OF RUM, RIGHTS, AND RICO: ARE PLAINTIFFS INTOXICATED WITH THE POWER OF CIVIL RICO? WHAT IS FALLING VICTIM TO THE STATUTE?

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I. INTRODUCTION

One comedy of human life is that sometimes our actions do not produce their intended results. In fact, the fruit of one's conduct often proves to be the exact opposite of the conduct's intended purpose. Such is the "irony" of human existence. Webster provides a definition of irony—"a state of affairs or events that is the reverse of what was or was to be expected: a result opposite to and as if in mockery of the appropriate result."[1] With this definition in mind, and given that Congress is composed of people no less human than the citizens they represent, it is no surprise our senators and representatives likewise have been known to face irony.

1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1195 (1981).

In 1970, Senator Roman Hruska[2] expressed serious concern about the insidious power of organized crime to infiltrate and control legitimate businesses.[3] He identified two tools commonly used by organized crime to accomplish its purposes—fear and intimidation.[4] Title IX of the Organized Crime Control Act of 1970[5] entitled "Racketeer Influenced and Corrupt Organizations" ("RICO")[6] was part of Congress' response to the threat of organized crime. Its purpose was to stem the infiltration of organized crime into legitimate business by "fashioning . . . new criminal and civil remedies and investigative procedures."[7]

Clearly RICO was intended to provide relief for certain victims of organized crime. Twenty years later, however, RICO has become a powerful weapon for intimidating civil defendants who have no connection with organized crime. In light of its intended purpose, RICO's present "state of affairs" is presenting "a result opposite to and as if in mockery of" our nation's most basic freedoms and systems of justice.

This Note briefly examines RICO's origins and history, reviews how some civil litigants are presently applying it, and how various plaintiffs are becoming intoxicated with its remedies. This author concludes RICO has fermented garden-variety state causes of action into unduly oppressive actions. This author also concludes that misuse of civil RICO is eroding the federal-state balance guaranteed by the tenth amendment.

Moreover, this Note evaluates how expansive use of civil RICO is seriously undermining the most basic freedoms of speech and press guaranteed by the first amendment. Current applications of the statute conflict with principles enunciated in earlier civil rights cases. Civil RICO presents an obvious irony—intended to be a tool to aid victims of intimidation, its "remedies" are instead becoming a tool of intimidation.

II. CIVIL RICO'S BIRTH: CONGRESS TREADING THE GRAPES OF WRATH AGAINST ORGANIZED CRIME

A. *Congress' Perceptions: The Threat of Organized Crime and the Need for RICO*

To understand the irony in RICO's present status, one must consider its legislative heritage.[9] In 1967, the President's Commission on Law

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2. Republican, Nebraska.
3. 116 CONG. REC. S30,602 (daily ed. Jan. 21, 1970) (statement of Sen. Hruska).
4. *Id.*
5. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970).
6. 18 U.S.C. §§ 1961-1968 (1988).
7. S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969).
8. *See supra* note 1 and accompanying text.
9. For an in-depth analysis of RICO's legislative history, see Lynch, *RICO: The Crime of Being a Criminal Parts I & II*, 87 COLUM. L. REV. 661, 664-84 (1987).

Enforcement and Administration of Justice ("Commission") reported organized crime presented a menace to society by gaining control of legitimate businesses and labor unions.[10] Partly in response to the Commission's report, Senators Hruska and McClellan introduced several bills that were intended to thwart organized crime's infiltration of businesses.[11] They emphasized the intimidation and illegal conduct employed by organized crime to gain control over legitimate businesses.[12] At the same time, Senator Hruska stated private businesses victimized by organized crime lacked adequate remedies for the injuries they suffered.[13] To fill that remedial void, Congress incorporated RICO[14] in the "Corrupt Organizations Act of 1969."[15]

Section 1962 of RICO prohibits any person from investing any money received "directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt" in an enterprise engaged in or affecting interstate commerce.[16] It also prohibits the acquisition of an interest in or control of such enterprises through "a pattern of racketeering activity."[17] Finally, RICO makes it unlawful to conspire to violate any of these provisions.[18]

Section 1964 of RICO provides several civil remedies for violations of section 1962. Federal district courts have "jurisdiction to prevent and restrain violations of section 1962" by ordering divestiture of any interest in

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10. Lynch, *supra* note 9, at 669 (quoting the PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967)). (The Commission stated organized crime was "extensively and deeply involved in legitimate business and labor unions. Here it employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out lawful ownership and leadership and to exact illegal profits from the public.")

11. Senator Roman Hruska introduced two bills: S. 2048, 90th Cong., 1st Sess. (1967) and S. 2049, 90th Cong., 1st Sess. (1967). The House introduced companion bills: H.R. 11,266, 90th Cong., 1st Sess. (1967) and H.R. 11,268, 90th Cong., 1st Sess. (1967). No action was taken on these bills, however.

12. Lynch, *supra* note 9, at 673-78; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 514-17 (1985) (Marshall, J., dissenting) (reviewing RICO's legislative genesis).

13. S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6993 (1969).

14. *Id.* The statute's sponsors intended to provide new remedies when present ones were inadequate. No indication exists, however, that the bill's proponents intended to supplant then-existing remedies under state and federal law. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 514 (Marshall, J., dissenting) ("Congress sought to fill a gap in civil and criminal laws and to provide new remedies broader than those already available . . . ."). *Cf.* Lynch, *supra* note 9, at 680 (Nowhere does RICO's legislative history suggest the imposition of additional criminal sanctions for crimes unrelated to organized crime.); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 845 (1980) ("There is no indication that RICO was designed to provide increased penalties for racketeering activities . . . or to greatly increase the scope of criminal conspiracy . . . .").

15. S. 1861, 91st Cong., 1st Sess. (1969).

16. 18 U.S.C. § 1962(a) (1988).

17. *Id.* § 1962(b),(c).

18. *Id.* § 1962(d).

any enterprise and by restricting any person from engaging in similar activities in the future.[19] In addition, the Attorney General is authorized to institute civil proceedings for injunctive relief.[20] RICO also permits a person to sue for treble damages, including attorney fees, for injuries resulting from a violation of section 1962.[21]

Congressional intent regarding application of these remedies has been the subject of considerable debate. Much of the controversy centers on Congress' meaning of "a pattern of racketeering activity" in section 1962. RICO's definition of "pattern of racketeering activity" simply "requires at least two acts of racketeering activity" occur within ten years of each other.[22] Section 1961 defines "racketeering activity" by means of a variety of state law crimes including murder, kidnapping, extortion, dealing in obscene matter, and drug trafficking.[23] "Racketeering activity" also includes a host of federal crimes involving such activities as bribery, embezzlement, extortion, drug trafficking, gambling, mail or wire fraud, obscenity, and obstruction of justice.[24]

Certainly, the crimes identified in section 1961 have been typical of organized crime. The problem is many common criminals with no connection to organized crime may also commit some of the same offenses. Thus, the minimum standards of RICO cover a broad range of activities outside the scope of organized crime. The catchall nature of RICO's provisions has not gone without criticism.[25]

B. *The Debate over RICO's Purpose: Discerning Congress' Intent*

The question of how broadly Congress intended RICO's language to be applied has been the subject of considerable controversy among both courts and commentators. Some commentators suggest RICO was intended to apply to all forms of criminal enterprise, not only to organized crime.[26] Other commentators, however, conclude RICO's purpose was to deal with the

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19. *Id.* § 1964(a). Subsection (a) also gives the district courts power to order "dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." *Id.*

20. *Id.* § 1964(b). The Ninth Circuit Court of Appeals has held private plaintiffs do not have a right to injunctive relief under the civil provisions of RICO. Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986). Under *Wollersheim*, only the Attorney General may use RICO's provision for an injunction. *Id.* at 1089.

