1-1-2002

Reptiles in the Weeds: Civil RICO vs. the First Amendment in the Animal Rights Debate

Jaime I. Roth

Reptiles in the Weeds: Civil RICO vs. the First Amendment in the Animal Rights Debate

> "A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees."[1]

INTRODUCTION

Like many bouts of social protest, the 1966 boycott of white businesses in Claiborne County, Mississippi exhibited what Justice Stevens called, "elements of criminality and elements of majesty."[2] The boycott was instituted by the NAACP and members of the Claiborne County community in an effort to secure compliance with demands for racial equality.[3] While the boycott primarily involved concerted and lawful withholding of business by conscientious objectors, some participants threatened violence and perpetrated physical attacks on the persons and property of black community members who continued to patronize targeted white businesses.[4]

Ultimately, the United States Supreme Court refused to find the entire boycotting community responsible for the acts of a few violent individuals, despite the fact that the violence may have contributed to the overall success of the boycott.[5] The Court reasoned that a judgment of "guilt for association" would be alien to the notion of a free society and would violate the First Amendment.[6] Instead, the Court held that only individuals responsible for carrying out illegal actions and who subsequently caused economic harm to the plaintiffs could be held liable.[7]

It is unclear whether the holding in *Claiborne Hardware* still stands to protect advocates for social change where the cause they promote is marred by instances of illegal or violent conduct on the part of a few individuals. This uncertainty has increased since the Racketeer-Influenced Corrupt Organizations Act (RICO) was held to apply to activist

1. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934 (1982).
2. *Id.* at 888.
3. *Id.* at 889.
4. *See id.* at 903.
5. *Id.* at 933.
6. *Id.* at 931.
7. *Id.* at 933.

groups with no profit-seeking motive in *NOW v. Scheidler.*[8]

RICO contains civil liability provisions that can subject political activist groups to liability for treble damages and attorneys' fees in potentially crippling sums. When *Scheidler* was decided, critics feared that civil liability would become a tool used to stifle political activism in arenas beyond the abortion context of that case, and would result in a net decline in political organizing.[9] These fears are beginning to materialize, as several RICO complaints have been filed in recent years against animal rights activists by both fur retailers and laboratories that conduct research on animals.[10]

This Comment asserts that civil RICO liability violates First Amendment rights to freedom of speech and association, and that until the legislature tailors the statute more narrowly, protest movements – which have helped shape American society since its inception – may cease to be effective agents for debate and positive change. Part I will analyze the ways in which activist movements have a net positive effect on society, and will reveal that the law adequately protects businesses from illegal protest activity without the constitutionally questionable use of RICO. Part II will examine the origins and applications of RICO, and will chart its evolution from a mechanism to counter the commercial influence of organized crime to a mechanism for protecting monied interests from the effects of protest activity. Part III will discuss the makeup and tactics of the animal rights movement, and will reveal that the facts underlying the animal rights lawsuits make *Claiborne Hardware,* not *NOW v. Scheidler*, the controlling precedent. This part will also look beyond the animal rights context, and will show that until a First Amendment exception to civil RICO liability is created, either through the statutory language or by court interpretation, the First Amendment freedoms of association and political expression remain in grave peril.

PART I. ACTIVIST MOVEMENTS PLAY A VITAL ROLE IN SHAPING AMERICAN SOCIETY

For most of its history, this nation has afforded extraordinary pro-

8. 510 U.S. 249, 262 (1994).

9. *See, e.g.,* Peter Burke, *Application of RICO to Political Protest Activity: An Analogy to the Antitrust Laws*, 12 J. L. & POL. 573 (1996); Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819 (1996); Brian J. Murray, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999).

10. N.J. Furriers Pelt Protestors With Civil RICO Suit, Civil RICO Litig. Rep., Dec. 1999, at 3; Press Release, Huntingdon Sues Animal Activists (Apr. 19, 2001) *available at* http://www.furcommission.com/news/newsF02t.htm.

tection to political expression.[11] This protection, however, has its limits. There are numerous instances in American history where proponents of change have gone beyond the law to make their message heard. For purposes of this Comment, the value of lawful expression is considered a given. What is at issue here is not the lawful holding of placards or distribution of literature. Instead, this Comment examines the value of those activities in conjunction with instances of concerted lawbreaking, in the form of civil disobedience, and in conjunction with "direct action," or unclaimed acts of vandalism undertaken for an ideological purpose.

A. *Civil Disobedience*

There is much disagreement over the precise definition of the phrase "civil disobedience."[12] Even the origins of the phrase are subject to speculation.[13] This Comment adopts the restricted definition proposed by Bruce Ledewitz, which conceives of civil disobedience as illegal non-violent conduct where the actor participates openly, intending that the community take notice of the action and that the action will result in punishment.[14] This definition recognizes the fact that civil disobedience inevitably involves some form of coercion, in that the target's ordinary course of business will be disrupted and third parties will unwittingly be affected. The definition also acknowledges that the distinction between coercion and violence is not absolute.[15]

Acts of civil disobedience, such as sit-ins and lock-downs,[16] while expressive, fall outside the protection of the First Amendment.[17] Generally, civil disobedience is prosecuted under local trespass laws.[18] Until recently, state law has been thought to be adequate to protect citizens

11. "Our nation in a sense came into being through a massive act of civil disobedience, for the Boston Tea Party was nothing but a massive act of civil disobedience." Martin Luther King, Jr., *Love, Law, and Civil Disobedience, in* CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY 217 (David R. Weber ed., 1978). Of Course, our American tradition of free speech is blemished by historical embarrassments such as the Alien and Sedition Acts. Surely repeat performances of such repression are to be avoided.

12. Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 69 n.12 (1990).

13. Gandhi attributed the coinage of the phrase to Henry David Thoreau, but the phrase appears nowhere in his writings, and his essay entitled "Civil Disobedience" was named in a republishing of the work four years after his death. *See* CIVIL DISOBEDIENCE, THEORY AND PRACTICE 16 (Hugo Adam Bedau ed., 1969).

14. Ledewitz, *supra* note 12, at 70-81. A typical example is the sit-in.

15. *Id.* at 70.

16. A "lock-down" is a variation on the sit-in wherein participants occupy an area by locking themselves to fixtures with devices such as bicycle U-locks to make removal by law enforcement more difficult and to prolong the duration of the protest.

17. Ledewitz, *supra* note 12, at 67-68.

18. *Id.* at 68.

from the inconvenience and potential economic loss that may result from civil disobedience.

