Article

EXAMINING THE PRESENT SECURITY-LIBERTY NEXUS: CIVIL RICO—REMEDY TO PROCURE SECURITY OR THREAT TO CIVIL LIBERTY?

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Thus do we poor humans attain our ends, striving through carnage and destruction to bring lasting peace and happiness upon the earth.[1]
–Jack London

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[1] JACK LONDON, THE IRON HEEL 2 (1908).

I. INTRODUCTION

The relationship between liberty, security, and public policy, generally speaking, is one fraught with tension. In the wake of recent terrorist attacks abroad and recent events that took place in the U.S. involving the right to free speech, violence, and counter-speech, it is timely to reexamine the liberty-security nexus. Security is broadly conceived as reflecting a state of affairs wherein an individual is emplaced within a societal order-arrangement ("Order") that equivocates itself with the general and specific wellbeing, and with public safety. Security, conceptually, constitutes an "organic bond uniting hierarchized individuals."[2] To be secure in the world therefore involves generating mechanisms of control over internal and external "threats" to Order. Liberty encompasses, or rather, focuses on the freedom of the individual subject to define its own wellbeing. How the law interprets and addresses the competing values of speech and security embodied in the liberty-security nexus thus directly impacts speech as a civil liberty, public order, and public policy. This Article therefore examines civil RICO as an exemplar of public policy and the complexity that attaches to adjudicating cases and controversies rooted in a liberty-security nexus. Civil RICO may, as will be discussed below, provide an effective means to enhance security, which encompasses law, order, and societal stability, by combatting terroristic violence via civil suits granting treble damages against perpetrators who engage in terroristic violence, broadly defined. In utilizing civil RICO, concerns have been raised that it may have an adverse effect on First Amendment freedom of speech. The tension between security and liberty is immanent in efforts to combat terroristic violence, and in procuring security. This Article thus explores the notion that civil RICO and First Amendment liberty may not be mutually exclusive, and that courts may better balance the competing

[2] Michel Foucault, *Preface* to GILLES DELEUZE & FÉLIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA xiv (Robert Hurley et al. trans., Univ. Minn. Press 1983) (1972).

values and interests embodied in the liberty-security nexus in the articulation of public policy.

When Congress enacted Title IX of the Organized Crime Control Act, i.e., the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in 1970, the Act primarily focused on effectively combating organized crime operating in the U.S.[3] RICO was an expression of public policy that privileged security, a law-and-order approach to criminal justice policy. With its implementation, RICO provided federal prosecutors with unprecedented statutory tools, like severe criminal penalties and public and private civil causes of action, to dismantle and severely punish the infiltration of organized crime into legitimate business enterprises operating within the stream of interstate commerce.[4] Forty-six years after its passage, RICO has, generally speaking, effectively crippled organized crime in the U.S. by way of encompassing statutory language in tandem with a consistent judicial posture of liberally defining RICO's language and mandate.[5] When interpreting the substance and parameters of RICO's powerful statutory tools—in particular, the award of treble damages in private civil actions for harm suffered by private parties from any enterprise that engages in a pattern of racketeering—the Court in particular has profoundly expanded the

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[3] *See* 18 U.S.C. § 1962 (2006) (enumerating unlawful activities stemming from racketeering activity). See 18 U.S.C. § 1964(c) (2006) stating:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

[4] In addition to harsh criminal penalties, RICO also provides for civil causes of action that can result in very significant damages awards. "*Any person* injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court *and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee*." 18 U.S.C. § 1964(c) (emphasis added).

[5] See United States v. Turkette, 452 U.S. 576, 593 (1981), wherein the Court initially posited a liberal interpretation of RICO:

> As a measure to deal with the infiltration of legitimate businesses by organized crime, RICO was both preventive and remedial. . . . If Congress had intended [a] more circumscribed approach . . . there would have been some positive sign that the law was not to reach organized criminal activities that give rise to the concerns about infiltration. The language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word "enterprise," and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.

circumference of RICO's applicability.[6] Expansive construction of RICO's provisions include the imposition of severe criminal and civil sanctions, as well as forfeiture provisions and equitable relief in the form of injunctions.[7]

RICO has a civil component, permitting a civil cause of action for recovery of treble damages and litigation costs, which provides relief to private citizens injured in conjunction with a RICO violation.[8] The federal courts' expansive interpretation of RICO has made some commentators anxious, *viz*., on First Amendment grounds.[9] While there may be a potential conflict betwixt speech (liberty) and civil RICO (security, order) in expanding RICO's criminal and civil scope, since its inception, RICO was never explicitly limited to the traditional notion of organized crime. Indeed, the federal courts—most importantly the U.S. Supreme Court—have expansively construed RICO, finding it to apply to variegated actors and contexts that qualify as "enterprises" engaged in "patterns" of racketeering.[10] "Though initially aimed at curbing organized crime activities, RICO has been successfully implemented against securities firms, large corporations, and video dealers," among other entities.[11] RICO has also been successfully applied to social protest movements, unions, the health care and tobacco industries, and even systemic police misconduct.[12]

Over the last 46 years RICO has substantively evolved, and the federal judiciary has endowed it with an expansive character, which has been applied in a variety of contexts that Congress never envisioned when it was enacted in 1970. In light of RICO's evolving complex and encompassing nature—especially its applicability to a variety of civil liberties contexts, such as social protest movements and labor organizations—it is proper to address an important development in the law that the U.S. Supreme Court has alluded to, but has not explicitly

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[6] *See id*. at 585.