21. 18 U.S.C. § 1964(c) (1988).

22. *Id.* § 1961(5).

23. *Id.* § 1961(1).

24. *Id.*

25. Sanders, *Showdown at Gucci Gulch*, TIME, Aug. 21, 1989, at 48.

26. *See, e.g.*, Blakely & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013-14 (1980).

infiltration of organized crime into legitimate businesses.[27] This latter group maintains RICO should not be used against unlawful conduct that has no relation to organized crime.

One reason for the confusion is Congress did not specifically state that RICO was to be aimed solely at members of the Mafia. Nowhere does the statute expressly refer to organized crime *per se*. In addition, Congress stated the statute was to be broadly construed to effectuate its purposes.[28] These facts, combined with the catchall nature of RICO's language, led five Justices of the United States Supreme Court to conclude RICO applied to the conduct of respected businesses that had no link to organized crime.[29]

Legislative history, however, indicates Congress chose not to identify organized crime *per se* in the statute to avoid constitutional problems.[30] Outlawing membership in an organization, even one such as the Mafia, would have infringed on the freedom of association inherent in the Bill of Rights.[31] Therefore, by making no direct reference to organized crime, Congress likely was only seeking to preserve the statute's constitutionality.

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27. *See, e.g.*, Lynch, *supra* note 9, at 678 (finding no support for the more expansive interpretation of RICO's purpose in its legislative history); Dorigan & Edwall, *A Proposed RICO Pattern Requirement for the Habitual Commercial Offender*, 15 WM. MITCHELL L. REV. 35, 86-87 (1989) (concluding congressional history points RICO toward organized crime).

28. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985).

29. *Id.* at 495, 497 (Section 1962 applies to " 'any person'—not just mobsters"; "RICO is to be read broadly"). *See infra* notes 46-49 and accompanying text.

30. *Id.* at 525 (Powell, J., dissenting). A study conducted by the American Bar Association ("ABA") concurs:

> [I]n an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a "pattern of racketeering activities" in connection with an "enterprise," rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. "Racketeering" was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers and other traditional members of "organized crime." The "pattern" element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes. The "enterprise" element, when coupled with the "pattern" requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime.

Id. at 526 (quoting *Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP., BANKING & BUS. L. 71-72 (footnote omitted)).

31. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963). Even the Smith Act did not outlaw the Communist Party *per se*. Instead, it was directed in general terms at the "*sort* of organization in which membership is prohibited." Lynch, *supra* note 9, at 686 n.120 (emphasis in original). *See also* 18 U.S.C. §§ 2385-2386 (1988).

The fact RICO's statutory language is so expansive does not necessarily mean it should be applied to nonorganized crime.

Nevertheless, by "defining species of crimes instead of species of criminals," RICO's penalties logically have been extended to "ordinary businessmen gone astray as well as career criminals."[32]

> [S]ince the statute"s working definition of organized crime is found only in expansive definitions of "enterprise" and "pattern of racketeering," the statute so read would apply not only to La Cosa Nostra, but to any group of individuals banded together into an "associat[ion] in fact" to commit any of the wide range of crimes defined by section 1961(1) as "typical of organized crime."[33]

Consequently, RICO's language has been applied to groups "associated in fact" that have no connection with organized crime.

Admittedly, any attempt to discern congressional intent from legislative history may be a perilous undertaking. Nevertheless, more than a few legal scholars have concluded Congress intended RICO to apply to only organized crime, not to other groups and activities.[34] Much of the controversy surrounding the statute revolves around civil RICO's involvement in lawsuits having no connection to organized crime.

III. CIVIL RICO IN FERMENT: INITIAL COURT INTERPRETATION AND THE IMPACT OF *SEDIMA*

For the first ten years of its life, RICO was used largely in a criminal context.[35] During the 1970s, civil RICO remained a fairly dormant provision. In the early 1980s, however, civil RICO grew increasingly popular as litigants discovered its broad language and substantial damage provisions. Initially courts were reluctant to apply the broad civil provisions of RICO against respectable businesses that had no connection to organized crime.[36] Thus, during the 1980s many courts required plaintiffs to show that

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32. Lynch, *supra* note 9, at 683 (footnote omitted).

33. *Id.* at 684-85 (footnote omitted).

34. *See id.*, *supra* note 9, at 664; Dorigan & Edwall, *supra* note 27, at 86; Melley, *The Stretching of Civil RICO: Pro-life Demonstrators Are Racketeers?*, 56 U. MO. KAN. CITY L. REV. 287, 309 (1988); Note, *Clarifying a "Pattern" of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*, 86 MICH. L. REV. 1745, 1763-68 (1988) [hereinafter Note, *Clarifying a "Pattern"*].

35. Melley, *supra* note 34, at 291. Section 1963 of RICO provides criminal penalties for violations of the racketeering activities prohibited in section 1962. 18 U.S.C. § 1963 (1988).

36. *See, e.g.*, Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (RICO is aimed at "a society of criminals," not legitimate businesses); Note, *Clarifying a "Pattern,"* *supra* note 34, at 1750; Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma*, 57 TEMP. L.Q. 731, 731-32 (1984) (courts were uneasy to apply RICO's broad provisions to legitimate businesses). *But see, e.g.*, Moss v. Morgan

a defendant had some nexus to organized crime to maintain a civil-RICO action.[37]

This resistance to using civil RICO in garden-variety fraud cases peaked when the Second Circuit Court of Appeals considered *Sedima, S.P.R.L. v. Imrex Co.*[38] *Sedima* involved a lawsuit between a Belgian and an American corporation based on common-law claims of unjust enrichment, conversion, breach of contract, breach of fiduciary duty, and breach of a constructive trust.[39] The plaintiff in *Sedima* sought treble damages and attorney fees under civil RICO, maintaining the defendant engaged in wire and mail fraud.[40]

The Second Circuit held that to have standing under RICO, the plaintiff must allege a "racketeering injury."[41] In other words, the plaintiff must show its injury resulted from the type of "activity which RICO was designed to deter"—infiltration by organized crime—not merely from anti-competitive activity.[42] Fundamental to the court's restrictive application was its disapproval of the "extraordinary, if not outrageous" ways civil RICO was being applied against respected businesses rather than mobsters.[43]

Moreover, to maintain a civil action under RICO, the plaintiff must show the defendant had been criminally convicted of the underlying predicate offense.[44] The defendant in *Sedima* had not been criminally convicted of wire or mail fraud, or of any other predicate offense. Therefore, the

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Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984) (rejecting argument that a RICO claim must be based on "allegations of any connection with organized crime").

37. Barr v. WUI/TAS, Inc., 66 F.R.D. at 113.

38. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

39. *Id.* at 484.

40. *Id.* at 485. The plaintiff alleged the defendant falsely overstated certain prices and charges in its billings to the plaintiff. *Id.* at 484. As with many modern-day transactions, the business transactions at issue in this suit involved the use of mails and telephones. Therefore, the plaintiff alleged the defendant engaged in a pattern of racketeering activity by violating federal wire and mail fraud statutes. *Id.* at 485. Both federal statutes are referenced under section 1961 of RICO in its definition of "racketeering activity." 18 U.S.C. § 1961 (1988). The plaintiff also alleged the defendant engaged in a conspiracy in violation of section 1962(d) of RICO. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d at 484. Considering how much business is transacted by mail and telephone today, almost any business transaction could conceivably qualify as wire and mail fraud under RICO, if one party engages in unlawful conduct.

