

# RICO AND SOCIAL PROTEST: DEVILIFYING A FIRST AMENDMENT LIBERTY

*LIBERTY is the soul's right to breathe, and, when it can not take a long breath, laws are girdled too tight. Without liberty man is in a syncope . . . . No tyranny ought to be endured which makes free speech dangerous.<sup>1</sup>*

## I. INTRODUCTION

### A. A Brief History of RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>2</sup> was created in 1970 as an “intentionally vague and loosely worded . . . tool to combat organized crime.”<sup>3</sup> Under RICO, racketeers, mobsters, and other members of criminal organizations could be subjected to the formidable coercive powers of “nationwide injunction[s], treble damage[s] and attorney fees.”<sup>4</sup> However, even before RICO became law, there were concerns that the very language that provided such ease and potency to the prosecution of organized crime could be used in the same vein to silence the voices of social protest.<sup>5</sup> In response to those concerns, RICO’s drafters attempted to narrow the bill accordingly before it was enacted into law.<sup>6</sup>

Despite the attempted narrowing of RICO’s language, creative uses for the law were soon concocted. RICO’s grasp was in fact extended far beyond the world of organized crime and into such areas as landlord-tenant agreements and divorce proceedings.<sup>7</sup> As feared, the quelling of social protests was soon added to the growing list of creative uses for RICO as courts have ultimately been unable to find in the statute’s lan-

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<sup>1</sup> HENRY WARD BEECHER, PROVERBS FROM PLYMOUTH PULPIT 71 (1887).

<sup>2</sup> 18 U.S.C. §§ 1961-1968 (1988).

<sup>3</sup> John Leo, *Are Protesters Racketeers?*, U.S. NEWS AND WORLD REPORT, May 4, 1998, at 18. While the Supreme Court has found the statute to be unambiguous, it has also acknowledged its intentional flexibility. The Court stated in *H.J. Inc. v. Northwestern Bell Telephone Co.*, that “the occasion for Congress’ action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in its application to organized crime.” 492 U.S. 229, 248 (1989).

<sup>4</sup> G. Robert Blakey, *Enlarged RICO Threatens Right of Free Speech*, NAT’L L.J., May 4, 1998, at A22; *see also* 18 U.S.C. §§ 1964(b)-(c).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See Leo, supra* note 3, at 18.

guage reasons that it should not be applied to abortion protesters.<sup>8</sup> Additionally, support for finding such reasons has been sparse among groups typically associated with the defense of civil liberties due to strong political and ideological opposition to the anti-abortion cause.<sup>9</sup> *National Organization For Women v. Scheidler*<sup>10</sup> (*Scheidler*) has come to embody this dynamic interplay between RICO and abortion protesters and is thus central to a discussion of the misapplication of RICO to social protests.

### B. Summation of Note

*Scheidler* exemplifies, among other things, the fact that the Supreme Court is often viewed as an efficient route to modified legislation. However, the Court's responsibility is the interpretation of the law and not its repair.<sup>11</sup> Asking the Court to find in legislation what is not there, or to ignore in legislation what is there is asking the Court to do what it has no authority to do: legislate. What it does have the authority to do, however, is to uphold the Constitution of the United States as the supreme law of the land thereby protecting the liberties declared in the Constitution from encroachment by other legislation.<sup>12</sup> Legislating, on the other hand, is left exclusively in the hands of Congress.<sup>13</sup>

This comment will show that social protesters could be exempted from RICO in two ways: Congress may amend the statute or the Su-

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<sup>8</sup> See generally *National Organization For Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

<sup>9</sup> See *Leo*, *supra* note 3, at 18.

<sup>10</sup> 510 U.S. 249 (1994).

<sup>11</sup> See U.S. CONST. art. III, § 1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that "it is emphatically the province and duty of the judicial department to say what the law is.").

<sup>12</sup> See *Marbury*, 5 U.S. at 177-78.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void . . . . This theory is essentially attached to a written constitution, and is consequentially to be considered by this court as one of the fundamental principles of our society . . . . [I]f a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

*Id.*

<sup>13</sup> U.S. CONST. art. 1, § 1.

preme Court may acknowledge a First Amendment exception. Section II will provide a factual foundation for these arguments by offering an overview of the history, arguments, and conclusions of the *Scheidler* case.