[7] *See id*. at 585–86; John P. Barry, *When Protesters Become "Racketeers," RICO Runs Afoul of the First Amendment*, 64 ST. JOHN'S L. REV. 899–900.

[8] Barry, *supra* note 7, at 900.

[9] *See* Arthur Patrick Breshnahan et al., *Racketeer Influenced and Corrupt Organizations*, 30 AM. CRIM. L. REV. 847, 899–900 (1993).

[10] Barry, *supra* note 7, at 902–03.

[11] *Id.* at 900 (footnotes omitted).

[12] *See generally* Teresa Bryan et al., *Racketeer Influenced and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987 (2003); Lee Coppola & Nicholas DeMarco, *Civil RICO: How Ambiguity Allowed the Racketeer Influenced and Corrupt Organizations Act to Expand Beyond its Intended Purpose*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 253–55 (2012) (noting the creative ways in which plaintiffs have used RICO).

answered in its RICO jurisprudence, which has a significant effect on liberty, security, and policy. In light of recent and ongoing terrorist attacks at home and abroad,[13] revisiting the role that civil law can play in combatting terroristic violence is timely. Efforts to bolster the campaign to effectively combat terroristic violence directly result from recent historical memory, e.g., the Oklahoma City bombing, the bombing of the World Trade Center (pre-9/11), the Unabomber, the 9/11 terrorist attack on the Twin Towers, and the bombing of abortion centers and killing of abortion providers. Civil RICO, as an exemplar of the security dimension of the liberty-security nexus, is a potentially significant tool to employ in combatting terroristic violence. For example, "civil RICO suits can act as an additional means by which to thwart terrorist financing. They enable private plaintiffs, serving as private attorneys general, to aid in the disruption of terrorist financing."[14]

This Article explores the question—and analyzes the tension immanent in attempts to balance liberty and security—does civil RICO, when employed to combat terroristic violence, unconstitutionally intrude upon cherished notions of First Amendment freedoms of speech and association? More specifically, can a plaintiff employ civil RICO in its private manifestation when it directly or indirectly impinges First Amendment freedoms of speech and association? Does the Court's RICO jurisprudence attenuate such freedoms? Or does it allow for the reconciliation of RICO's mandate, scope, meaning, and purpose vis-à-vis First Amendment freedoms? As a matter of law, can civil RICO be employed if it chills speech and association? What role, if any, does (or should) civil RICO play in combatting terroristic violence?

To address the preceding questions, this Article will conduct a select discussion of RICO's juridical development to establish a working context for fleshing out the relationship between civil RICO and the First Amendment. Next, the relationship between civil RICO and the First Amendment will be discussed via analysis of civil RICO's

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[13] *See, e.g.*, *Barcelona and Cambrils attacks: What we know so far*, BBC NEWS (Aug. 21, 2017), http://www.bbc.com/news/world-europe-40964242; Maggie Astor et al., *A Guide to the Charlottesville Aftermath*, N.Y. TIMES, (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html?mcubz=3; Garrett Haake et al., *Thousands March in Boston for Counter-Protest to 'Free Speech Rally'*, NBC NEWS (Aug. 19, 2017), https://www.nbcnews.com/news/us-news/thousands-march-boston-counter-protest-free-speech-rally-n794156.

[14] Adam B. Weiss, *From the Bonannos to the Bin Ladens: The Reves Operation or Management Test and the Viability of Civil RICO Suits against Financial Supporters of Terrorism*, 110 COLUM. L. REV. 1123, 1123 (2010).

encompassing character and evolving nature and application beyond the traditional notion of organized crime, such as its application to social protest movements that (arguably) engage in patterns of racketeering activity. A discussion of the federal courts' application of civil RICO to speech and association in light of support of terrorism will be presented, and then analyzed in light of civil RICO and First Amendment freedoms. Throughout the discussion and analysis, this Article will keep the following structural query in mind; i.e., what type of speech and association does civil RICO apply to? More specifically, in the exercise of speech and association rights, can private civil RICO be employed when it has the potential effect of chilling First Amendment freedoms of entities that instigate, express, and/or provide "support" for acts of terroristic violence? Is curbing First Amendment freedoms permissible—is cabining speech and association in line with RICO's stated purpose and goals as interpreted by the U.S. Supreme Court?