41. *Id.* at 496.

42. *Id.* at 495-96.

43. *Id.* at 487.

44. *Id.* at 496. In reviewing prior caselaw and the construction of the statute itself, the Second Circuit Court of Appeals determined RICO was "designed to provide new penalties and remedies to combat conduct which explicitly has already been found criminal." *Id.* at 500. Thus, the court found there could be no liability under the statute without conviction for a predicate criminal act. *Id.* at 501.

Second Circuit affirmed the district court in dismissing the RICO counts.[45] Faced with substantial criticism,[46] the Second Circuit decision in *Sedima* was perhaps symbolic of the high water mark of judicial restraint against using civil RICO broadly.

To resolve a conflict among the circuits,[47] the United States Supreme Court granted certiorari and reversed the Second Circuit.[48] In a five to four decision, the majority found neither the statutory language nor the legislative history of RICO required a prior criminal conviction before one could sue for treble damages under section 1964(c).[49] Perceiving "no distinct 'racketeering injury' requirement" in the statute, the majority also rejected the requirement that a civil RICO plaintiff must show an "injury caused by conduct that RICO was designed to deter."[50] In other words, the majority in *Sedima* found it permissible to apply RICO's remedies against businesses that had no nexus to organized crime.

Rather than granting clarity to civil RICO, however, the majority's analysis sent conflicting signals to the circuit courts. On the one hand, the majority stated the statute was to be read broadly.[51] Certainly, by reversing the Second Circuit the Court permitted a broader application of civil RICO. On the other hand, through its widely-noted footnote fourteen, the Court indicated that "pattern of racketeering activity" under RICO should be construed narrowly.[52] The Court also noted the statute's legislative history

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45. *Id.* at 502-04.

46. *See, e.g.*, Moran, *supra* note 36, at 745 n.55.

47. In Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), the Seventh Circuit Court of Appeals expressly rejected the argument that a "racketeering injury" was necessary in order to bring a civil RICO action. *Id.* at 398.

48. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

49. *Id.* at 488-93. Writing for the majority, Justice White stated that requiring prior conviction would "arbitrarily [restrict] the availability of private actions" because many lawbreakers escape conviction. *Id.* at 490 n.9. Thus, the majority found the Second Circuit's rule "would severely handicap potential plaintiffs." *Id.* at 493.

50. *Id.* at 494-95. The majority found the Second Circuit's requirement of a "racketeering injury" to be vague and "unhelpfully tautological." *Id.* at 494.

51. The majority stated that both general principles of statutory construction and Congress' conscious use of expansive language called for liberal application of the statute. *Id.* at 497-98.

> The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."

Id. at 499 (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d at 398 (7th Cir. 1984)).

52. *Id.* at 496 n.14. In footnote 14, the Court noted RICO's legislative history indicated that "two isolated acts of racketeering activity do not constitute a pattern." *Id.* Rather, legislative history indicated the alleged acts must show " 'continuity plus relationship' " to constitute a pattern of racketeering activity. *Id.* The footnote appears to encourage restrictive application

indicated that "two isolated acts of racketeering activity do not constitute a pattern."[53] As a result, a number of scholars believe the decision in *Sedima* did more to confuse than to clarify civil RICO's parameters.[54]

Four justices dissented from the decision in *Sedima*.[55] Justice Powell[56] wrote one dissenting opinion and Justice Marshall wrote the other.[57] The dissenters agreed the majority's holding effectively provided a "federal forum for plaintiffs for . . . many common law wrongs."[58] Significantly, both dissents challenged the majority's analysis of the statute's legislative history. Justice Powell stated that Congress made no reference to the Mafia in the statute to avoid constitutional problems, and that RICO's history clearly showed it was to be applied only against organized crime.[59] Justice Marshall similarly concluded the statute's legislative history focused on organized crime.[60]

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of the pattern requirement in the context of a decision that otherwise encouraged very broad use of the statute.

53. *Id.* Dorigan and Edwall suggest most courts have not "followed the Supreme Court's lead" and undertaken to study RICO's legislative history more closely. Dorigan & Edwall, *supra* note 27, at 86. They conclude the statute's history reveals that it was to be aimed at organized crime. *Id.*

54. *See* Note, *Clarifying a "Pattern,"* *supra* note 34, at 1754. Dorigan and Edwall have noted most courts have "accepted the Supreme Court's invitation to more closely examine the pattern requirement." Dorigan & Edwall, *supra* note 27, at 54. They also indicate, though, that the circuits have applied several different tests in determining which type of activity qualifies as a "pattern of racketeering," some more liberal and some more restrictive. *Id.* at 54-77. It is evident the lower courts are still struggling with how to interpret the Supreme Court's lead in *Sedima*.

55. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 523 (1985).

56. *Id.*

57. *Id.* at 500.

58. *Id.* at 525 (Powell, J., dissenting)(quoting Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492 (2d Cir. 1984)). Justice Marshall stated:

> The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. We do not lightly infer a congressional intent to effect such fundamental changes.

Id. at 501 (Marshall, J., dissenting).

> The civil RICO provision . . . stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the States.
>
> In addition to altering fundamentally the federal-state balance in civil remedies, the broad reading of the civil RICO provision also displaces important areas of federal law.

Id. at 504 (Marshall, J., dissenting).

59. *Id.* at 525. Justice Powell quoted a study conducted by an ABA Task Force in support of this conclusion. *Id.* at 526; *see supra* note 30.

60. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 513-20 (Marshall, J., dissenting). Of the three opinions in *Sedima*, Justice Marshall's presents the most thorough analysis of RICO's legislative history.

Moreover, Justice Powell stated that by rejecting the requirement of a "racketeering injury," the Court was reading the "statute so broadly that it will be difficult, if not impossible, for courts to adopt a reading of 'pattern' that will conform to the intention of Congress."[61] Justice Marshall agreed.[62] The result, in Justice Powell's opinion, would be an increase in civil RICO lawsuits that have no connection to organized crime—an outcome contrary to congressional intent.[63] His statement was prophetic.

IV. CIVIL RICO "UNCORKED": WHAT IS FALLING VICTIM TO ITS INTOXICATING EFFECT?

A. *Federalizing State Law*

Since the decision in *Sedima*, the lower courts have struggled with its guidelines. Perhaps the greatest unity among the circuits since *Sedima* is that they do not agree on what tests properly effectuate the statute's provisions.[64] The result has been inconsistent interpretation and application.[65] Moreover, liberal interpretation of RICO's expansive language is federalizing broad areas of state law.[66]

For example, in *Williams v. Hall*[67] two former oil company executives were able to convert a wrongful discharge claim into a RICO action.[68] A wrongful discharge claim would normally produce only compensatory damages. However, under civil RICO's treble damages provisions, the plaintiffs received $43 million and $23 million respectively, in addition to $3 million in punitive damages.[69] Under RICO, termination can apparently become a profitable affair.

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61. *Id.* at 528 (Powell, J., dissenting).

62. *Id.* at 520 (Marshall, J., dissenting) ("The only way to give effect to Congress' concern is to require that plaintiffs plead and prove that they suffered Rico injury . . . .").

63. *Id.* at 529-30 (Powell, J., dissenting).

64. For more detailed analysis of the different circuits' positions, see Dorigan & Edwall, *supra* note 27, at 54-77 and Note, *Clarifying a "Pattern,"* *supra* note 34, at 1754-60.