American society has a general tolerance for acts of civil disobedience.[19] Schoolchildren are taught to value the work of Henry David Thoreau, Mohandas Gandhi, Susan B. Anthony, and Martin Luther King, Jr., individuals who refused to cooperate with unjust laws. Of course, the movements these individuals represent (civil rights, womens' suffrage, national sovereignty, and non-violence), enjoy general support today, but whether these movements would have been able to garner such recognition and support had the tactic of civil disobedience not been used is unknowable.

Critics of civil disobedience abound. Dr. King's assertion that "there is a right to disobey an unjust law," was met with the criticism that, "[i]f this philosophy were accepted and carried out by the twenty million American Negroes, it would be enough to disorganize our entire society and produce an intolerable chaos and a denial of individual liberty to every other American."[20] This is perhaps a legitimate concern. Yet, to date, no movement employing civil disobedience has disrupted the orderly functioning of society on such a large scale. Again, the precise reason for this is not readily understood. It may be that movements that are morally "right" succeed in winning significant support and their ideals become integrated into law, while those philosophies which are not "right," or that society is not willing to accept, remain confined to a small enough minority that local laws prohibiting trespassing and impeding traffic overpower occasional disobedience. Whatever the reason, it is probably true that civil disobedience is justified at least some of the time and is not likely to cause unacceptable harm.[21]

B. *Direct Action*

While civil disobedience certainly has its critics, society is decidedly less tolerant of calculated acts of property destruction done for the purpose of furthering an ideological goal.[22] These acts are referred to herein as "direct action."[23] The property destruction conceived of herein

19. *Id.* at 68 (quoting R. DWORKIN, A MATTER OF PRINCIPLE 105 (1985)) ("Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community.").

20. Louis Waldman, *Civil Rights—Yes: Civil Disobedience—No (A Reply to Dr. Martin Luther King)*, *in* CIVIL DISOBEDIENCE THEORY AND PRACTICE 109 (Hugo Adam Bedau ed., 1969).

21. Ledewitz, *supra* note 12, at 82.

22. This is especially true in the wake of the attacks on the World Trade Center and the Pentagon on September 11, 2001.

23. The term "direct action" is frequently used to describe acts of civil disobedience. This Comment reserves the term direct action to refer to purposeful vandalism rather than to acts of civil disobedience. Participants in civil disobedience seek the end result of arrest and publicity

is limited to destruction of inanimate property with care taken to ensure against harm to persons. In the wake of the September 11 attacks, this country has experienced a new respect for adherence to law and a new suspicion of ideology. One aim of this Comment is to remind readers of historical examples of direct action such as the Boston Tea Party. The Boston Tea Party is an example of direct action where participants disguised their identities to evade capture and destroyed British tea in a symbolic act of defiance. Modern-day direct action exhibits similar elements. Destruction of property is often characterized as "violence," and our kneejerk reaction after Sept. 11 may be to agree with this characterization. Yet, we have a responsibility to remember the glaring difference between the devastation of populated buildings and the throwing of tea off ships. While there is a wide expanse of gray area between these extremes, we must be cognizant of contextual variables when forming opinions on instances of ideological property destruction. "Direct action" as discussed here refers only to acts that are carefully carried out to avoid human injury.

Participants in direct action ("direct activists") manifest varied goals. Most hope their acts of vandalism will draw attention to the ill they perceive in the status quo. One example of this type of direct action was the 1984 break-in at the brain damage laboratory at the University of Pennsylvania by the Animal Liberation Front (A.L.F.), a group that engages in direct action in support of animal rights.[24] The group removed forty-five hours of videotape that showed researchers inflicting brain damage on conscious, unanesthetized baboons, and lifting a baboon by a shoulder which they acknowledge was probably dislocated.[25] The tapes were widely distributed and prompted an investigation by Congress that culminated in closure of the lab by the Department of Health and Human Services.[26]

Some direct activists inflict economic damage to dissuade a target from engaging in what activists believe is a morally wrong act. A modern-day example is the so-called "monkeywrenching" done by environmental groups such as Earth First!, which encourages the spiking of forest trees and the pouring of sand into the engines of bulldozers.[27]

---

while participants in direct action typically seek an end result of economic loss to the target and usually try to avoid arrest.

24. GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 24 (1996).

25. *Id.*

26. *Id.*

27. William W. Cason, Comment, *Spiking the Spikers: The Use of Civil RICO Against Environmental Terrorists*, 35 HOUS. L. REV. 745, 753 n.64 (1995). Tree spiking is the practice of driving a railroad spike into a tree so that when it is felled the spike will destroy lumber processing machinery.

While presumably part of their motive is to draw attention to the problem of deforestation, the direct impact of their actions is economic loss to the timber industry. There is a great deal of debate surrounding the tactic of direct action in social movements, even among movement leaders and constituents themselves. Critics speak of violence and "terrorism,"[28] while supporters make comparisons to heroic acts such as the "theft" of slaves by abolitionists along the underground railroad, and invoke the inquiry, "If not you, who? If not now, when?"[29]

Supporters of direct action believe that the ends justify the means, and that destruction of property is a lesser wrong than allowing that property to continue to be used for a purpose that perpetuates a perceived harm. The question of whether theft or destruction of property is justifiable triggers a second question: What is property? The law now recognizes that human beings are not property, but this was not always the case. To the members of Earth First!, trees are not property, so tree spiking in their view is justified. No harm befalls timber harvesters so long as they do not take what activists believe is not theirs to take. Yet, most people and the law recognize that trees indeed can be property. Most believe that the alteration of trees to destroy machinery, and perhaps injure workers, is not justifiable. Thus, it seems to follow that direct action can perhaps be justified in retrospect, after a movement has succeeded in persuading a critical mass of supporters. Few Americans today would condemn Harriet Tubman or the participants in the Boston Tea Party for their illegal acts of trespass and interference with property.

This discussion does not mean to imply that because what is considered "justified" changes over time that we as a society should turn the other cheek to direct action. Indeed, what is illegal should be prosecuted. This Comment merely suggests that criminal law, without civil RICO liability for non-violent movement adherents, is sufficient to combat ideologically motivated crime.

PART II: THE ORIGINS AND EVOLUTION OF RICO

The Organized Crime Control Act of 1970 (OCCA) was created to deal with an increase in organized crime, or racketeering, and to stop it from infiltrating legitimate industry.[30] Title IX of OCCA is known as

28. *Id.* at 745.