Section III will argue that Congress should amend RICO's language so that it more precisely accomplishes its original goal. It will show that as written, RICO's language does not exclude social protest and, thus, the Supreme Court had little latitude in coming to its decision in *Scheidler*. While the Supreme Court's finding in *Scheidler*, that the defendant protesters were not excluded from the statute's reach, was effectively mandated by RICO's language, it does not reflect RICO's proper scope or purpose. This section will illustrate not only the fact that RICO was never intended to reach social protesters, but that its architects and endorsers positively intended that social protest be protected from it.

Section IV will address the effects of First Amendment protections on the application of RICO to social protesters. It will examine, as a model, the Supreme Court's decision in *NAACP v. Claiborne Hardware*,<sup>14</sup> as alluded to in Justice Souter's concurring opinion in *Scheidler*. Analysis of the legal issues there will show that the right to free speech, protected by the First Amendment, could exempt social protesters from RICO.

## II. THE SCHEIDLER SAGA: FACTS AND HISTORY OF THE CASE

Joseph Scheidler, a "longtime student of the non-violent philosophy of Dr. Martin Luther King Jr.,"<sup>15</sup> was arrested and charged with trespass and harassment after participating in a protest of the Delaware Women's Health Organization in April 1986. The court held that he had not been guilty of harassment but that he had committed a trespass and, accordingly, ordered him to pay a small fine before releasing him with the judge's commendation "for his nonviolent approach."<sup>16</sup>

Not satisfied with that outcome, Delaware Women's Health Organization joined with the National Organization For Women (NOW) and Summit Women's Health Organization<sup>17</sup> in filing suit against Mr. Scheidler and the Pro-Life Action Network (PLAN)<sup>18</sup> as well as several

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<sup>14</sup> 458 U.S. 886 (1982).

<sup>15</sup> Blakey, *supra* note 4, at A22.

<sup>16</sup> *Id.*

<sup>17</sup> The National Organization for Women is "a national nonprofit organization that supports the legal availability of abortions." Both Delaware Women's Health Organization and Summit Women's Health Organization "are health centers that perform abortions and other medical procedures." *NOW v. Scheidler*, 510 U.S. at 252.

<sup>18</sup> The Pro-Life Action Network is "a coalition of antiabortion groups." *Id.*

other defendants.<sup>19</sup> In their amended complaint to the district court,<sup>20</sup> the two health organizations and NOW (collectively, Petitioners) alleged specifically that PLAN was a racketeering "enterprise" under the language of 18 U.S.C. § 1962(c) and that respondents had further offended RICO in as much as they were "members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity."<sup>21</sup> According to Petitioners' complaint, that "pattern of illegal activity" included "extortion in violation of the Hobbs Act,"<sup>22</sup> and a conspiracy to use force or threats of force to compel doctors, patients, and clinic employees "to give up their jobs . . . , their economic right to practice medicine, and . . . their right to obtain medical services at the clinics."<sup>23</sup>

The district court dismissed the RICO claims on the grounds that the "income" allegedly gained by respondents was "in no way . . . derived from a pattern of racketeering"<sup>24</sup> but, rather, was the product of donations given voluntarily by individual abortion opponents.<sup>25</sup> According to the district court, a "profit-generating purpose must be alleged" in order to bring suit under RICO<sup>26</sup> and thus, petitioners' complaint failed to state a claim because it alleged no such economic motive.<sup>27</sup>

The Seventh Circuit Court of Appeals agreed and affirmed the lower court's decision.<sup>28</sup> In its analysis, it adopted the reasoning of the Second Circuit Court of Appeals for the Second Circuit in *United States v. Ivic*.<sup>29</sup> In *Ivic*, the court found simply that "an 'economic motive' requirement [is] implicit in the 'enterprise' element of [a RICO] offense."<sup>30</sup> "[E]ither the predicate acts or the enterprise [must] be geared toward economic

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<sup>19</sup> In addition to Mr. Scheidler and the Pro-life Action Network (PLAN), "John Patrick Ryan, Randall A. Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, Monica Migliorino, Vital-Med Laboratories, Inc., Pro-Life Action League, Inc. (PLAL), Pro-Life Direction Action League, Inc. (PDAL), Operation Rescue, and Project Life" were also named in the complaint. *Id.* at 277 n. 1.

<sup>20</sup> Petitioners originally brought suit in United States District Court for the Northern District of Illinois. *Id.* at 249.

<sup>21</sup> *Id.* at 253-54.