65. Dorigan & Edwall, *supra* note 27, at 88.

66. *See, e.g.*, Lynch, *supra* note 9, at 714-17 (RICO has "swallowed large chunks of the state penal code."); *cf.* Dorigan & Edwall, *supra* note 27, at 89 (applying "RICO to 'garden variety' fraud cases exceeds the congressional intent of the legislation").

67. Williams v. Hall, 683 F. Supp. 639 (E.D. Ky. 1988).

68. In *Williams*, the plaintiffs alleged they were fired by the defendant oil company after they questioned certain large payments made by the company. *Id.* at 640. The payments allegedly were bribes to certain foreign officials to obtain access to Middle East oil in violation of federal law. *Id.*

The plaintiffs maintained the defendant's transactions involved wire, mail, and securities fraud, as well as interstate travel to deliver bribes. *Id.* This conduct was alleged as the predicate acts constituting a pattern of racketeering activity under RICO. *Id.* The plaintiffs also alleged the defendant violated RICO's conspiracy provisions. *Id.* at 641.

69. Harrison, *Look Who's Using RICO*, 75 A.B.A. J. 56, 56 (Feb. 1989).

Civil RICO's broad provisions have also provided an additional forum for accounting and legal malpractice claims. Under the statute, one who is "associated with any enterprise," which affects interstate commerce through a pattern of racketeering activity is liable under its treble damage provisions.[70] In *Bennett v. Berg*,[71] residents of a retirement community claimed its owner had engaged in fraud and mismanagement of the community's assets.[72] Because the owner was judgment-proof, the residents sued the community's accountants, lawyers, and bankers, claiming they were "associated" with the community.[73] The plaintiffs maintained the defendants knew or should have known of the fraud.[74] Prudential Insurance Company, the mortgagee, settled for a total of $62.8 million.[75]

In *Nelson v. Bennett*[76] the accounting firm of Laventhol & Horwath found that by doing accounting work for a tax-shelter plan, it was "associated" with the "enterprise" when the tax-shelter went sour.[77] The firm settled the case for $15 million after the jury found it liable under RICO.[78] In another civil RICO case, a major law firm was charged with mishandling the registration and disclosure of securities offered by a client.[79] The law firm opted to settle the case for $7.3 million rather than let the jury determine damages under RICO's treble damages provisions.[80] Such cases portend still higher costs for malpractice insurance.[81]

The labor law arena also is beginning to feel the impact of civil RICO. In one case, a female carpenter sued labor union officials under RICO, maintaining they engaged in the "pattern and practice" of sexual discrimination and harassment.[82] In another case, a bus company sued a labor

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70. 18 U.S.C. §§ 1962(c), 1964(c) (1988).

71. Bennett v. Berg, 710 F.2d 1361 (8th Cir.), *cert. denied*, Prudential Ins. Co. v. Bennett, 464 U.S. 1008 (1983).

72. *Id.* at 1363.

73. *Id.*

74. *Id.*

75. Harrison, *supra* note 69, at 57.

76. Nelson v. Bennett, 662 F. Supp. 1324 (E.D. Cal. 1987); *see also* Harrison, *supra* note 69, at 57.

77. Harrison, *supra* note 69, at 57.

78. *Id.*

79. *Id.*

80. *Id.*

81. In another lawsuit an investment-banking firm pleaded guilty to lesser charges in the face of RICO's sweeping forfeiture provisions. Sanders, *supra* note 25, at 48. The firm incurred $650 million in penalties. *Id.*

82. Hunt v. Weatherbee, 626 F. Supp. 1097, 1104 (D. Mass. 1986). The plaintiff stated she was the victim of an assault and battery as well as sexual discrimination. *Id.* at 1099. She filed a criminal complaint concerning the assault, and alleged union officials "expressed sexually discriminatory animus toward her" in an attempt to coerce her to withdraw the complaint. *Id.* She also maintained the defendants sought to coerce her to purchase raffle tickets. *Id.* She brought her claim under RICO by alleging these two incidents amounted to a pattern of racketeering activity in the form of extortion. *Id.* at 1101.

union under RICO for property damage and lost profits suffered during a strike.[83] Such a case raises the likelihood civil RICO's treble damages provisions "will be raised again and again when collective bargaining negotiations turn bitter."[84]

The application of the statute appears to be limited only by the creativity of the plaintiffs. "[A]s currently interpreted, RICO is capable of exceptionally broad application."[85] "Now the plaintiff's bar is vigorously asking what else RICO can be used for. And the questions now being posed may be more difficult to answer than those that were resolved in *Sedima*."[86] In the present state of affairs, the statute threatens to usurp and swallow established areas of state law.[87]

Such application of a federal statute infringes on the federal-state nature of our republic. In their dissenting opinions in *Sedima*, Justices Powell and Marshall both contended the decision caused the federalization of broad areas of state law.[88] Their arguments were justified. While the balance between federal and state realms has changed substantially since our nation's inception, the concept of a federal government with limited powers remains fundamental to our system.[89]

RICO is clearly founded on congressional powers under the Commerce Clause. Admittedly, with the development of a complex economy, Congress' powers of regulation have grown substantially under the Commerce Clause. Nevertheless, by extending the statute to state-based claims that have no connection to organized crime, courts are effectively nullifying the tenth amendment. "RICO does not extend federal jurisdiction to specific areas of particular federal concern or competence; it creates federal jurisdiction over broad reaches of criminal conduct, characterized

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83. Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 785 (D.C. Cir.), *cert. denied*, 488 U.S. 926 (1988). During the strike, various labor union members threatened violence against company property, including a threat to burn company buses. *Id.* The bus company maintained that the threats were extortion, bringing the case under RICO. *Id.* at 789. One justice on the District of Columbia Circuit Court of Appeals found the decision was supported by case law and "not inconsistent with RICO's broad remedial purpose." *Id.* at 795 (Edwards, J., concurring). However, he also noted the ruling was "at odds with certain fundamental precepts of labor law and collective bargaining." *Id.* (Edwards, J., concurring).

84. Harrison, *supra* note 69, at 58. Harrison discusses other cases in which civil RICO is impacting other realms of established law. These realms include employment-benefits law, preferential treatment actions against local government officials, and bankruptcy law. *See id.* at 58-59.

85. Lynch, *supra* note 9, at 713.

86. Harrison, *supra* note 69, at 59.

87. *See* Lynch, *supra* note 9, at 714 ("Over a wide domain of actors and conduct, RICO has swallowed the penal code.").

88. *See supra* note 58, and accompanying text.

89. The tenth amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

only by loose concepts of concerted and repeated activity and minimal subject matter limitations."[90] Furthermore, making the irony complete, RICO is proving to be almost a total failure for its intended purpose of combating organized crime's infiltration of legitimate businesses.[91]

B. *The "Blackmailing" of Civil RICO Defendants*

Out of this milieu civil RICO has emerged increasingly as a weapon in the hands of garden-variety civil litigants.[92] The reason for its growing popularity is that its remedies can be "draconian."[93] The statute's broad provisions for treble damages and attorney fees are intimidating to any defendant.

When Congress considered RICO, its proponents noted findings that organized crime often used methods of violence, intimidation, and fear to control its victims.[94] The statute's proponents also asserted victims of organized crime's activities had no adequate remedies available under current law.[95] RICO was intended to fill that gap.[96] In an effort to meet the need for more remedies, the House added the provision authorizing private damage suits similar to those authorized under the Clayton Act.[97] This private treble damages provision was added to the bill late in the legislative process, however, with very little debate.[98]

Nevertheless, three congressmen dissented from the House Judiciary Committee's favorable report of the bill.[99] They noted section 1964(c) "provide[d] invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. . . . What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the ri-

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90. Lynch, *supra* note 9, at 716.