29. *See* Animal Liberation Frontline Information Service, *at* http://www.animalliberation.net (last checked Mar. 6, 2001).

30. The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970), was prefaced with the following "Statement of Finding and Purpose":

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force,

the Racketeer Influenced and Corrupt Organizations Act.[31] OCCA was deliberately drafted with broad language to allow law enforcement to build cases against evasive and powerful perpetrators of organized crime.[32] Its goal was to halt the proliferation of organized crime "by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities [of those engaged] in organized crime."[33]

Unlike the rest of OCCA, RICO itself does not mention "organized crime."[34] Rather than focusing on a class of perpetrators, RICO lists types of prohibited activities that apply to any actor engaging in those activities.[35] RICO provides for both civil and criminal remedies, and allows private plaintiffs to recover treble damages and attorneys' fees.[36] This Comment deals mainly with the civil component of RICO because that is the arm used against the pro-lifers in *NOW v. Scheidler* and against the animal rights activists in the pending district court cases discussed *infra*. It is important to note, however, that the criticisms herein regarding RICO's First Amendment implications apply equally to the criminal arm of RICO should the government begin to utilize it to prose-

---

fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

31. 18 U.S.C. §§ 1961-1968 (1994).

32. Bryan W. Riley, RICO *Economic Motive Unnecessary for the Proof of an Enterprise:* National Organization of Women v. Scheidler, 17 U. ARK. LITTLE ROCK L. REV. 343, 345 (1995).

33. Jennifer Bullock, National Organization for Women v. Scheidler: *RICO and the Economic Motive Requirement*, 26 CONN. L. REV. 1533, 1536 (1994) (quoting "Statement of Findings and Purpose of OCCA").

34. *Id.*

35. *Id.*

36. *Id.*

cute political protestors.[37]

A. *"Racketeering" Activity*

The types of activities prohibited by RICO are those that inflict injury to business or property by a defendant: (1) investing income derived from racketeering activity in the establishment or operation of an enterprise; (2) acquiring or maintaining interest or control of an enterprise through a pattern of racketeering activity; (3) conducting the affairs of an enterprise through a pattern of racketeering activity; or (4) conspiring to commit any of the preceding three acts.[38] To prove allegations under RICO, a plaintiff must show the existence of an "enterprise," and a "pattern" of "racketeering activity."[39] These requirements are intentionally broadly stated and their definitions open-ended.[40] Further, these uncertain terms are subject to the requirement that RICO "be liberally construed to effectuate its remedial purposes."[41]

RICO provides a list of predicate acts that can satisfy the "racketeering activity" requirement, including: "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year . . . ."[42] The Act also defines as "racketeering activity" violations of the Hobbs Act, which prohibits interference with commerce through robbery or extortion.[43] Plaintiffs most frequently use Hobbs Act extortion as the predicate offense when using RICO against protestors.[44]

B. *"Pattern" Requirement*

RICO's required "pattern" of racketeering activity need only comprise a minimum of two predicate acts committed within ten years of each other.[45] To constitute a pattern, the alleged predicate acts must

37. The *Scheidler* opinion impacts both civil and criminal applications of RICO since the enterprise element is the same for both. *See* Riley, *supra* note 32, at 345.

38. Riley, *supra* note 32, at 345-46 (paraphrasing 18 U.S.C. §§ 1962(a)-(d) (1994)).

39. *Id.* at 346.

40. *Id.*

41. *Id.* (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 947 (1970)).

42. 18 U.S.C. § 1961(1)(A) (2000).

43. 18 U.S.C. § 1961(1)(B) (2000). The Hobbs Act is codified at 18 U.S.C. section 1951(a) (2000). It defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

44. Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 820 (1996).

45. "'Pattern of racketeering activity' requires at least two acts of racketeering activity, one of which had to occur after the effective date of this chapter [October 15, 1970] and the last of which

exhibit relatedness and continuity of activity.[46] That is, a similar purpose for the predicate acts must be evident (relatedness) and it must be shown that the illegal acts occurred continuously within a specified time period or that the acts were threatened to continue into the future (continuity of activity).[47]

C. *"Enterprise" Requirement*

The term "enterprise" has been interpreted by courts in an increasingly broad manner. It is explicitly defined in 18 U.S.C. § 1961(4) as "including any individual, partnership, corporation, association, or other legal entity, and any union of group of individuals associated in fact although not a legal entity."[48] The circuit courts have generally understood RICO's use of the term "enterprise" to encompass three elements. The first is that individuals involved in the enterprise work toward a common purpose.[49] Second, there must be an ongoing organization and structure forming the enterprise. The enterprise may make decisions hierarchically or consensually, but they must be made in a manner that is more than merely ad hoc.[50] This organizational element also requires that there be some degree of continuity of personnel forming the enterprise such that the organization has a discernible structure over time.[51] The final element is the enterprise's "existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."[52] That is, a RICO enterprise must be more than a mere conspiracy to commit a predicate offense, and must be more like an ongoing planning body which carries out predicate offenses over time.[53]

D. *The Circuit Court Split Over Economic Motive*

Until *NOW v. Scheidler*, most circuit courts imputed an economic motive to the definition of "enterprise."[54] The Eighth Circuit, for exam-

---

must occur within ten years (excluding period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. 1961(5) (2000). This provision is subject to the statute of limitations. 18 U.S.C. § 3282 (2000).

46. Riley, *supra* note 32, at 348 (citing H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989)).

47. *Id.* (citing *Northwestern Bell Tel. Co.*, 492 U.S. at 239, 240).

48. 18 U.S.C. § 1961(4) (2000).

49. Parker, *supra* note 44, at 837 (citing United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982)).

50. *Id.* (citing United States v. Riccobene, 709 F.2d 214, 222 (3d Cir. 1983)).

51. *Lemm*, 860 F.2d at 1199.

52. Parker, *supra* note 44, at 837-38 (citing *Riccobene*, 709 F.2d at 224).

53. *Id.* at 838.

