIONS

Against the backdrop of the first amendment, the use of civil

⁵³ See Note, *Civil RICO is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964*, 100 HARV. L. REV. 1288 *passim* (1987).

⁵⁴ 18 U.S.C. § 1951(a) (1988); see *McMonagle*, 868 F.2d at 1348-50.

⁵⁵ 18 U.S.C. § 1964(c) (1988); see *McMonagle*, 868 F.2d at 1348-50.

⁵⁶ See *supra* note 3 and accompanying text. The Senate Judiciary Committee Report on RICO stressed that legitimate businesses were only to be affected by RICO when mobsters attempted to use them for unlawful purposes. See Crovitz, *supra* note 7, at 17. The concern was that organized crime had already infiltrated many legitimate businesses such as: jukebox and vending machine distribution, laundry services, food wholesaling, record manufacturing, nightclubs, and liquor distribution. *Id.*

Senator John McClellan (Dem.-Ark.), however, stressed that RICO would capture more than just mobsters, when he stated: "the Constitution applies to those engaged in organized crime just as it applies to those engaged in white collar crime . . . [This bill] must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases." *Id.*

⁵⁷ See *supra* note 16 and accompanying text. One of the areas where RICO has caused much first amendment debate is an obscenity law violation included as a "predicate act" in section 1961(1). See Pub. L. No. 98-473, § 1020, 98 Stat. 2143 (1984). Commentators have found the forfeiture of all enterprise assets, including a bookseller's non-obscene materials, to be particularly troubling as a restraint on free expression. See Bandow, *The Obscenity of Federal RICO Laws*, in *THE RICO RACKET* 34-35 (1989). In one instance, over one million dollars worth of bookstore inventory was seized after the defendants were convicted of selling six obscene magazines and four obscene videotapes valued at \$105.30. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 51-52 (1989) (however, pretrial seizure order found unconstitutional); see also Note, *RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores*, 43 U. MIAMI L. REV. 419, 446-47 (1988) (arguing that use of RICO to regulate obscenity presents constitutional problems).

RICO against protesters such as those in *McMonagle* poses compelling constitutional questions.⁵⁸ Expressivist activities such as protest marches, picketing of public and private facilities, mass mailings, newsletters, and a variety of more creative acts are entitled to protection under the first amendment.⁵⁹ Even though the Third Circuit recognized that the protest activities in *McMonagle* fell under the category of expressive conduct and were entitled to protection under the first amendment,⁶⁰ the court found that the government's interest in public safety justified the imposition of limitations on such expression.⁶¹ Due to the severity of the civil RICO sanctions, allowing suits in this context arguably might have a chilling effect on free expression.

A. Symbolic Speech

The Supreme Court has recognized that certain acts take the form of expression, and are therefore entitled to the same first amendment protection that speech enjoys.⁶² The standard employed examines the acts in question to establish whether they are

⁵⁸ See Melley, *supra* note 14, at 309-10. "[C]hampions of social causes must now fear the institution of a RICO action against them, the stigma of being labeled 'racketeers' and the overwhelming burden of treble damages." *Id.* at 309. The ACLU has expressed the view that "civil RICO's potential for chilling First Amendment rights of expression is enormous." *The Washington Post*, July 8, 1989, at A-15 (quoting Antonio Califa, legislative counsel to ACLU).

⁵⁹ See *United States v. Grace*, 461 U.S. 171, 176-78 (1983). The rights of anti-abortion picketers to express their views has been found to be protected by the first amendment. See *North Shore Right to Life Comm. v. Manhasset Am. Legion*, 452 F. Supp. 834, 838-40 (E.D.N.Y. 1978). Where picketing also inflicts economic injury on the object of the picketing, that fact alone does not make the picketing unlawful. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971). Although a defendant's message may have injured a plaintiff economically, it can still be entitled to full first amendment protection. See *Eagle Books, Inc. v. Jones*, 130 Ill. App. 3d 407, 415, 474 N.E. 2d 444, 449, *cert. denied*, 474 U.S. 920 (1985).

⁶⁰ See *McMonagle*, 868 F.2d at 1348-49. The defendants characterized their activities as "civil disobedience." *Id.* The court stated that "[t]he defendants have a constitutional right to attempt to persuade the Northeast Women's Center to stop performing abortions." *Id.* at 1349 (quoting district court's jury instructions).