91. *See id.* at 726 (noting that fewer than eight percent of RICO indictments involve charges under section 1962(a) or (b) prohibiting investment in or control of enterprises engaged in interstate commerce). *See also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (1985) (only nine percent of civil RICO cases involved allegations of professional criminal activity) (citing *Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. OF CORP., BANKING AND BUS. L. 55-56)).

92. *See* Harrison, *supra* note 69, at 56.

93. Sanders, *supra* note 25, at 48.

94. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 517-18 (Marshall, J., dissenting) (reviewing RICO's legislative history).

95. *Id.* at 516 (Marshall, J., dissenting) (citing 115 CONG. REC. 6993 (1969) (statement of Senator Hruska)).

96. *Id.*

97. *Id.* at 518 (Marshall, J., dissenting).

98. *Id.* at 518-19 (Marshall, J., dissenting).

99. Representatives Abner Mikva, William F. Ryan, and John Conyers, Jr. opposed the bill. *See* H.R. REP. NO. 1549, 91st Cong., 2d Sess. 1, 181, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4076.

val's business."[100] Thus, they feared that rather than being used to remedy injuries suffered by victims of organized crime, RICO's civil provision would instead be used as a tool to intimidate opponents.

Justice Marshall expressed the same concerns in *Sedima*.[101] "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."[102]

Civil RICO's track record is revealing the validity of these concerns. As noted earlier, defendants in civil RICO cases may be intimidated into settling, when they would not otherwise do so, rather than risk a jury verdict under RICO.[103] Realistically, the threat of being held liable for treble damages plus attorney fees, and the stigma of being labeled a "racketeer" is a potent source of intimidation for any defendant. Those factors give some plaintiffs "enormous leverage" that is not necessarily based on the merits of the case.[104] The statute is placing too much at risk. Given the "quantum leap" of civil RICO's damage provisions over traditional state-based remedies, claims that might otherwise be contested by defendants may prove too perilous to litigate.

Moreover, the lure of treble damages under RICO offers no incentive for private plaintiffs to exercise restraint in its use. Whereas government prosecutors might exercise restraint when invoking such sanctions, "private attorneys general" have no basis for such self control.[105]

> In the context of civil RICO . . . the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. Then the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a 'racketeer,' will have a strong interest in settling the dispute.[106]

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100. *Id.* at 187, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS at 4083.

101. *See supra* note 58 and accompanying text.

102. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 506 (Marshall, J., dissenting).

103. *See supra* text accompanying notes 67-75. *See also* Sanders, *supra* note 25, at 48 ("The economic penalties of the law can squeeze some defendants into plea-bargain agreements.").

104. Sanders, *supra* note 25, at 48.

105. Justice Marshall noted the Justice Department assured that prosecutors would exercise restraint in applying RICO's expansive provisions. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 503 (1985) (Marshall, J., dissenting). These assurances evidently were one reason why Congress placed such broad language in the statute. *Id.*

106. *Id.* at 504 (Marshall, J., dissenting).

Thus, once litigants taste the increased potency of RICO's provisions, traditional state-based remedies become unappealing.

America's system of civil jurisprudence is founded on statutory and common-law remedies, many which are centuries old. These well established remedies promote an orderly and peaceful society by clarifying what may be expected of others. Many expectations in private conduct are based on a general understanding of what conduct is prohibited. Moreover, expectations are built around a general understanding of the types of penalties or remedies which may result from certain kinds of unlawful activity.

Principles of duty and liability embodied in the law are based on those expectations. Such principles constitute the "wineskins" of American jurisprudence, containing remedies that ideally promote justice and fair play. However, "no one puts new wine into old wineskins; otherwise the wine will burst the skins, and the wine is lost, and the skins as well."[107] RICO's provisions provide a "new wine" that does not fit well into the "wineskins" of civil litigation.

First, under RICO's expansive language, unlawful conduct that has no connection with organized crime is suddenly labeled "racketeering activity." Therefore, one is less sure what activity may elevate one to the status of a racketeer. Second, the statute's provisions for treble damages and attorney fees are supplanting long-established remedies that provide for compensatory damages. Thus, civil RICO is dramatically altering proven standards of liability.

When civil RICO proves to be a tool of intimidation, rather than a remedy for it, it becomes the antithesis of its intended purpose. Such application creates "a state of affairs or events that is the reverse of what was or was to be expected: a result opposite to and as if in mockery of the appropriate result."[108]

C. *The Fall of the First Amendment: Shootout at the RICO Corral*

Justice Cardozo characterized freedom of speech as "the matrix, the indispensable condition of nearly every other form of freedom."[109] Tear up grass by its roots on a hillside, and the rains of nature will erode the sur-

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107. *Mark* 2:22. In ancient times wine was kept in the skins of animals. New wine poured into skins would not be fully fermented, however, and required the wineskins to expand with further fermentation. Old wineskins would be too inelastic to accommodate further expansion and would burst, causing both the new wine and the wineskins to be lost.

By analogy, as RICO has fermented in the courts, its expansive language has been applied more broadly. There comes a point, however, when the expansion can no longer harmonize with established notions of justice and fair play in civil litigation. The danger is that well established remedies that serve to maintain a cohesive society may be lost as RICO continues to envelop still greater areas of litigation.

108. *See supra* text accompanying note 1.

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

face. Tear up our freedoms of expression, and other freedoms fundamental to our society will also be eroded by the storms of political conflict.

Some recent applications of civil RICO present the prospect of chilling freedom of expression. Notably, this problem emerges in the context of some of the statute's most controversial applications. By supplanting traditional state-based remedies, RICO bodes ill for the expression of unpopular political opinion.

1. *RICO and Free Speech: Recent Applications in Which the First Amendment Is Implicated*

In *Northeast Women's Center, Inc. v. McMonagle,*[110] a clinic that performed abortions sued anti-abortion activists under RICO.[111] The suit was based on four sit-ins held at the clinic by the various activists.[112] In addition to the RICO claim, the clinic brought claims under federal antitrust laws and several state-based claims, including trespass.[113] Ultimately, only the trespass and RICO claims went to the jury.[114] The clinic alleged the defendants' activity amounted to extortion under the Hobbs Act.[115] Section 1961 of RICO includes Hobbs Act prohibitions against extortion in its definition of "racketeering activity."[116]

In its verdict, the jury found the defendants liable for $887 in property damage, which was trebled to $2661.[117] In addition, the jury assessed $42,087.95 in compensatory damages.[118] Later the clinic filed a motion for attorney fees and costs under section 1964(c) of RICO.[119] Ultimately, $64,946.11 was granted in response to the motion.[120]

More recently, in *Town of West Hartford v. Operation Rescue,*[121] the town of West Hartford, Connecticut sued anti-abortion protestors under RICO for two sit-ins at an abortion clinic.[122] The town sought and obtained

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110. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), *aff'g in part and remanding,* 665 F. Supp. 1147 (E.D. Pa. 1987).

111. *Id.* at 1347.

112. *Id.* at 1345-46. The plaintiff alleged the acts of trespass and minor property damage violated RICO as "a pattern of extortionate acts." *Id.* at 1348.

113. *Id.* at 1347.

114. *Id.*

115. *Id.* at 1349-50.

116. 18 U.S.C. § 1961(1) (1988). The Hobbs Act is codified at 18 U.S.C. § 1951 (1988).

117. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1347 (3d Cir. 1989).

118. *Id.* The jury also assessed $48,000 in punitive damages. However, the court granted the defendants a judgment n.o.v. regarding the punitive damages. Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1160-61 (E.D. Pa. 1987).