54. *Id.*

ple, stated, "for purposes of RICO, an enterprise must be directed toward an economic goal."[55] The Third Circuit, however, reached the opposite conclusion when it held that because the predicate offense does not require economic motive, RICO requires no additional economic motive.[56] The United States Supreme Court granted certiorari in *Scheidler* to resolve the controversy over the reach of RICO where no economic motive is apparent on the part of defendants.[57]

E. *An Unprecedented Interpretation of RICO: NOW v. Scheidler*

In 1986, frustrated by an increasingly intrusive pro-life presence at women's health clinics, the National Organization for Women joined forces with the Delaware Women's Health Organization and the Summit Women's Health Organization to bring suit against Joseph Scheidler and the Pro-Life Action Network (PLAN), among other pro-life defendants.[58] Their complaints, filed in the Northern District of Illinois, alleged violations of both RICO and the Sherman Act.[59] The plaintiffs requested injunctive relief, treble damages, and attorneys' fees and costs.[60]

The complaints alleged that the defendant pro-life activists had engaged in a pattern of racketeering activity to halt the operation of abortion clinics.[61] The predicate act alleged was Hobbs Act extortion, in conjunction with alleged violations of the Sherman Act[62] arising from the establishment of competing pregnancy testing and counseling centers,[63] and several state claims alleging trespass, physical blockade, property destruction, and interference with patient appointments by tying up clinic phone lines and making false appointments.[64] The plaintiffs claimed that the activists used threats and intimidation tactics to dissuade patients from having abortions and to dissuade facility employees from pursuing careers facilitating abortion. The plaintiffs' claims were dismissed by the district court for failure to state a claim on which relief could be granted.[65] The district court found the Sherman Act inapplicable because the alleged anticompetitive activities were politically, not commercially motivated, thus shielding them from Sherman Act

55. *Id.* (quoting United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir. 1988)).
56. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989).
57. NOW v. Scheidler, 510 U.S. 249, 255 (1994).
58. *Id.* at 252.
59. *Id.*
60. *Id.*
61. *Id.*
62. 15 U.S.C. §§ 1-7 (2000).
63. NOW v. Scheidler, 765 F. Supp. 937, 938 (N.D. Ill. 1991).
64. *Id.*
65. *Id.* at 941.

liability.[66]

The court also dismissed the RICO claims on three grounds. The plaintiffs' RICO claims were based on alleged violations of 18 U.S.C. §§ 1962(a), (c), and (d). The § 1962(a) claim, that the activists were investing income received through racketeering activity in the establishment or operation of an enterprise,[67] was dismissed because the defendants' "income" was generated through donor contributions and the court did not consider contributions campaigns to be a pattern of racketeering activity.[68] The § 1962(c) claims (conducting the affairs of an enterprise through a pattern of racketeering activity)[69] were dismissed because the court read this section to require an economic motivation on the part of the alleged enterprise, and the plaintiffs claimed no economic motivation.[70] Finally, the § 1962(d) claim, alleging conspiracy to commit any other RICO claim, was dismissed because the other RICO claims were dismissed.[71]

The plaintiffs appealed to the Seventh Circuit, which affirmed the district court's ruling that both RICO and the Sherman Act require an economic motive not held by political actors.[72] The circuit court determined that Congress did not intend for RICO to apply to political actors.[73] While cognizant of the mandate that RICO be applied broadly, the court read a requirement of an economic motive in the wording of the statute that prevented it from ruling for the plaintiffs.[74] The Seventh Circuit reasoned that the donations were not the proceeds of racketeering because the relationship between the defendants' activities at abortion clinics and their receipt of donations was too tenuous.[75]

F. *The Supreme Court Finds No Economic Motive Requirement in RICO*

After a request for a rehearing en banc was denied,[76] the plaintiffs appealed to the Supreme Court.[77] They claimed that summary judgment in the defendants' favor was improper because no economic motive was

66. Burke, *supra* note 9, at 598 n.102 (citing *Scheidler*, 765 F. Supp. at 941).
67. 18 U.S.C. § 1962(a) (2000).
68. *Scheidler*, 765 F. Supp. at 941.
69. 18 U.S.C. § 1962(c) (2000).
70. *Scheidler*, 765 F. Supp. at 944.
71. *Id.*
72. NOW v. Scheidler, 986 F.2d 612, 630-31 (7th Cir. 1992).
73. *Id.* at 617-23.
74. *Id.* at 629.
75. Burke, *supra* note 9, at 589 n.109.
76. NOW v. Scheidler, No. 91-2468, 1992 U.S. App. LEXIS 17686 *1 (7th Cir. Aug. 4, 1992).
77. NOW v. Scheidler, 510 U.S. 249 (1994).

required to prevail under RICO. The only issue before the Supreme Court was whether RICO required that defendants have an economic motive. No First Amendment defense was raised. Respondents simply countered that an economic motive was implied in the RICO statute, and that even if it was not, the protestors' activities could not be construed as extortion.

The unanimous opinion, authored by Chief Justice Rehnquist, held that RICO contained no economic motive requirement, thereby reversing the decision of the Seventh Circuit.[78] The Court looked directly to the language of the statute to render its decision.[79] Instead of a required economic *motive*, the Court found that the enterprise needs merely to *affect* interstate commerce.[80] The Court did not consider whether extortion had in fact occurred, nor did it address whether RICO liability could violate the First Amendment when used against protestors.[81]

G. *First Amendment Concerns Mentioned in Concurrence*

Justices Souter and Kennedy concurred in the judgment, but wrote separately to address the First Amendment concerns voiced by numerous amici.[82] The amici believed that the requirement of an economic motivation would be necessary to protect free speech rights. The Justices responded to pleas that the Court construe RICO to require an economic motivation to avoid potential violations of the First Amendment where RICO is used against protest organizations.[83] They disagreed with *amici* because they believed that such a requirement "would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling."[84] The Justices also believed that the requirement might not provide as much protection as amici believed, because all protest groups might not be entirely without economic motivations, "for even protest movements need money."[85] Finally, the concurrence advised that "nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case," and that even where RICO predicate acts are present, a defendant may be entitled to a dismissal based on a finding that the predicate acts

78. *Id.* at 262.
79. *Id.* at 258-59.
80. *Id.* at 257-58.
81. *Id.*
82. *Id.* at 263. Amicus briefs were filed for: People for the Ethical Treatment of Animals, Inc., the Ohio Right to Life Society, the Southern Center for Law and Ethics, the American Civil Liberties Union, and Focus on the Family. *Id.* at 251.
83. *Id.* at 263.
84. *Id.* at 264.
85. *Id.*

are "fully protected First Amendment activity."[86]

Protest groups who take solace in the *Scheidler* concurrence are misguided. The concurrence does not announce a safe haven for protestors in the First Amendment. Instead, it invites litigants to test the judicial waters with regard to just how much speech can be restrained through characterization of speech activity as "violence" and racketeering.