⁶¹ See *id.* at 1348. "The First Amendment, which guarantees individuals freedom of conscience and prohibits governmental interference with religious beliefs, does not shield from government scrutiny practices which imperil public safety, peace or order." *Id.* (quoting *United States v. Dickens*, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983)). In *Dickens*, the defendants were convicted of RICO violations for robberies committed to finance their religious organization. *Dickens*, 695 F.2d at 772. It is important to note that the interest asserted by the government when it attempts to limit expression must, however, be "substantial." *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

⁶² See *O'Brien*, 391 U.S. at 376.

sufficiently imbued with elements of communication to implicate the first amendment based on the context in which the acts occurred and any speech which accompanied the acts.⁶³ When an act involves both speech and nonspeech elements, the government must demonstrate a sufficiently important interest in regulating the nonspeech element before it can limit the expression which emanates from the conduct.⁶⁴ The test for the constitutionality of the regulation of expressive conduct was outlined in *United States v. O'Brien*.⁶⁵ Under *O'Brien*, the regulation of conduct must be within the constitutional power of the government.⁶⁶ Second, there must be a substantial government interest in regulating the conduct.⁶⁷ Third, the government's interest must not be related to the suppression of free expression.⁶⁸ Finally, the regulation must first be no broader than necessary to protect the government interest.⁶⁹

It is submitted that the use of civil RICO against protest organizations fails to satisfy the third and fourth prongs of the *O'Brien* test, since the individual wrongful acts of protest which are punishable under state law can be distinguished from the message they convey. A message is conveyed by the persistent action of a protest group, or, in other words, a pattern of activity.⁷⁰ While

⁶³ See *Texas v. Johnson*, 109 S. Ct. 2533, 2539 (1989). When analyzing whether conduct is expressive, the issue is whether "[a]n intent to convey a particularized message was present, and . . . [if] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Many different types of conduct have been held to be expressive under this analysis. See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505-06 (1969) (wearing black armbands to school); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (sit-in).

⁶⁴ *O'Brien*, 391 U.S. at 376. If the limitation on the conduct is not related to the expressive nature, or the message that the actor is attempting to convey, then the test laid out in *O'Brien* will apply. See *Johnson*, 109 S. Ct. at 2538. If, however, the regulation is "related to the suppression of free expression," the test for constitutionality is much stricter. See *id.*

⁶⁵ 391 U.S. 367 (1968).

⁶⁶ *Id.* at 377. In *O'Brien*, the requirement that males carry a draft registration card was found to be a constitutional exercise of Congress' power to raise and support armies. *Id.* at 377-78.

⁶⁷ *Id.* The Court has used a variety of synonyms to describe the type of government interest which can justify a regulation of expression, which include: compelling, substantial, paramount, cogent, and strong. *Id.* at 376-77.

⁶⁸ *Id.* A court should not try to find an illicit motive behind a regulation. *Id.* at 383. Rather, a court should merely examine the statute itself and the legislative history to determine if the statute is an attempt to limit free expression. *Id.*

⁶⁹ *Id.* at 377.

⁷⁰ See *McMonagle*, 868 F.2d at 1349; see also *Texas v. Johnson*, 109 S. Ct. 2533, 2537 (1989) ("[g]iven the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the mes-

state law addresses the wrongful actions themselves, RICO attempts to curtail the "pattern of racketeering activity."⁷¹ Since it is the *pattern* of activity that creates a message, and RICO liability arises from a pattern of activity, it is suggested that the net result is that RICO liability hinges on conduct which is inherently expressive. Thus, while state tort law attacks the individual acts of the group, RICO attacks the pattern from which the expressive quality of the acts arises.⁷² Since RICO is premised on deterrent-type remedies, the likely effect of imposing RICO liability on this kind of conduct is a discontinuation of the pattern of protest activity and a silencing of the message it seeks to convey.⁷³ Further, it can be contended that RICO creates a limitation on expressive conduct which is broader than necessary to limit wrongful protest activity since state criminal and tort law already provide adequate redress for victims of disruptive protest acts.⁷⁴

sage that appellant intended to convey" (quoting *Johnson v. State*, 755 S.W.2d 92, 95 (Tex. Ct. App. 1988), *aff'd*, 109 S. Ct. 2533 (1989)); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505 (1969) (high school students allowed to wear black armbands to protest Vietnam War); *Stromberg v. California*, 283 U.S. 359, 368-70 (1931) (display of red flag to symbolize opposition to government could not be prohibited by statute).

⁷¹ 18 U.S.C. § 1962 (1988); see *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) ("racketeering acts must have been connected with each other by some common scheme, plan or motive") (emphasis added).