119. Northeast Women's Center, Inc. v. McMonagle, 889 F.2d 466, 469 (3d Cir. 1989).

120. *Id.* at 470. Thus, the total fines, penalties, and costs exceeded $109,000 in *McMonagle.*

121. Town of West Hartford v. Operation Rescue, 726 F. Supp. 371 (D. Conn. 1989).

122. *Id.* at 373.

an injunction prohibiting further sit-ins.[123] In addition, the town sought $43,000 in overtime police costs for the two demonstrations.[124] It also sought to have the costs trebled as well as recovery of attorney fees under RICO.[125]

West Hartford alleged the trespassing at the clinic was intended to intimidate the clinic, its patients, and employees.[126] It maintained such acts amounted to extortion under the Hobbs Act.[127] The town further alleged other conduct including publishing editorials, holding press conferences, distributing press releases, and issuing a paid advertisement in a local newspaper amounted to extortion.[128] One of the defendants was a man who was not present at the protests. His alleged act of "extortion" was an editorial that criticized the conduct of the West Hartford police at the demonstrations.[129]

On appeal, the Second Circuit Court of Appeals vacated the injunction and remanded the case to be dismissed for lack of subject matter jurisdiction.[130] The court found, under the facts of the case, the town could not properly assert a claim for extortion under the Hobbs Act.[131] Therefore, West Hartford's RICO claim proved unsuccessful.

In *West Hartford* the town brought the RICO claim, whereas in *McMonagle* the clinic that performed abortions brought the claim. In *West Hartford* the town could not show it had been extorted by the defendants in violation of the Hobbs Act. The Second Circuit did not state, however, that the RICO claim would not have been successful had it been asserted by the clinic instead of the town.[132] Thus, although the claim in *West Hartford* was dismissed, a similar claim brought by the clinic (such as that brought in *McMonagle*) may not have met the same fate. If the Second Circuit were willing to follow the Third Circuit's decision in *McMonagle*, a civil RICO claim brought by the clinic instead of the town may have been successful.

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123. *Id.* at 382-84. The injunction was issued under a pendant state claim, however, not under RICO.

124. *Id.*

125. *Id.*

126. Town of West Hartford v. Operation Rescue, 726 F. Supp. at 376.

127. *Id.*

128. Town of West Hartford v. Operation Rescue, 915 F.2d 92, 96-97 (2d Cir. 1990).

129. *Id*; *see* Henthoff, *RICO Stalks the Press*, Village Voice, Oct. 17, 1989, at 22, col. 2 (criticizing the use of vague and sweeping provisions of RICO to chill journalists' first amendment rights).

130. Town of West Hartford v. Operation Rescue, 915 F.2d at 105.

131. *Id.* at 100-04.

132. *See id.* at 102-03 ("[W]hatever RICO claim the [clinic] may have against these defendants, there is no plausible basis for its assertion by the Town."). The Second Circuit indicated it did not approve of the expansive manner RICO is being applied, however, "We have stated 'our own views that the RICO provision cast too wide a net with respect to the civil actions that may be brought.' " *Id.* at 104 (quoting Beauford v. Helmsley, 865 F.2d 1386, 1393 (2d Cir. 1989)). The court also stated it did not "countenance fanciful invocations of the draconian RICO weapon in civil litigation." *Id.*

Both *McMonagle* and *West Hartford* further illustrate how litigants are attempting to apply RICO's broad definition of "racketeering activity" to claims that would have otherwise merited only garden-variety state claims. When such claims occur in the context of civil disobedience, however, they implicate the first amendment. Therefore, one should consider general principles previously laid down by the Supreme Court regarding civil disobedience.

2. *RICO and Other Precedents: Could Southern Segregationists Have Used RICO?*

Not many years ago a different set of protesters used such tactics as picketing and demonstrations to express their opposition to war or racism. Blocking public buildings and passive resistance to arrest were forms of civil disobedience sometimes used by those protesters. By means of criminal arrests and prosecutions, as well as civil lawsuits and injunctions, segregationists sought to sap the finances, energy, and time of civil rights proponents.[133] In most cases these legal tactics entailed fairly minor charges such as trespass or breach of the peace.[134] Even so, they had a "chilling" effect on the protesters' freedom of speech.[135] One should consider the application of civil RICO in the context of civil disobedience in light of precedents established by the Supreme Court.

In *Edwards v. South Carolina*,[136] the police ordered black protesters to disperse from a civil rights demonstration.[137] The protesters became "boisterous" and "loud" and one of them allegedly subjected onlookers to a "religious harangue."[138] As a result, they were arrested and convicted for breach of the peace.[139]

On appeal to the Supreme Court, the convictions were reversed.[140] The Court stated, "We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific

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133. *See* S. BARKAN, PROTESTORS ON TRIAL 58-86 (1985) (discussing how defenders of the status quo sought to exercise legal control to suppress civil rights protests).

134. *See also* Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1541-42 (1968) (though crimes involved were minor, the cases' public importance for free speech were significant).

135. *Id.* at 1542. Mr. Greenberg was counsel with the National Association for the Advancement of Colored People ("NAACP") and was personally involved in a number of civil rights cases. *See id.* at 1520.

136. Edwards v. South Carolina, 372 U.S. 229 (1963).

137. *Id.* at 233.

138. *Id.* Compare such activity to the alleged conduct of some who protest abortion clinics.

139. *Id.* at 234. The maximum penalties meted out were a $100 fine or thirty days in jail. *Id.*

140. *Id.* at 238.

conduct be limited or proscribed."[141] The offense of breach of the peace as found in the statute was "'not susceptible of exact definition.'"[142] Therefore, the Court found the statute was "vague and indefinite" and impinged on the protesters' constitutional freedoms.[143] Even though the penalties involved were minor, the Supreme Court determined the statute improperly "criminal[ized] the peaceful expression of unpopular views."[144]

In *Cox v. Louisiana*[145] various students were arrested and jailed for picketing and urging a boycott of certain stores with segregationist policies.[146] The next day about 2000 students gathered opposite the courthouse to protest segregation and the arrest of the picketers.[147] Around lunchtime Cox, the leader of the demonstration, called for the demonstrators to enter the stores and sit at segregated counters.[148]

Considering the statements to be "'inflammatory,'" the sheriff ordered the demonstrators to break up.[149] The demonstrators did not comply with the sheriff's demand, however, and tear gas was used to disperse them.[150] Cox was convicted of disturbing the peace, obstructing public passages, and picketing before a courthouse.[151]

On appeal, the Supreme Court stated the statute for breach of the peace was overly broad, and therefore, unconstitutionally vague.[152] The statute had essentially been used as a tool to suppress views that differed from those "'of the majority of the community.'"[153] The Court stated "'that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'"[154]

In *Cox* the Supreme Court noted that "[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."[155]

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141. *Id.* at 236.
142. *Id.* at 237 (quoting State v. Edwards, 239 S.C. 339, 343, 123 S.E.2d 247, 249 (1961)).
143. *Id.* at 238.
144. *Id.* at 237. The statute presented no more than $100 in fines or thirty days in jail. *Id.* at 234. Yet, the Court demanded careful and evenhanded application of such statutes to insure that free speech would not be impinged. *Id.* at 234-38. Compare its capacity to chill free speech with a statute that can present many thousands of dollars in penalties.
145. Cox v. Louisiana, 379 U.S. 536 (1965).
146. *Id.*
147. *Id.* at 539-40.
148. *Id.* at 543.
149. *Id.*
150. *Id.* at 543-44.
151. *Id.* at 538. He was sentenced to a total of 21 months in jail and fined $5700. *Id.*
152. *Id.* at 551.
153. *Id.* (quoting Edwards v. South Carolina, 372 U.S. 229, 237 (1963)).
153. *Id.* (quoting Watson v. City of Memphis, 373 U.S. 526, 535 (1963)).
155. *Id.* at 552.