PART III. RICO SUITS AGAINST ANIMAL RIGHTS ACTIVISTS: THE BEGINNING OF THE END OF PROTEST

The *NOW v. Scheidler* decision prompted a flood of discussion on the propriety of the decision and the potential for use and abuse of RICO in the context of protest activity.[87] The use of RICO against animal activists was widely predicted.[88] In fact, People for the Ethical Treatment of Animals (PETA) filed an amicus brief in *Scheidler* in which the group argued against reversal.[89]

The first RICO suit against animal rights protestors was filed in May of 1999 under the name *Jacques Ferber, Inc. v. Bateman.*[90] The case was the first use of RICO against protestors outside the abortion context.[91] The fur retailer's location in Center City, Philadelphia had been the target of protests on an almost weekly basis since 1995. The complaint named three animal rights groups and four individuals as defendants.[92] The individuals were between the ages of seventeen and twenty-one years of age.[93]

The complaint alleged that the activists set out "to ultimately force Ferber out of business"[94] and listed "twelve examples of [the activists']

86. *Id.* at 268.

87. *See, e.g.,* Suzanne Wentzel, NOW v. Scheidler: *RICO a Valuable Tool for Controlling Violent Protest*, 28 AKRON L. REV. 391 (1995); Carole Golinski, *In Protest of* NOW v. Scheidler, 46 ALA. L. REV. 163 (1994); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson From the Abolitionists*, 62 ALB. L. REV. 853 (1999); Tracy S. Craige, Note, *Abortion Protest: Lawless Conspiracy or Protected Free Speech?*, 72 DENV. U. L. REV. 445 (1995).

88. *See, e.g.,* Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 848 (1996).

89. *Scheidler*, 510 U.S. at 251.

90. Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D. Pa., filed May 5, 1999); Shannon P. Duffy, *Phila. Furrier Files Civil RICO Suit, Claims Protesters Have Gone Too Far*, Legal Intelligencer, May 5, 1999, at 1.

91. Duffy, *supra* note 90, at 1.

92. The groups include in the complaint were the Coalition to Abolish the Fur Trade, the Animal Defense League, and Vegan Resistance for Liberation. *Id.*

93. Interview with Brett Wyker, defendant in *Jacques Ferber, Inc. v. Bateman*, Pompano Beach, Florida (Jan. 30, 2001).

94. Duffy, *supra* note 90, at 1.

alleged illegal and harassing conduct."[95] The allegations included three instances of paint thrown on the store's doorway, two instances of "forcible entry" into the showroom, three instances of the store's large plate glass window being "etched" with anti-fur messages, and three instances of the store's door being glued shut.[96] The complaint also charged the activists with posting anti-fur stickers on the storefront and adjacent buildings[97] and with affixing posters to public property that contained the image of company president Kenneth Ferber and the message, "Wanted for Murder, Considered Extremely Violent."[98] The activists were further accused of threatening store employees with violence.[99]

It is notable that none of the named defendants was criminally charged with perpetrating the alleged vandalism or harassment.[100] After the suit was filed, in late 1999, twenty-year-old defendant Joseph Bateman was arrested on a warrant for allegedly breaking the window at Jacques Ferber Furs by pounding on the window during the course of a protest.[101] Pennsylvania later dropped the charges when Bateman's claim of innocence survived two polygraphs.[102]

Furriers in New Jersey filed a second RICO suit against animal rights activists three months after *Jacques Ferber, Inc. v. Bateman.*[103] The plaintiffs in the New Jersey case are fur retailers who allege that activists have harassed customers, vandalized their property, and illegally blocked entry to their stores.[104] The furriers claim that the actions of the anti-fur groups have forced them "to protect against the frequent protest activities," and they claim that these protective measures have caused them considerable financial hardship.[105]

---

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* Note that the posting of signs and posters on public property is considered classic or "pure" speech that is virtually always protected by the First Amendment. Arlington County Republican Comm. v. Arlington County, 983 F.2d 587, 593 (4th Cir. 1993).

99. Duffy, *supra* note 90, at 1.

100. Interview with Brett Wyker, defendant in *Jacques Ferber, Inc. v. Bateman*, Pompano Beach, Florida (Jan. 30, 2001).

101. Telephone interview with Joseph Bateman, defendant in *Jacques Ferber, Inc. v. Bateman* (Feb. 6, 2001).

102. Bateman's alibi, that he was not even present at the protest on the day in question, was supported by his polygraph results. *Id.*

103. Winters Fur Shoppe, Inc. v. Fullmer, No. 99-CV-3583 (D.N.J., filed Aug. 15, 1999).

104. *NJ Furriers Pelt Protestors With Civil RICO Suit*, CIVIL RICO LITIG. REP., Dec. 1999, at 3. Note that "harassment" is frequently in the eye (or ear) of the beholder. The chanting of anti-fur message may seem like harassment to a furrier, but to most, and most likely to a competent court, it would be deemed pure First Amendment activity.

105. *New Jersey Furriers File 'Cross the Line' Suit Against Animal Rights Activists*, CIVIL RICO LITIG. REP., Sept. 15, 1999. Query whether any single action undertaken to "protect against" protest activity has been as effective or as expensive as the filing of the lawsuit at issue.

Prior to these suits, in 1997, a pharmaceutical testing laboratory called Huntingdon Life Sciences instituted a RICO action against People for the Ethical Treatment of Animals after an agent of the group covertly videotaped abuse at the laboratory and released the video to the news media, which aired scenes of flagrant animal abuse on national television.[106] The suit was different from the suits filed by the furriers in that it was filed against a single organization, PETA, for the actions of one of its agents in videotaping and releasing footage. The suit did not involve protest activity as that term is understood here. The parties ultimately settled, but Huntingdon later followed the lead of the furriers and filed another RICO suit in April, 2001 against several groups who continued to respond to Huntingdon's ongoing pattern of animal welfare violations.[107] Four undercover investigations over the last five years have revealed horrific abuse such as Huntingdon workers punching beagle dogs in the face at one of the company's British labs.[108] Activists have staged massive rallies such as one held October 29, 2001 in Little Rock, Arkansas to protest the making of a life-saving loan to the financially strapped Huntingdon by its major investor, Stephens, Inc.[109] Activists have also held protests at the homes of Huntingdon and Stephens employees.[110]

The Huntingdon Life Sciences lawsuit, filed in the Federal District of New Jersey, requests an injunction preventing activists from engaging in "acts and threats of force, violence and intimidation" directed at the Company, its investors, and their respective employees, customers, and shareholders.[111] It also seeks damages for losses the company alleges it incurred as a result of the defendants' activities.[112] The defendants include Stop Huntingdon Animal Cruelty, Voices for Animals, Animal Defense League, In Defense of Animals, and several individuals.[113] A

106. *See Hearings on the Civil RICO Clarification Act of 1990 Before the House Subcomm. On Crime of the Comm. of the Judiciary,* 105th Cong. 3-8 (1998) (statement of Jeffrey S. Kerr, PETA General Counsel), *available at* http://www.house.gov/judiciary/35055.htm.