<sup>22</sup> 18 U.S.C. § 1951. Extortion is defined in section 1951(b)(2) as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under the color of official right." *Id.* at § 1951(b)(2).

<sup>23</sup> *Scheidler*, 510 U.S. at 253.

<sup>24</sup> *National Organization for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 941 (N.D. Ill. 1991).

<sup>25</sup> *Scheidler*, 510 U.S. at 254.

<sup>26</sup> *NOW*, 765 F. Supp. at 943.

<sup>27</sup> *Id.*

<sup>28</sup> *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7<sup>th</sup> Cir. 1992).

<sup>29</sup> 700 F.2d 51 (1983).

<sup>30</sup> *Scheidler*, 510 U.S. at 254.

gain.”<sup>31</sup> Consequentially, “non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO.”<sup>32</sup> In applying this rule to *Scheidler*, the Seventh Circuit Court of Appeals recognized the economic effect that the respondents’ actions had and were probably intended to have had on petitioners, but would not “equate that effect with the economic motive required by *Ivic* and its progeny.”<sup>33</sup>

This holding fell in direct conflict with the Third Circuit Court of Appeals’ finding in *Northeast Women’s Center, Inc. v. McMonagle*.<sup>34</sup> The court’s finding in that case was that no economic motive is required of the predicate offense.<sup>35</sup> The United States Supreme Court granted certiorari to resolve the conflict between the circuit courts.<sup>36</sup>

In its analysis, the Supreme Court agreed with the Third Circuit Court because RICO’s language would allow no other finding. The Court’s examination revealed that “[n]owhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.”<sup>37</sup> In support of this conclusion, the Court focused on language in subsection (c) which identifies an affected enterprise as “any enterprise engaged in, or the activities of which affect, interstate or foreign commerce.” Regarding that language, the Court conceded that, if limited to enterprises engaged in interstate or foreign commerce, the requirement of an economic motive would arguably be suggested.<sup>38</sup> However, because the same language includes enterprises whose activities merely *affect* foreign or interstate commerce, the Court reasoned that subsection (c) could not imply a required economic motive due simply to the fact that an enterprise may conceivably, without any profit-seeking motive, affect such commerce.<sup>39</sup>

The Supreme Court further disagreed with the Seventh Circuit’s notion that the term “enterprise” should necessarily carry the same meaning and implications in subsection (c) as are arguably apparent in subsections (a) and (b).<sup>40</sup> The Court found that while the term “enterprise”

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<sup>31</sup> *Scheidler*, 968 F.2d at 628.

<sup>32</sup> *Id.* at 629.

<sup>33</sup> *Id.* at 630.

<sup>34</sup> 868 F.2d 1342 (1988).

<sup>35</sup> *Id.* at 1350.

<sup>36</sup> *Scheidler*, 510 U.S. at 255.

<sup>37</sup> *Id.* at 257.

<sup>38</sup> *Id.* at 257-258.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 258. Section 1962(a) provides that:

[It] shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of ant

was used in subsections (a) and (b) to denote something "acquired through illegal activity or the money generated from illegal activity," the same term in subsection (c) refers to the "vehicle through which the unlawful pattern of racketeering activity is committed." Therefore, because the "enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity."<sup>41</sup>

Having found that the term "enterprise" does not necessarily carry with it the requirement of an economic motive, the Court examined the same requirement as it might apply to the predicate acts that spawn RICO claims. The lower courts had held that an economic motive is required of the predicate acts based on the logic of *United States v. Bargaric*<sup>42</sup> in which the Second Circuit Court of Appeals upheld the RICO convictions of members of a political terrorist group. The *Bargaric* court found, in a preface to RICO, a congressional statement that referred to groups draining "billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."<sup>43</sup> It concluded from that language that such prohibited activities included and required an economic motive.

In *Scheidler*,<sup>44</sup> the Supreme Court, again, found the argument for a required economic motive something less than compelling. The Court observed that the "[r]espondents and the two Courts of Appeals . . . overlook[ed] the fact that predicate acts, such as the alleged extortion, may not benefit the protesters financially but still may drain such money from the economy by harming businesses . . . ."<sup>45</sup> In its final analysis, the Court found that RICO does not mandate an economic motive either in the "enterprise" or the predicate acts but rather required only "that an association-in-fact enterprise . . . be 'directed toward an economic or

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enterprise which is engaged in, or the activities of which affect, interstate or foreign Commerce.