> [A] "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."[156]

Therefore, the Supreme Court stated civil or criminal sanctions must not be used to penalize the content of speech, even if it is odious to some.

The Court in *Cox* also reversed the defendant's conviction under the statute that prohibited obstructing public passages.[157] The Court stated the first amendment did not prohibit a state from reasonable regulations to maintain peace and order, and to promote the public interest.[158] However, the statute gave local officials "unfettered discretion" regarding its application.[159] As a result, the Court found the statute could be used to suppress communication of ideas.[160] Thus, under *Cox*, statutes that potentially infringe on free speech must be narrowly drawn and applied to insure they are uniformly applied in a nondiscriminatory manner.[161]

In light of cases such as *McMonagle*, the fact pattern in *Cox* could readily have been the basis for a RICO claim, had it been available in 1965.[162] *Cox* presents multiple acts within a two-day period that arguably had adequate continuity and relationship to satisfy RICO's "pattern and practice of racketeering" provisions. Thus, civil rights protesters could conceivably have faced RICO claims, rather than mere claims for trespassing or breach of the peace, if RICO had been available in the 1960s.

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156. *Id.* at 551-52 (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949)).

157. *Id.* at 558.

158. *Id.* at 554.

159. *Id.* at 558.

160. *Id.* at 557-58. The Court stated:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

Id.

161. *Id.* at 558.

162. Adderly v. Florida, 385 U.S. 39 (1967), presents a similar fact pattern to *Cox*. Civil rights protesters were arrested for "trespass with a malicious and mischievous intent." *Id.* at 40. They were protesting the arrest of other demonstrators as well as state and local segregation policies. *Id.*

In *NAACP v. Claiborne Hardware Co.*,[163] the Supreme Court considered another case that could readily have fit RICO's pattern of racketeering activity provisions as currently applied. In 1966 several hundred black citizens of a Mississippi town organized an extensive boycott of white merchants due to the merchants' discriminatory practices.[164] The trial court found some of the defendants used physical force and violence to enforce the boycott and keep prospective customers away from the merchants.[165] In addition, the trial court found the defendants used intimidation, threats, social ostracism, and slanderous language to achieve their purposes.[166]

The evidence offered to support the trial court's findings included a statement made by one defendant: "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'"[167] Other evidence indicated that "store watchers," stationed in front of white merchants' stores, identified blacks who gave the white merchants business.[168] Those who violated the boycott were "'branded as traitors to the black cause'" and socially ostracized.[169] In addition, there were several incidents when violators encountered physical beatings and property damage, and had shots fired at their homes.[170]

The trial court found many blacks were forced against their wills to withhold business from white merchants out of sheer fear.[171] It also found the defendants had violated state laws against secondary boycotts and antitrust activity.[172] As a result, the chancellor imposed joint and several liability upon 150 defendants for a judgment exceeding $1,250,000.[173] In addition, the chancellor entered a permanent injunction that not only prohibited violence or property damage, but also enjoined picketing or persuading people from patronizing white merchants.[174] Furthermore, "'demeaning and obscene language to or about any person'" who violated the boycott was also enjoined.[175]

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163. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

164. *Id.* at 889, 898-900.

165. *Id.* at 894.

166. *Id.*

167. *Id.* at 902 (footnote omitted).

168. *Id.* at 903.

169. *Id.* at 904.

170. *Id.* at 904 n.37, 905-06. The unlawful discipline of violators also included threatening phone calls. *Id.* The phone calls would easily have satisfied RICO's prohibition against wire fraud and extortion. 18 U.S.C. § 1961(1) (1988).

171. NAACP v. Claiborne Hardware Co., 458 U.S. at 894.

172. *Id.* at 891-92.

173. *Id.* at 893. The national office of the NAACP was included among the defendants held jointly and severally liable. *Id.* Under RICO, the judgment would have come to over three million dollars.

174. *Id.*

175. *Id.*

On appeal, the United States Supreme Court reversed, finding the sanctions to be overbroad.[176] "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[177] Thus, the fact some tactics were "offensive to others" did not deprive them of the protections of the first amendment.[178]

The Supreme Court noted that the first amendment offered no sanctuary for violence or tort liability.[179] However, it also stated that when violence or threats of violence occur "in the context of constitutionally protected activity, . . . 'precision of regulation' is demanded."[180] "Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[181] Thus, one could properly recover only those losses proximately caused by unlawful conduct.[182] Moreover, liability could be imposed only on those who engaged in unlawful activity.[183] The Court stated the first amendment prohibited the state from "impos[ing] liability on an individual solely because of his association with another."[184]

Therefore, under *Claiborne Hardware*, a state may not impose civil liability on an individual merely because he belongs to a group of which some members engaged in unlawful conduct.[185] When dealing with activity protected by the first amendment, the Supreme Court found that liability for unlawful conduct must be narrowly imposed to avoid stifling fundamental personal liberties.[186] "The rights of political association are

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176. *Id.* at 934. None of the justices dissented. Justice Rehnquist concurred in the result, and Justice Marshall took no part in the case. *Id.*

177. *Id.* at 910. " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)).

178. *Id.* at 911 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)). The Supreme Court also stated: "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' . . . There is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.' " *Id.* at 913 (quoting Carey v. Brown, 447 U.S. 455, 467 (1980) and New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

179. *Id.* at 916.

180. *Id.* (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

181. *Id.* at 916-17.

182. *Id.* at 918.

183. *Id.* at 920.

184. *Id.* at 918-19. The Court also stated that a " 'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.' " *Id.* at 919 (quoting Scales v. United States, 367 U.S. 203, 229 (1961)).

185. *Id.* at 920.

186. *Id.*

fragile enough without adding the additional threat of destruction by lawsuit."[187]

In light of the decision in *McMonagle*, the fact pattern in *Claiborne Hardware* could easily have fallen within the provisions of RICO. The violence and threats of violence could have been classified as extortion. In combination they would have met the statute's definition of a pattern and practice of racketeering. Thus, had RICO been available, those who protested segregation in *Claiborne Hardware* could have been labeled as "racketeers."

3. *From Edwards to McMonagle: Civil Disobedience Both Then and Now*

Those who practice civil disobedience generally recognize that conviction for such crimes as trespassing or breach of the peace may result from their protests. Those convictions are the price of civil disobedience. When faced with the relatively minor penalties of such crimes, civil rights protesters in the 1960s chose to pay the price of civil disobedience to confront social injustice. Had they faced the threat of civil RICO's awesome remedies, though, many may conceivably have held back. The danger of using RICO against protesters is that private litigants can selectively choose the parties against whom they will invoke its provisions. The net result is RICO may become a tool to suppress unpopular speech rather than a remedy for unlawful conduct.

Normally the Supreme Court does not review cases involving minor offenses such as trespassing or breach of the peace. Yet, in the 1960s it reviewed a large number of such cases as *Edwards* and *Cox* to insure they were handled in a manner that did not invidiously infringe on the protesters' first amendment rights. "The Court has long recognized the 'chilling' effect of pending criminal prosecutions on speech. One might analogously describe the Court's repeated reversals of protest demonstration convictions as having a 'thawing' effect."[188]

The decisions in *Claiborne Hardware*, *Edwards*, and *Cox* do not stand for the proposition that the first amendment protects unlawful conduct. They stand for the proposition that when unlawful conduct occurs within the context of public expression, the civil and criminal remedies must be precisely crafted and narrowly applied to avoid chilling free speech. If a

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187. *Id.* at 931-32 (quoting NAACP v. Overstreet, 384 U.S. 118, 122 (1966) (majority denied certiorari) (Douglas, J., dissenting)).