107. Huntingdon has been exposed for its flagrant disregard for animal welfare in four undercover investigations since 1997. Workers have been videotaped abusing drugs and alcohol on the job, performing crude operations on alert, unanesthetized animals, and failing to notice that a monkey was in fact alive before commencing a necropsy. *See* Stop Huntingdon Animal Cruelty, *at* http://www.october29.org/shacusa/inside-michelle.htm (last checked Dec. 29, 2001) (copy of file with author).

108. *029: Business as Usual?*, SHAC USA NEWSLETTER (Stop Huntingdon Animal Cruelty USA, Phila., PA), Winter 2001, at 5.

109. *Id.*

110. News Briefs, SHAC USA Newsletter (Stop Huntingdon Animal Cruelty USA, Phila., PA), Winter 2001, at 12.

111. Press Release, Huntingdon Life Sciences, Huntingdon Sues Animal Activists (Apr. 19, 2001), *at* http://www.furcomission.com/news/newsF02t.htm (last checked Dec. 29, 2001).

112. *Id.*

113. *Id.* It is telling that fur trade groups are paying close attention to a lawsuit filed by a

spokesperson for Huntingdon boldly stated, "[t]his lawsuit states unequivocally that no one has the right to replace dialogue and debate with extortion and terrorism."[114] One must wonder whether the suit itself is an act of extortion, and whether these attempts to combat "terrorism" by elusive perpetrators in fact target those engaged in nothing more than dialogue and debate.

A. *The Myriad Tactics and Organizational Philosophies Within the Animal Rights Movement*

"Animal Rights" is a generic label attached to diverse philosophies.[115] In contrast to some other social movements, it lacks a single, overarching objective. Many scholars have asked, what does it mean to give animals "rights?"[116] If society comes to believe that animals should have rights, what rights should they have?[117] Would rights for animals mean all animals, including cockroaches, or would rights be awarded selectively? How would rights eligibility criteria be determined? The philosophy of animal rights provides no clear answers and individual adherents have differing responses to the many questions raised by the concept of "animal rights."

Similarly, there is no clear consensus among proponents of animal rights as to what tactics best promote the cause. Animal welfare efforts, such as campaigning for bigger cages on factory farms, are undertaken by many groups who would prefer to ban factory farms altogether, but who choose to go after more readily attainable piecemeal reform.[118]

---

pharmaceutical testing firm. It seems that there is coordination or at least a sense of solidarity among all of those inconvenienced by the actions of animal rights activists.

114. *Id.*

115. "[T]he phrase, which both activists and their detractors tend to use, is imprecise." Vance Lehmkuhl, *Introduction to Animal Rights: Your Child or the Dog?*, PHILA. CITY PAPER, Sept. 7-14, 2000, at 21 (book review). A common misconception is that all advocates for animals are advocates of animal "rights." In fact, most opponents of animal abuse subscribe to a conception of animal welfare. Animal welfarists advocate better treatment of animals by humans, but do not challenge the basic assumption that the use of animals for human benefits is justified. *See, e.g.*, Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 768 (1995). In contrast, animal rights advocates believe that animals are not merely resources to be exploited for human ends and that the use of animals by humans should cease entirely. *Id.* at 772.

116. *See, e.g.*, PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (1975); ROBERT GARNER, ANIMALS, POLITICS, AND MORALITY (1993); ANIMAL RIGHTS AND HUMAN OBLIGATIONS (Tom Regan & Peter Singer eds., 1976); TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983).

117. "[M]ost people hear 'animal rights' and think of animals driving, animals voting, animals bringing lawsuits. No. I'm talking about one right: not to be property. That's all." Lehmkuhl, *supra* note 115, at 21 (quoting Gary L. Francione).

118. This tactic resulted in success for PETA in its campaign for improved treatment of farm animals by suppliers to McDonald's. Press Release, People for Ethical Treatment of Animals,

Other individuals and groups denounce piecemeal reform because they believe that it hinders real progress toward abolition of the use of animals for human ends.[119]

PETA, the group most widely identified as representing the animal rights movement, is probably the group whose tactics are most criticized by animal rights activists themselves.[120] The group has repeatedly employed the use of shock tactics, such as its use of a picture of former New York City Mayor Rudolph Giuliani on an anti-milk billboard with the message, "Got Prostate Cancer?" The response of many animal activists and groups has been to refuse to work with PETA on campaigns.[121]

Another point of contention regarding movement tactics concerns the propriety of illegal activity for the purpose of advancing the cause of animal rights. Most animal rights groups support the use of illegal sit-ins to attract attention to animal rights causes.[122] Less widely accepted among movement adherents is the illegal breaking and entering of facilities such as laboratories for the purpose of removing animals or evidence of animal abuse, and the unlawful destruction of property of businesses targeted by activists.[123] Many groups, however, avidly support these types of actions, but do not openly advocate them. PETA is one such group. It places dates of significant past "raids" against animal abusers on its yearly calendar sent to members.

The identities of the perpetrators of direct action for animal rights are kept relatively well-hidden. Most instances of direct action are claimed by the Animal Liberation Front (A.L.F.) which allows any perpetrator of direct action to use its name, so long as s/he conforms to broad guidelines.[124] The guidelines are published on the "Animal Liber-

---

World's Largest Animal Rights Group Offers Assistance to World's Largest Buyer of Beef (Dec. 7, 2000), *at* http://www.peta.com/news/1200/1200mcveggie.html.

119. The figure most visibly associated with this position is Gary L. Francione, professor of law at Rutgers University. *See* GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (1996); *see also* Lehmkuhl, *supra* note 115, at 21 ("Compromise to Gary [Francione] means eliminating an entire class of activity, whereas others are more willing to work for animal welfare.").

120. *See* Lehmkuhl, *supra* note 115, at 21 (quoting Gary L. Francione) ("I don't believe [PETA] should use morally problematic means to get to whatever ends [they] want to get to. That's exactly why . . . a lot of forms of animal exploitation are bad.").