*Scheidler*, 510 U.S. at 258.

Section 1962(b) provides that it "shall be unlawful for any person through a pattern of racketeering activity or through collection of unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.*

Subsection 1962(c) provides, in part, that it shall be unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." *Scheidler*, 510 U.S. at 258.

<sup>41</sup> *Id.* at 259.

<sup>42</sup> 706 F.2d 42 (2<sup>nd</sup> Cir. 1983).

<sup>43</sup> *Id.* at 57 n. 13.

<sup>44</sup> 510 U.S. at 260.

<sup>45</sup> *Scheidler*, 510 U.S. at 260.

*other identifiable goal.*"<sup>46</sup> RICO's language, the Court reasoned, is unambiguous and no such requirement of economic motive is expressed or can be "fairly implied in the operative sections of the Act."<sup>47</sup>

The Supreme Court was unanimous in its opinion but that opinion did not come without caveat. Justice Souter, joined by Justice Kennedy, authored a concurring opinion crafted specifically to address the decision's relation to First Amendment free speech issues.<sup>48</sup> While he found that the lack of an economic motive requirement in RICO does not, in and of itself, offend the First Amendment, he advised that this in no way implies the unavailability of First Amendment defenses in particular cases.<sup>49</sup> Justice Souter was as unwilling as his colleagues to read into RICO an economic motive requirement. By joining the Court's opinion, he too agreed that the language of the statute, as written, could not support such a conclusion. However, he did not forego the opportunity to "caution courts applying RICO to bear in mind the First Amendment interests that could be at stake" as "RICO actions could deter protected advocacy."<sup>50</sup>

### III. RICO'S LANGUAGE SHOULD BE AMENDED TO PROPERLY EXCLUDE SOCIAL PROTESTERS

One of *Scheidler's* more intriguing novelties is found not so much in how its issues were formally debated but rather by whom. Ironically, it was G. Robert Blakey who served both as RICO's chief architect in 1969<sup>51</sup> and as Joseph Scheidler's chief advocate before the Supreme Court in 1994.<sup>52</sup> Therefore, in order for the Supreme Court to disagree with respondents in *Scheidler*, it had to find unpersuasive the arguments formed by the same mind that created the statute at issue.

As is apparent in the outcome of the case, the Supreme Court did in fact disagree with Blakey on *Scheidler's* central issue: whether respondents were among the class of individuals against whom RICO charges may be brought.<sup>53</sup> It is in this that RICO's greatest fault is exemplified. RICO's language is written in such a way that the author who drafted it and the Supreme Court whose responsibility it is to interpret it can come

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<sup>46</sup> *Id.* at 261 (citing U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-110.360 (Mar. 9, 1984)) (emphasis in original).

<sup>47</sup> *Id.* at 260-61.

<sup>48</sup> *Id.* at 263-265.

<sup>49</sup> *Scheidler*, 510 U.S. at 264.

<sup>50</sup> *Id.* at 265.

<sup>51</sup> Maria McFadden, *Are "Pro-Lifers" Really Mafia Mobsters?*, HUMAN LIFE REV., June 22, 1998, at 35.

<sup>52</sup> *See Scheidler*, 510 U.S. 249.

<sup>53</sup> *See generally id.*

to polar opposite conclusions, not as to finer points of the statute's constitutionality or legal propriety, but rather as to something as rudimentary as to whom the law applies.

It is widely accepted that, under the American system of justice, ignorance of the law is no excuse for offending it<sup>54</sup> because individuals are assumed to have the ability to know the law.<sup>55</sup> However, if the statute's author was found, in the eyes of the Supreme Court, not to know the very law he drafted, how can any other individual be expected to know when the line has been crossed between misdemeanor trespass at a protest rally and an act of felonious racketeering? It is this, RICO's Kafkaesque<sup>56</sup> quality of overly pliable and enigmatic application, that Congress has the responsibility to remedy.

This is not to say that RICO's language is ambiguous.<sup>57</sup> On the contrary, it is the fact that RICO's language is unambiguous that renders it

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<sup>54</sup> See, e.g., *Lambert v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Reynolds v. United States*, 98 U.S. 145, 167 (1879); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 182 (1820) (Livingston, J., dissenting).