188. Greenberg, *supra* note 134, at 1542 (citing Dombrowski v. Pfister, 380 U.S. 479, 487 (1965)).

statute, or its application, does not meet these tests, it may easily be used to suppress unpopular speech.[189]

In both *Edwards* and *Cox*, the Supreme Court reversed the convictions because statutes prohibiting breach of the peace were overbroad and vague.[190] Yet, the language in those statutes can hardly compare to the breadth and vagueness of RICO's prohibition of a pattern of racketeering activity. Moreover, in *Cox* the Supreme Court also struck down a statute that permitted local officials to enforce it with unfettered discretion.[191] The Court was concerned excessive discretion provided undue opportunity to selectively apply a statute to suppress unpopular views. However, civil RICO contains no limit to a litigant's use of the statute for that very purpose.

In *Claiborne Hardware*, the Court strictly scrutinized the damages assessed by the district court to insure the remedies were not over broad.[192] When first amendment activity is involved, civil liability may be imposed only when there is "precision of regulation" and only for damages proximately caused by illegal conduct.[193] In contrast with this principle, the Third Circuit Court of Appeals in *McMonagle* permitted RICO's broad language to be applied against the defendants. The court in *McMonagle* determined the expansive interpretation by the Supreme Court in *Sedima* was applicable, even when the first amendment is implicated.[194]

One may reasonably question whether RICO's broad provisions—not to mention the stigma of being labelled a "racketeer"—provide a narrow remedy that meets the exacting standards of *Claiborne Hardware, Edwards* and *Cox*. In those cases, the Supreme Court recognized even minor criminal prosecutions, involving no more than a few hundred dollars in fines or brief jail terms could have a "chilling" effect on free speech, if the statutes involved were not clearly written and applied for narrow governmental purposes. Had the penalties entailed multiple thousands of dollars from broadly-written statutes, however, one might logically assume they would have had more than a "chilling" effect on free speech. Free speech could conceivably have been "frozen."

Yet, RICO has proven broad enough to classify civil disobedience as "extortion." Moreover, it has proven potent enough to convert a claim for $887 in property damage into an action involving over $100,000 in penalties.[195] The ruling by the Third Circuit in *McMonagle* is not consistent with the principles enunciated by the Supreme Court in these earlier decisions. A showdown with these precedents seems to be imperative, if not inevitable.

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189. Cox v. Louisiana, 379 U.S. 536, 557-58 (1965); Edwards v. South Carolina, 372 U.S. 229, 236-38 (1963).

190. *See supra* text accompanying notes 136-56.

191. *See supra* text accompanying notes 157-61.

192. *See supra* text accompanying notes 176-84.

193. *See supra* text accompanying notes 180-82.

194. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir. 1989).

195. *See supra* notes 117-20 and accompanying text.

While civil disobedience may be repugnant to many, it has, nevertheless, played a role in awakening our nation's conscience and shaping policy. Today's radicals often become tomorrow's heroes. America's founding fathers, held in high regard today, were at one time considered traitors to a previous sovereign. More recently, the controversy surrounding Dr. Martin Luther King's defiance of a court injunction in Birmingham, Alabama[196] played a role in changing the Kennedy administration's views toward the need for new civil rights laws.[197] The fruit of Birmingham was a bill introduced by President Kennedy—legislation that eventually became the 1964 Civil Rights Act.[198]

V. CONCLUSION: LET US NOT THROW AWAY THE IDEALS FUNDAMENTAL TO A FREE SOCIETY

Few would challenge the argument that organized crime presents a genuine threat to our society. However, the popular reaction to this threat which gave political impetus to RICO's birth, has been compared to the "red scares" that gave birth to legislation such as the McCarran Act.[199] "What is certain is that, by enacting RICO in an atmosphere of fear, Congress overreacted to the problem with a statute that is overly broad."[200] Even if organized crime presents a serious threat to our society, the remedy for that threat must not undermine the cornerstones of our society's freedoms. The means of addressing the problem must be crafted in a manner consistent with our system of government.

As written and applied, RICO undermines that system. One reason our founding fathers enacted the Bill of Rights was because their experiences had shown that the end does not justify the means. When Congress enacted RICO, it apparently considered the statute to be an expedient answer to the problem of organized crime: broad remedies for a complex problem. However, that which is birthed in expediency is destined to reproduce the fruit of expediency: self-serving conduct.

Current trends indicate that a growing number of civil plaintiffs are finding it expedient to use RICO's expansive remedies. Traditional but "mundane" remedies, long established under other statutes and common

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196. *See* Walker v. Birmingham, 388 U.S. 307 (1967).

197. S. BARKAN, *supra* note 133, at 73. Before the events in Alabama in 1963, the Kennedy administration had not supported new civil rights laws. However, the violent conduct of the local police toward the protesters " 'shocked the world.' " *Id.* at 71-72. "The events in Birmingham 'changed the thinking of the Kennedy administration . . . and of the country.' " *Id.* at 73 (quoting A. LEWIS, THE SECOND AMERICAN REVOLUTION: A FIRST HAND ACCOUNT OF THE STRUGGLE FOR CIVIL RIGHTS 121 (1961)).

198. *See id.* at 73.

199. *See* Bradley, *supra* note 14, at 837.

200. *Id.* Bradley also noted courts "have in many cases expanded it far beyond the congressional language and intent." *Id.* at 838.

law, are evidently not potent enough. Realistically, why should one settle for compensatory damages when civil RICO offers the promise of treble damages and attorney fees? RICO's broad language has made the possibility of such recovery a reality. Its effect is intoxicating.

The results, however, are oppressive. State-based remedies are being federalized, further eroding the federal-state balance of powers. Furthermore, RICO is becoming a weapon used for the purpose of intimidation, rather than a remedy for it. Such uses give rise to the very evils it was intended to curb.

Moreover, by federalizing state law with such potent "remedies," RICO's shadow bodes the chilling of free speech on unpopular views. It is difficult to believe the Supreme Court would have upheld RICO's stern penalties against civil rights demonstrators had the statute been available in that era. The decision in *McMonagle* runs counter to principles enunciated in earlier civil rights cases.

The central question presented in cases such as *McMonagle* is not whether one favors or opposes abortion. The central question is whether one favors free speech. The first amendment does not protect illegal conduct. However, the decisions in *Edwards*, *Cox*, and *Claiborne Hardware* show that penalties and remedies for unlawful conduct in the context of public speech must be precisely formulated for narrow governmental purpose.

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[201] Failure to do so undermines "the matrix, the indispensable condition of nearly every other form of freedom."[202] Both Congress and the courts are guilty for RICO's eroding effect on the first amendment.

Unquestionably, legislation is needed to clarify and restrict the statute's scope. Equally necessary is judicial scrutiny of RICO's application comparable to that applied in earlier civil rights cases. Even if the Supreme Court is unwilling to strike down any of RICO's provisions, it nevertheless can trim RICO's application to Congress' original intent—organized crime.

Curtis Roggow

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201. *In re* Yamashita, 327 U.S. 1, 81 (1946) (Rutledge, J., dissenting) (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Foner ed. 1945)).

202. *See supra* text accompanying note 102 (quote by Justice Cardozo).