121. Telephone Interview with John Goodwin, former Director of Coalition to Abolish the Fur Trade (Nov. 30, 2001).

122. *Id.*

123. *Id.* Many prominent figures in the animal rights movement are vehemently opposed to direct action such as that done by the A.L.F. *See, e.g.*, Animal People, *A.L.F. Raids Kill Animals*, Aug./Sept. 1996, *available at* http://www.animalpeoplenews.org/ALFRaids.html (a commentary by the publisher of *Animal People* magazine, Merritt Clifton) (on file with author).

124. A.L.F., *Introducing the Animal Liberation Front*, *at* http://www.animalliberation.net/library/facts/alf.html.

ation Frontline Information Service"[125] website which serves as a clearinghouse for information on the actions of the A.L.F. The site explains the structure of the A.L.F., or lack thereof, as "small autonomous groups of people all over the world who carry out direct action according to the A.L.F. guidelines."[126]

B. *The Amorphous Nature of the Animal Rights Movement Makes RICO Liability Inappropriate*

The RICO suits against animal rights activists seem to be, in effect, attempts to sue the A.L.F. for damages stemming from illegal vandalism activity. Since the identities of the A.L.F. members are not known, however, the plaintiffs have chosen to scapegoat the nearest available target—the activists who openly protest their facilities each week.[127] In addition to providing a scapegoat, this approach carries an added benefit for industry, namely the potential to dissuade activists from participating in the political speech that industry finds bothersome and that harms businesses by persuading the public to boycott animal-derived merchandise and services. Essentially, the plaintiffs' allegations of racketeering activity center on two types of illegal actions. The first type is illegal civil disobedience which is open and defiant, and for which activists are arrested on the spot. All three suits discussed *infra* allege that sit-in activity contributed to their loss of business and entitles them to damages.[128] The second type of activity for which the furriers seek redress is illegal vandalism by unknown perpetrators. It is the latter type that

125. The A.L.F. states its guidelines are:

> (1) To liberate animals from places of abuse, i.e. laboratories, factory farms, fur farms, etc., and place them in good homes where they may live out their natural lives, free from suffering, (2) To inflict economic damage to those who profit from the misery and exploitation of animals, (3) To reveal the horror and atrocities committed against animals behind locked doors, by performing non-violent direct actions and liberations, (4) To take all necessary precautions against harming any animal, human and non-human. Any group of people who are vegetarians or vegans and who carry out actions according to A.L.F. Guidelines have the right to regard themselves as part of the A.L.F. The Animal Liberation Front consists of small autonomous groups of people all over the world who carry out direct action according to the A.L.F. guidelines.

A.L.F., *Animal Liberation Front Guidelines*, *at* http://www.animalliberation.net/library/facts/guidelines.html.

126. *Id.*

127. It is important to note that activists have also been known to protest at the homes of the directors of their targeted business and that these protests have been dubbed "terrorism" by the plaintiffs. *See, e.g.*, Press Release, Huntingdon Life Science, Huntingdon Sues Animal Activists (Apr. 19, 2001), *at* http://www.furcommission.com/news/newsF02t.htm.

128. *See* Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D. Pa. filed May 5, 1999); Winters Fur Shoppe, Inc. v. Fullmer, No. 99-CV-3583 (D.N.J. filed Aug. 15, 1999); Press Release, Huntingdon Life Sciences, Huntingdon Sues Animal Activists (Apr. 19, 2001), *at* http://www.furcommission.com/newsF02T.htm.

makes these cases factually similar to *NAACP v. Claiborne Hardware Co.*[129]

C. *NAACP v. Claiborne Hardware Affirms the Freedom of Association*

In March of 1966, black residents of Claiborne County, Mississippi presented their local government officials with a list of nineteen demands for racial equality and integration.[130] The demands included desegregation of the public schools and facilities, inclusion of blacks in the jury pool, integration of bus stations, and an end to verbal abuse by police officers.[131] A back-up plan was drawn up when, as predicted, the white elected officials were unresponsive to the demands.[132] Several hundred black attendees of a local meeting of the National Association for the Advancement of Colored People (NAACP) voted unanimously to initiate a boycott of local white merchants.[133]

One feature of the boycott was the presence of persons known as "black hats"[134] outside white businesses to keep track of any black patrons who violated the boycott. In public speeches, defendant Charles Evers, Field Secretary of the NAACP in Mississippi, warned that boycott violators would be "disciplined" and reminded them that the sheriff could not sleep with violators at night.[135] Evers was alleged to have said in an unrecorded speech, "If we catch any of you going into them racist stores, we're gonna break your damn neck."[136] The "black hats" recorded the names of black community members who continued to do business with white merchants.[137] The names were read at NAACP meetings and published in the "Black Times" for purposes of ostracizing boycott violators.[138] In addition, in at least ten instances, acts of violence were visited upon the violators in the form of gunshots fired into homes, a brick thrown through a windshield, destruction of a flower garden, and at least one physical attack.[139]

Alongside this illegal activity was the widespread withholding of business from white merchants and occasional peaceful picketing and

129. 458 U.S. 886 (1982).
130. *Id.* at 889.
131. *Id.* at 899.
132. *Id.* at 889.
133. *Id.*
134. They were also called "deacons," "enforcers," or "store watchers." *Id.* at 894.
135. *Id.* at 902.
136. *Id.*
137. *Id.* at 903-04.
138. *Id.* at 904.
139. *Id.* at 904-07.

marches in support of the boycott.[140] In writing the unanimous opinion, Justice Stevens outlined the elements of the boycott that were entitled to protection under the First and Fourteenth Amendments.[141] The boycott participants' speeches and picketing were found to be wholly protected by the First and Fourteenth Amendments.[142] The Court recognized the value of collective action, stating, "[e]ffective 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."[143]

Other elements of the boycott were also found to be safeguarded by the First Amendment. The Court found that speech, which was directed toward inducing prospective customers not to patronize a business, was entitled to constitutional protection.[144] Further, the publishing of the names of boycott violators in a local paper was protected speech, which did not become unprotected "merely because it may [have] embarrass[ed] others or coerce[d] them into action."[145] Perhaps most surprisingly, the Court found that the presence of the "black hats" was protected. "There is nothing unlawful in standing outside a store and recording names," the Court explained, nor is there anything unlawful in wearing black hats.[146]