⁷² 18 U.S.C. § 1961(5) (1988). RICO creates an incentive to plead creatively a state law tort claim. See *Boucher*, *supra* note 30, at 45. By alleging a Hobbs Act violation for interference with one's business, a plaintiff can transform a trespass or nuisance action against protestors into a full-blown RICO suit. See *id.* Thus, the defendant risks being labeled a "racketeer" and faces the prospect of treble damages. See *id.*

⁷³ See *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting). "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Id.*

The risk of RICO being used against protest organizations is bound to increase since *McMonagle*. Interestingly, the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law revealed that only nine percent of all civil RICO actions "involved allegations of criminal activity normally associated with professional criminals." *Id.* (citing *Report of the Ad Hoc Civil RICO Task Force*, ABA SEC. CORP., BANKING & BUS. LAW 69 (1985)).

Additionally, criminal RICO actions are limited by the United States Attorney's Manual which states that RICO actions must undergo a centralized review process. See U.S. Department of Justice, United States Attorney's Manual 9-110, at 9-2131. However, "[i]n the context of civil RICO . . . the restraining influence of prosecutors is completely absent." *Sedima*, 473 U.S. at 504, (Marshall, J., dissenting); see also, *Abrams*, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. Rev. 11, 20 (1989) (proposing that civil RICO claims be subjected to "prosecutorial review" which would screen out cases that were based upon actions which would not merit criminal prosecution).

⁷⁴ See *McMonagle*, 868 F.2d at 1347. In *McMonagle*, the plaintiff sought relief under

B. Reasonable Time, Place, and Manner Restrictions

The Supreme Court has upheld limitations on organized protest activity only when the limits are content neutral.⁷⁵ In order to be deemed content neutral, a restriction must be a limitation of reasonable time, place, and manner.⁷⁶ Proponents of extending civil RICO liability to protest groups who engage in wrongful conduct assert that RICO functions as a content neutral regulation on disruptive protest activity by merely penalizing activity which is considered extortion under the Hobbs Act.⁷⁷ Any protest activity which does not fall under the ambit of the Hobbs Act is not affected regardless of its message.⁷⁸ The proponents of such liability conclude that RICO is a reasonable time, place, and manner type

the common-law torts of trespass and intentional interference with contractual relations. *Id.* The Hobbs Act's definition of extortion and robbery is based on the New York State criminal code. See *United States v. Furey*, 491 F. Supp. 1048, 1062 (E.D. Pa.), *aff'd*, 636 F.2d 1211 (3d Cir. 1980), *cert. denied*, 451 U.S. 913 (1981).

The Fifth Circuit recognized the potential for overlap between the federal law and existing state law:

[t]he scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform any ordinary state law claim into a federal racketeering charge. It may be unfortunate for federal courts to be burdened by this kind of case, but it is not for this Court to question policies decided by Congress and upheld by the Supreme Court.

R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985).

Justice Thurgood Marshall noted that:

[t]he effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years the Courts of Appeals have "tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law."

Sedima, 473 U.S. at 502 (Marshall, J., dissenting) (quoting *United States v. Weiss*, 752 F.2d 777 (2d Cir. 1985) (Newman, J., dissenting)).

⁷⁵ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Court held that a regulation of organized protest activity is constitutional if it is made without reference to the content of the demonstration, is narrowly tailored to serve a substantial government interest, and leaves open alternative avenues of communication of the intended message. *Id.*

⁷⁶ *Id.* at 294; see, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983) (when forum is either traditionally open to public or designated open to public, any regulation on expressive conduct must be content neutral, narrowly tailored to effectuate compelling government interest, and leave open ample channels of communication); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (ordinance banning picketing within 150 feet of school fails reasonable time, place and manner test because exception for "peaceful picketing of any school involved in a labor dispute" is not content neutral).

⁷⁷ See *McMonagle*, 868 F.2d at 1350.

⁷⁸ *Id.* at 1348. The Third Circuit stated that "[w]e would have grave concerns were these or any other defendants held liable under civil RICO for engaging in the expression of dissenting political opinions in a manner protected under the First Amendment." *Id.*

limitation on protest activity.⁷⁹

This argument, however, is open to attack. As described previously, RICO's jurisdiction over protest activity is very broad,⁸⁰ and a wide variety of actions taken by a protest group could be characterized as wrongful and accordingly be labelled extortion under the *McMonagle* view of the Hobbs Act.⁸¹ Relatively minor digressions from lawful conduct could subject a protester to RICO liability.⁸² Since RICO does not contain safeguards to prevent its application to trivial offenses,⁸³ it appears that this results not in a reasonable limitation on the time, place, or manner of protest activity, but a *prohibition* of all protest activity involving trespass or other minor unlawful activity. Moreover, a group unwilling or unable to risk a large judgment against it, would have fewer avenues of communication to oppose policies or practices it finds objectionable.⁸⁴

C. Prior Restraints

Regulations that can be classified as prior restraints on expression are generally looked upon with disdain.⁸⁵ The inherent policy underlying the first amendment is that everyone should have an

⁷⁹ Cf. *Clark*, 468 U.S. at 293. The Court will uphold content neutral, time, place, and manner limitations on protest activity if the limitations are "narrowly tailored" and "leave open ample alternative channels for communication." *Id.*

In defense of RICO, Professor Blakey stated that the statute was intended to be applied broadly:

[r]ead the language . . . [it] says 'any person.' There's nothing about any person whose name ends in a vowel. It says any person. Stop and think about it for a minute. It would be obscene if it were otherwise. The statute doesn't apply to blue-collar people only, or no-collar people only. It applies to everybody.