<sup>55</sup> This presumption, that every individual knows the law, is based on the common-law idea that "the law is definite and knowable." *Cheek v. United States*, 498 U.S. 192, 199 (1991). It is interesting to note that this expectation presumes that Congress has placed the law in a knowable state. However, in some cases, such as tax legislation, where it has been held impossible or impractical for Congress to make the law knowable and comprehensible to average citizens, specific intent has been made a required element of the offense. See, e.g., *United States v. Carter*, 516 F.2d 431 (5th Cir. 1975).

<sup>56</sup> See generally FRANZ KAFKA, *THE TRIAL* (1956). Kafka tells the story of Joseph K. who is arrested but never comes to the knowledge of the charges brought against him or the authority that brings them. This is apropos to a discussion of RICO because the Supreme Court's decision in *Scheidler* effectively invalidated G. Robert Blakey's interpretation of RICO. In disagreeing with Blakey, as to the scope of RICO's application, the Court necessarily found that Blakey, RICO's chief architect, had misinterpreted the very statute he created. If Blakey, RICO's author, can not, in the eyes of the Court, be sure of the scope of the statute, its application would appear to be at least as enigmatic to the general population.

<sup>57</sup> It seems, at first, contradictory to say that RICO is vague, see Leo, *supra* note 3, and yet unambiguous. The contradiction proves illusory, however, because "vagueness" and "ambiguity" are simply not synonymous. "Vagueness is a matter of degree, a shading of meaning." Ambiguity, on the other hand, "is a matter of choice among different connotations; the meaning must be one thing or another." SCOTT J. BURNHAM, *DRAFTING CONTRACTS* 95 (2nd ed. 1993).

RICO's inconsistency resides in the fact that the Supreme Court has found in its language no exclusion of a class of individuals that the statute's drafters openly admit they specifically intended to exclude. This does not, however, equate with ambiguity in the language because, as the Court has stated, "[a] statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the act' that the statute encompasses the conduct at issue." *Salinas v. United States*, 118 S. Ct. 469, 475 (1997) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)).



ineligible for judicial correction in the present case.<sup>58</sup> Had the language been ambiguous, the Court would have, at least, had within its discretion the rule of lenity.<sup>59</sup> It is, therefore, not the ambiguity of RICO's language that renders it unknowable and overly broad but rather RICO's failure to embody the intent of its framers. Put simply, while RICO says *something* clearly, it does not say what it was intended to say. It is thus, the responsibility of Congress to clarify the limits of RICO's application by amending its language rather than the responsibility of the Court to remove respondents and other social protesters from the limits of RICO's definitions through a contorted interpretation of the statute. This portion of the discussion is greatly aided by an examination of the opposing views taken by Blakey and the Supreme Court.

The position of the Supreme Court is relatively simple: RICO's language is unambiguous<sup>60</sup> and, as written, does not require the economic motive that would exclude respondents from the statute's reach.<sup>61</sup> Furthermore, if desired, it would have been an extremely simple task to indicate the requirement of an economic motive in RICO's language.<sup>62</sup> In actuality, however, Congress did not "either in the definitional section or the operative language, require[] . . . an economic motive."<sup>63</sup> In light of this fact, the Court found the statements of congressional findings offered in respondent's support to be "a rather thin reed upon which to base a requirement of economic motive . . . ."<sup>64</sup> Plainly stated, the court implied that if Congress had intended to require an economic motive, it would have said so in the statute's language.<sup>65</sup>

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<sup>58</sup> It is important to note that this ineligibility for a judicial remedy refers only to the question of whether an economic motive is required in RICO suits. In as much as that issue was one of statutory interpretation and not Constitutional propriety, the Court was bound by the language of the statute. As was stated by Justice Souter, however, "nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case." *Scheidler*, 510 U.S. at 264.

<sup>59</sup> *See id.* at 262. The Lenity Rule provides "that where there is ambiguity in the language of a statute concerning multiple punishment, ambiguity should be resolved in favor of lenity in sentencing." BLACK'S LAW DICTIONARY 902 (6th ed. 1990) (citing *United States v. Barrington*, 662 F.2d 1046, 1054 (4th Cir. 1981)).

<sup>60</sup> *Scheidler*, 510 U.S. at 261.

<sup>61</sup> *Id.* at 262.