While finding that much of the boycott was protected by the First Amendment, the Court noted that "the First Amendment does not protect violence" and that "there is no question that acts of violence occurred."[147] When violence occurs in the context of constitutionally protected speech, "precision of regulation is demanded."[148] Without such precision, "there is a danger that one in sympathy with the legitimate aims of . . . an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."[149]

The Court concluded that the imposition of civil liability could only be imposed for mere association if the group was found to possess unlawful goals, and if the individuals held a specific intent to further

140. *Id.* at 903.
141. *Id.* at 907.
142. *Id.*
143. *Id.* (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)).
144. *Id.* at 909 (citing Thornhill v. Alabama, 310 U.S. 88 (1940)).
145. *Id.* at 909.
146. *Id.* at 925.
147. *Id.* at 916.
148. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 n.52 (1963)).
149. *Id.* at 916 (quoting Noto v. United States, 367 U.S. 290, 299-300 (1961)).

those illegal aims. Finding that the participants in the boycott possessed the lawful aims of challenging "a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure," the Court held that the lower court's finding of liability for economic damage from the boycott was improper.[150]

D. *NOW v. Scheidler Did Not Overrule Claiborne Hardware: RICO is Now a Seductive Means Toward Impermissible Ends*

The defendants in *NOW v. Scheidler* made a critical mistake which has led to the present controversy. That mistake was their failure to properly raise a First Amendment challenge to the plaintiffs' use of RICO.[151] Instead of focusing on speech and association rights, they focused their energies on attempting to rein in the runaway RICO statute, which one federal appellate judge described as "the monster that ate jurisprudence."[152] Of course, it was not unwise for the defendants to incorporate the overbreadth argument in their defense since the argument has broad appeal and countless supporters.[153] Their mistake was to rely on this argument exclusively and to forego the opportunity to make a First Amendment argument. In choosing this strategy, the *Scheidler* defendants forfeited the opportunity to safeguard protesters from RICO liability for illegal acts perpetrated by a minority of movement adherents, and to expand the holding of *Claiborne Hardware* to protect participants in civil disobedience from owing treble damages under RICO.

Since the Supreme Court remanded the case in 1994, *NOW v. Scheidler* has continued to attract the attention of observers. On April 22, 2002, the Supreme Court granted certiorari to hear a second appeal in the case.[154] Oral argument is expected to take place in the fall of 2002.[155] The Court also granted a request from PETA to file a brief in the case.[156] The Court also expressly declined to hear the abortion protestors' free speech claims.[157]

---

150. *Id.* at 918, 921.

151. NOW v. Scheidler, 510 U.S. 249, 262 n.6 (1994).

152. Theodore B. Olson, *RICO is Worst Possible Way to Handle Rampart*, L.A. TIMES, Sept. 3, 2000, at 5. The judge referred to is Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia. *See also* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1037 (1990).

153. *See, e.g.*, Geoffrey Aronow, *In Defense of Sausage Reform: Legislative Changes to Civil RICO*, 65 NOTRE DAME L. REV. 964 (1990); Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050 (1990).

154. Michael Kirkland, *Court Takes Landmark Abortion Protest Case*, WASH. TIMES, Apr. 22, 2002.

155. *Id.*

156. *Id.*

157. *Id.*

It appears that the onus of defending the First Amendment from the sweeping reach of RICO now falls upon the shoulders of the animal rights movement. It will be up to these defendants to demonstrate that our nation's long history of protecting demonstration and political protest[158] demand "precision of regulation,"[159] especially in the face of RICO's tradition of liberal interpretation.

This showdown between RICO and the First Amendment may be avoided if Congress heeds the common cry to safeguard groups whose primary purpose is exchange in the marketplace of ideas from RICO liability.[160] Prompt Congressional action would avoid further harassment of cash-poor social protest groups and individual activists by monied industry with appallingly low regard for the value of First Amendment expression.[161]

JAIME I. ROTH*

158. Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 847 n.171 (1996) (citing Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Thornhill v. Alabama, 310 U.S. 88 (1940)).

159. *Claiborne*, 458 U.S. at 916 (quoting NAACP v. Button, 371 U.S. 415, 438 n.52 (1963)).

160. Parker, *supra* note 158, at 848. Congressional reform of RICO is periodically proposed, and has been proposed at least three times in the past twelve years, but has never succeeded. *Id.* at 848 n.2 (citing H.R. 3522, 101st Cong. (1st Sess. 1989)); *Bill to Limit RICO Fails to Reach Floor*, 47 CONG. Q. ALMANAC 292, 292-93 (1991); *Attempts to Limit RICO Fails Again*, 46 CONG. Q. ALMANAC 536, 536-38 (1990)).

161. *39 Arrested in Protest*, FUR AGE WEEKLY, Aug., 14, 1995, at 9 (discussing need for aggressive response to animal rights protestors, and indicating the possibility that tactics used against Operation Rescue might be adaptable to animal rights protesters). Both *Winters Fur Shoppe, Inc. v. Fullmer* and *Jacques Ferber, Inc. v. Bateman* are currently in civil suspense, after both groups of activists agreed to stipulate that they would not engage in illegal or harassing behavior, including civil disobedience, at any of plaintiffs' places of busniesss. Since those stipulations were filed, however, numerous acts of vandalism, mostly the breaking of display windows, have been visited upon plaintiffs' stores by unknown perpetrators. The named defendants have received at least three letters of intent from plaintiffs to reinstate the complaints, but thus far, to the defendants' knowledge, no further legal action has been taken. Telephone Interview with Joseph Bateman, *supra* note 101. The effect of these stipulations emphasizes the need for Congressional action. Activists are currently forced to choose between capitulating to their targeted industry's demands or continuing aggressive litigation, while potentially harming their ability to prevail in court if they choose to continue to engage in civil disobedience. The *Huntingdon Life Sciences* case is still in active litigation. The parties submitted to a court-ordered settlement conference on October 2, 2001 in which Stephens, Inc., Huntingdon's major investor and a plaintiff in the suit, offered to settle if SHAC USA (Stop Huntingdon Animal Cruelty) agreed to the company's restrictions on how it would like the activists' campaign to be run. Legal Update, SHAC USA NEWSLETTER (Stop Huntingdon Animal Cruelty USA, Phila., PA), Winter 2001, at 11. SHAC USA refused the offer and continues its active campaign against Huntingdon Life Sciences. *Id.*

* The author would like to express her gratitude to Professor John Hart Ely for his insight in the preparation of this Comment. A special word of thanks goes to all those working toward a gentler world for animals, human and non.