Crovitz, *supra* note 7, at 30 (citing *Nightline* (ABC television broadcast, April 12, 1989)).

⁸⁰ See *supra* notes 31-57 and accompanying text.

⁸¹ See Melley, *supra* note 14, at 309. When RICO is applied to ordinary trespass situations such as in *McMonagle*, the penalties can be out of proportion to the tort committed. *Id.*

⁸² See *supra* notes 45-51 and accompanying text.

⁸³ See *supra* notes 50-53 and accompanying text.

⁸⁴ See Melley, *supra* note 14, at 309.

⁸⁵ See *Near v. Minnesota*, 283 U.S. 697, 713 (1931). "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." *Id.* The Supreme Court consistently has adhered to the strong presumption against prior restraints. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-62 (1976) (state court's prohibition of press attending murder trial held to be unconstitutional prior restraint); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (government's attempt to enjoin publication of Pentagon Papers did not overcome presumption against prior restraints); *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (state's attempt to informally censor certain publications held to be impermissible prior restraint).

opportunity to be heard.⁸⁶ However, a premium is placed on the right to have one's message disseminated, since the speaker can be punished when the expression is subsequently found to be unprotected.⁸⁷

It can be argued that RICO represents a potential prior restraint on protest activity, based on the threat of severe penalties⁸⁸ and the provisions regarding conspiracy to commit a RICO offense.⁸⁹ If faced with the threat of treble damages and being labeled "racketeers," there is a likelihood that groups may curtail protest activities which fit under the broad umbrella of extortion as defined in *McMonagle*.⁹⁰

Furthermore, the conspiracy provision of RICO could have a chilling effect on the recruitment of supporters, since merely by assisting those who are undertaking the protest activity which is found to be extortive, a supporter of the organization can become a target for a civil RICO suit under the conspiracy provision.⁹¹ The threat of RICO liability may cause an erosion of popular support from concerned but not actively involved parties, and more importantly, a dwindling of funding for social activist groups by prospective donors who may fear retribution for "conspiring to violate RICO" by contributing to the group.⁹² It is, therefore, possible to

⁸⁶ *Near*, 283 U.S. at 713-14; see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes enunciated his "marketplace of ideas" theory which advocated a policy of allowing everyone an opportunity to be heard. *Id.* (Holmes, J., dissenting). Justice Holmes believed that under the Constitution the "best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* (Holmes, J., dissenting). The Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), subsequently held that free speech could not be proscribed unless the speech was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*

⁸⁷ Three examples of when the speaker can be punished for speech determined to be unprotected after its utterance are: (1) obscenity, see *Miller v. California*, 413 U.S. 15, 23 (1973); (2) defamation, see *New York Times v. Sullivan*, 376 U.S. 254, 254 (1964); and (3) "fighting words," see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 568 (1942).

⁸⁸ See 18 U.S.C. § 1964(c) (1988).

⁸⁹ See *id.* § 1962(d).

⁹⁰ See, Melley, *supra* note 14, at 309; see also *The Washington Post*, July 8, 1989, at A-15 (protest groups are more prudent about activities due to RICO liability fear).

The expense and risk of a RICO judgment will persuade many defendants to settle, perhaps even agreeing to end the protests rather than defend a suit. See *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting).

⁹¹ See *McMonagle*, 868 F.2d at 1350. Because attempted extortion and conspiracy to commit extortion are crimes under the Hobbs Act, the fact that the protestors did not achieve their ultimate goal of closing the center is no defense to the RICO cause of action. *Id.*

⁹² See Melley, *supra* note 14, at 309.

view the fear of retribution merely for supporting a protest group as a prior restraint on the ability of the group to communicate its message.

CONCLUSION

RICO was purposefully designed broadly with severe penalties for use as an effective weapon against organized crime, its intended target. However, RICO has been applied in many circumstances not originally intended by Congress, such as the use of RICO's civil provisions against protest organizations. This usage, in particular, raises significant first amendment issues. RICO suits, or the mere threat of these suits, against protesters could have a chilling effect on free expression, as this Note has suggested. Consequently, the Supreme Court should scrutinize the use of civil RICO against protest groups, and limit its use when first amendment rights are threatened.

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