<sup>62</sup> *See id.* at 260-61. In explanation of its position, the Court discussed the "analogous question [of] whether 'enterprise' as used in § 1961(4) should be confined to 'legitimate' enterprises." In *United States v. Turkett*, 452 U.S. 576 (1981), the Court found that "1961(4)'s definition of 'enterprise' appears to include both legitimate and illegitimate enterprises . . . . Had Congress intended otherwise, it "could easily have narrowed the sweep of the term 'enterprise' by inserting a single word, 'legitimate.'" *Scheidler*, 510 U.S. at 261 (quoting *Turkette*, 452 U.S. at 580-81).

<sup>63</sup> *Scheidler*, 510 U.S. at 261.

<sup>64</sup> *Id.* at 260.

<sup>65</sup> *See id.* at 260-61.

Blakey, on the other hand, argued that RICO was never intended to apply "beyond gangsters and savings-and-loan kingpins to those who engage in social protest."<sup>66</sup> These intentions are evidenced by the fact that concerns, present at the statute's genesis, that RICO would be misapplied to social protesters, were answered by a narrowing of the legislation.<sup>67</sup> In oral arguments before the Supreme Court, Blakey argued as much, stating that:

The issue that burned in this country [in 1970] was not abortion, not animal rights, not fossil fuels, not fur and the fur industry, but the war in Vietnam. This statute was proposed and it was objected to by the American Civil Liberties Union specifically on the grounds that the definition of racketeering activity was so wide open it might apply to the takeover of the Pentagon and to the takeover of the University of Columbia. Congress immediately turned to narrow the definition, with a specific intent of avoiding the application of RICO to demonstrations.<sup>68</sup>

At RICO's core is the idea of illicit gain.<sup>69</sup> It was modeled after anti-trust statutes. Just as their purpose was "securing freedom in the marketplace," RICO's purpose was "securing integrity in the market place."<sup>70</sup> In the view of its drafters, "no offense remotely related to trespass, vandalism or any other aspect of civil disturbance that might go beyond

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<sup>66</sup> Blakey, *supra* note 4, at A22; see also Respondent's Oral Arguments, 1993 WL 757635, at \*25.

<sup>67</sup> According to Blakey:

[W]hen Senator McClellan proposed RICO in 1969, Sen[ator] Edward Kennedy, D-Mass., objected to its application beyond "organized crime"; he was concerned that President Nixon would use it to quell protests against the war in Vietnam. The American Civil Liberties Union also objected, arguing the bill would restrict anti-war demonstrations. To meet these objections, Senator McClellan told me to narrow the bill. I did what I was told.

Blakey, *supra* note 4, at A22.

<sup>68</sup> Respondent's Oral Arguments, 1993 WL 757635, at \*42.

<sup>69</sup> *Id.* at \*32. In Blakey's view the concept of illicit gain is inextricably intertwined with the purpose and intent of RICO. In oral arguments before the Supreme Court he stated that:

[RICO] can be summed up in two words, illicit gain. The concept of illicit gain pervades the statute, the title the findings, the definitions, the operative language in the statute, the criminal remedies, the civil remedies, statutes with which it is in *pari materia*, and legislative history. The precise words used in each section varies [sic] with the purpose of each section, but the statute can be summed up in two words, illicit gain. Look at the title. This is the label on the bottle. It says Racketeering Influenced and Corrupt Organizations. Racketeer means extortion and fraud. Corrupt means venal. There right on the label of the bottle is the commercial notion of gain.

*Id.* at \*32.

<sup>70</sup> *Id.* at \*47.

First Amendment protections was included in [RICO]."<sup>71</sup> While "extortion" was included in the statute, the meaning commonly attributed to it by its drafters was "obtaining property by fear."<sup>72</sup> In fact, "[n]o knowledgeable statutory drafter in 1969 would have believed that 'to protest' could be equated with 'to extort.'"<sup>73</sup>

The Supreme Court's difficulty with entertaining this line of argumentation springs from the fact that the Court is not required or expected to interpret RICO as a statutory drafter in 1969, but as the Supreme Court in 1994. While these unwritten understandings as to the meanings of words and pervading concepts may have existed, they were just that: unwritten. When told that the statute had been amended to exclude social protesters, the Court inquired as to the exact amendments that were made. Those amendments did not touch the broad definition of the term "enterprise."<sup>74</sup> Under examination, even Mr. Blakey was forced to admit that under § 1962(a),(b) and (c), "it is certainly possible, consistent with those texts, for there to be an enterprise which is not itself devoted to economic gain."<sup>75</sup>

For the Court to find a required economic motive, it essentially would have to endorse definitions and presuppositions that are not evident in RICO's text. If the Court were to do that, it would effectively be rewriting the statute. In *Scheidler*, the Court was asked to overstep its role as interpreter and assume the role of drafter. The mere fact that such a disconnect exists between the understood parameters of RICO and those set out in its language is unquestionable evidence of RICO's need for redrafting. This, however, is an activity for Congress and not the Supreme Court. Admittedly, RICO's shortcomings in this area are due in some degree to almost thirty years of flux in language usage, but not even a shifting in the English language should be allowed to rewrite legislation. It is therefore, Congress' responsibility to amend RICO's language so that it properly reflects its original purpose and effectively excludes social protest activities.

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<sup>71</sup> Blakey, *supra* note 4, at A22.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Respondent's Oral Arguments, 1993 WL 757635, at \*43.

<sup>75</sup> *Id.* at \*33.

#### IV. AS APPLIED TO SOCIAL PROTESTERS, RICO VIOLATES FIRST AMENDMENT PROTECTIONS OF FREE SPEECH

##### *A. Naacp v. Claiborne Hardware, a Similar Situation*

Citing *NAACP v. Claiborne Hardware Co.*,<sup>76</sup> (*Claiborne Hardware*) Justice Souter remarked, in his concurring opinion in *Scheidler*, that: [L]egitimate free-speech claims may be raised and addressed in individual RICO cases . . . . Accordingly, it is important to stress that nothing in the Court's opinion [in *Scheidler*] precludes a RICO defendant from raising the First Amendment in its defense . . . . [Some] of the . . . somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis."<sup>77</sup>

The subject matter in *Claiborne Hardware* differed from that in *Scheidler*, but the circumstances were otherwise very similar.<sup>78</sup> In *Claiborne Hardware*, the National Association for the Advancement of Colored People (NAACP) organized a boycott of several white merchants in Port Gibson, Mississippi.<sup>79</sup> As in *Scheidler*, the sponsoring organizations and several individuals were accused of conspiring to drive businesses to "economic ruin"<sup>80</sup> through the "agreed use of illegal force, violence, and threats against the peace."<sup>81</sup>

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<sup>76</sup> 458 U.S. 886 (1982).

<sup>77</sup> *Scheidler*, 510 U.S. at 264 (Souter, J., concurring).

<sup>78</sup> Where the subject of protest in *Scheidler* was abortion, the subject of protest in *Claiborne Hardware* was racial equality and integration. In both, the targets of protest were privately owned businesses that failed to comply with the ideologies of the protesting bodies. See generally *Scheidler*, 510 U.S. 247; see also *Claiborne Hardware*, 458 U.S. 886.

<sup>79</sup> 458 U.S. at 889.

<sup>80</sup> The Chancellor in equity, at the trial level found that "[t]he testimony in the case at bar clearly shows that the principle objective of the boycott was to force the white merchants of Port Gibson and Claiborne County to bring pressure upon governing authorities to grant defendants' demands or, in alternative, to suffer economic ruin." *Id.* at 892 n. 8. (quoting App. to Pet. For Cert., at 51b).

<sup>81</sup> *Id.* at 895 (quoting *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1300 (1980)). The similarity in the accusations brought in *Scheidler* and *Claiborne Hardware* is exemplified in a comparison of the language of the trial court in *Claiborne Hardware* and the petitioners in *Scheidler*. The trial court in *Claiborne Hardware* found that:

In carrying out the agreement and design, certain of the defendants, acting for all the others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers [of the white merchants]. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards ("enforcers," "deacons," or "black hats") in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced

### B. Protected Activities

The Supreme Court began its analysis in *Claiborne Hardware* by separating the constitutionally protected aspects of the protesters' actions from the unprotected aspects. The actions of gathering together, nonviolent picketing, the giving of speeches, and encouraging others to join the actions of the group were all found to be "form[s] of speech or conduct that [are] ordinarily entitled to protection under the First . . . Amendment."<sup>82</sup> The Court unequivocally restated its dedication to the protection of the freedoms of speech and association stating:

"[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the political process. . . ."<sup>83</sup> "[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost. . . ."<sup>84</sup> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."<sup>85</sup>

Though there was violence associated with the protest activities,<sup>86</sup> the Court refused to find that the association of the individuals lacked constitutional protection "merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."<sup>87</sup> Likewise, nonviolent speech elements of the protest activi-

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and compelled against their personal wills to withhold their trade and business intercourse from complainants.

*Claiborne Hardware Co.*, 393 So. 2d at 1300.

The claims made by petitioners in *Scheidler* were similar in that "[t]hey claimed that the respondents conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, their right to practice medicine, and their right to obtain clinic services . . . ." *Scheidler*, 510 U.S. at 249.

<sup>82</sup> *Claiborne Hardware*, 458 U.S. at 907. See also U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the government for redress of grievances").

<sup>83</sup> *Claiborne Hardware*, 458 U.S. at 907 (quoting *Citizens Against Rent Control Coalition for Fair Housing v. Berkley*, 454 U.S. 290, 294 (1981)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 908 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

<sup>86</sup> For example, shots were fired at the homes of some individuals who ignored the boycott; a brick was thrown through a car windshield; another vehicle was vandalized; a flower garden damaged; a product purchased at a boycotted establishment was taken by a NAACP member; assaults occurred, and threatening phone calls were made. *Id.* at 904-06.

<sup>87</sup> *Id.* at 908.

ties, which were calculated to coerce others into action through ridicule and embarrassment, did not, in the Court's opinion, strip the speech of its protected character.<sup>88</sup> Ultimately, the Court held that at very least, "the nonviolent elements of petitioners' activities are entitled to protection of the First Amendment."<sup>89</sup>

The alleged activities of respondents in *Scheidler*, are quite similar to those at issue in *Claiborne Hardware*.<sup>90</sup> The respondents picketed abortion clinics, attempted to convince others to join their cause, and made speeches.<sup>91</sup> Also, as in *Claiborne Hardware*, some individuals associated with the protesting groups allegedly committed acts of violence.<sup>92</sup> The application of constitutional protections should be no more distinguishable between the two cases than are the genera of the protesters' objectives and the means employed to accomplish those objectives. The nonviolent elements of the respondent's activities in *Scheidler* should have been, therefore, entitled to the full protection of the First Amendment.

### C. Unprotected Activities

"The First Amendment does not protect violence."<sup>93</sup> The laws of the United States do not restrain the imposition of tort liability for losses caused by violence.<sup>94</sup> However, "[w]hen such conduct occurs in the context of constitutionally protected activity, . . . 'precision of regulation' is demanded."<sup>95</sup> In particular, "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."<sup>96</sup>

The legitimate conduct in question in *Claiborne Hardware* was protected by the First Amendment. No damages were allowed as compensation for the consequences of any nonviolent, constitutionally protected activities. In fact, the sole damages that were allowed were those for particular losses caused by unprotected, unlawful activities.<sup>97</sup> Inasmuch as

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<sup>88</sup> *Claiborne Hardware*, 458 U.S. at 910. In the language of the Court "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *Id.*

<sup>89</sup> *Id.* at 915.

<sup>90</sup> See generally *Scheidler*, 510 U.S. 249 (1994).

<sup>91</sup> *Id.* at 252-53.

<sup>92</sup> *Id.* at 256.

<sup>93</sup> *Claiborne Hardware*, 458 U.S. at 916.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)) (emphasis added).

<sup>96</sup> *Id.* at 916-17.

<sup>97</sup> *Id.* at 915-920.

the activities giving rise to the Court's decision in *Claiborne Hardware* were substantially similar to those in *Scheidler*, the same standard should be applied. The majority of the activities alleged in *Scheidler* are entitled to First Amendment protection.<sup>98</sup> Only the remainder, those activities that were unprotected and unlawful, should give rise to the possibility of damages liability.

#### V. CONCLUSION

The right to communicate, individually or corporately, ideas popular and unpopular alike, is an indispensable ingredient to the American form of government. RICO, in its current form, threatens that right. Though created with a given amount of breadth, its own creators oppose its application to a situation that they specifically intended to insulate from its reach—social protest. The mere fact that the very minds that created RICO now oppose its application to social protesters is conclusive evidence that RICO needs to be rewritten in order to effectively protect First Amendment rights left vulnerable by its language. Until rewritten, the Supreme Court should find its use against social protesters to be an unconstitutional use of an otherwise constitutional, but poorly drafted, law.

*Shawn D. Akers*

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<sup>98</sup> See discussion *supra* Part IV.B.