II. PRIVATE CIVIL RICO: AN EXERCISE IN CONTINUITY

Liberty need not be severely attenuated to procure security. Civil RICO and First Amendment freedoms may not be mutually exclusive. Indeed, in light of the Court's RICO and First Amendment jurisprudence, it is possible for the federal courts to reconcile the competing values that underlie: (1) the (seemingly limitless) application of civil RICO with (2) the preservation of the integrity of fundamental freedoms of free speech and association. In light of RICO's overarching stated purpose and First Amendment freedoms as interpreted by the U.S. Supreme Court, civil RICO's application to speech and association that is "actually malicious"[15] and poses an "imminent threat of harm,"[16] e.g., materially supports acts of violence and (domestic) terrorism, appears to allay fears of RICO chilling speech and association. A selective analysis of the Court's RICO and First Amendment jurisprudence supports this contention, and the remainder of this Article will develop the notion that civil RICO may indeed be reconciled with First Amendment freedoms if applied via a uniform, objective legal standard that enables the courts to test whether speech and association fall within the purlieus of civil RICO. The courts thus have the means at their disposal to fashion a legal standard to reconcile civil RICO, First Amendment freedoms, and what

[15] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[16] *See* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2621 (2011).

types of "support" of terrorism are shielded from private civil RICO liability.[17]

At the outset, it is important to note that, as a matter of fact and law, although § 1962(c) is a remedial provision providing aggrieved private parties with a private cause of action, the *state action doctrine* tinctures such suits with the color of law. This aspect of RICO comprises an interesting expression of how security and order manifest in public policy. Because civil RICO is a congressional grant of power to private parties, suits brought under § 1962(c) fall under the state action doctrine. This, in turn, gives rise to the sundry First Amendment issues analyzed in this Article. Most "rights secured by the Constitution are protected only against infringement by governments" rather than infringements by private actors.[18] The Court, however, has utilized the state action doctrine to identify instances where private parties' actions occur under color of law.

> The state action issue is implicit in almost every claim that a plaintiff has been deprived of constitutionally protected rights. Theoretically, before a court may address the merits of such a constitutional claim, the court must first determine whether there is any governmental action that triggers the claimed constitutional protection.[19]

When ascertaining the basis for an actionable claim, "[i]nstead of a unitary principle applicable in all state action cases, the Court has essentially resorted to a case-by-case factual analysis."[20] The Court has stated that, "[o]nly by sifting [through] facts and weighing circumstances

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[17] *See* United States v. Freeman, 6 F.3d 586, 597–98 (9th Cir. 1993) (RICO's application to state legislative bribery scheme did not chill First Amendment rights regarding solicitation of campaign contributions); United States v. Jenkins, 974 F.2d 32, 34–35 (5th Cir. 1992) (First Amendment freedoms were not violated by pre-trial restraining order prohibiting defendants from selling or transferring their assets, which order exempted defendants' operation of any lawful business in a lawful manner, including the sale of allegedly obscene materials); United States v. Pryba, 900 F.2d 748, 755 (4th Cir. 1990) (RICO forfeiture of non-obscene expressive materials acquired in violation of RICO did not violate the First Amendment); United States v. Yarbrough, 852 F.2d 1522, 1540–41 (9th Cir. 1988) (wherein a white supremacist's RICO conspiracy conviction did not violate his First Amendment rights of political advocacy and association).

[18] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978); *see also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349–50 (1974); The Civil Rights Cases, 109 U.S. 3, 17–19 (1883).

[19] Richard L. Stone & Michael A. Perino, *Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law*, 1995 COLUM. BUS. L. REV. 453, 464 (1995) (footnote omitted).

[20] *Id*. at 465–66.

can the nonobvious involvement of the State in private conduct be attributed its true significance."[21] When determining if the state action doctrine applies, the Court has applied a two-part test: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[22] Civil RICO, as a grant of congressional power that authorizes private parties to bring suit when negatively impacted by the activities of enterprises engaged in patterns of racketeering, clearly satisfies this two-part test. Thus, § 1962(c), as a remedial provision, complements § 1962(b) (which allows the government to file a civil suit against enterprises engaged in patterns of racketeering activities),[23] and falls within the state action doctrine.

Whether one finds the development welcome or disagreeable, the types or class of entities and activities that fall within RICO's encompassing language have been profoundly expanded since the Court expounded upon RICO's scope, purpose, and meaning in the early 1980s, over a decade after RICO was enacted.[24] Over the past 46 years, the Court has, with some exceptions, consistently reified its initial interpretation of congressional intent to construe RICO (civilly and criminally) quite broadly; indeed, the Court's RICO jurisprudence has, for the most part, maintained that the federal courts adhere to a liberal, expansive construction of RICO's text and legislative history.[25] "One of the principal reasons for the unforeseen and unprecedented expansion of RICO, especially in civil cases, is the broad and ambiguous language of the statute. This has made it a powerful weapon against persons engaged in prohibited racketeering activities."[26] To fully grasp and appreciate the

[21] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[22] Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).

[23] 18 U.S.C. § 1962(b) (2006).

[24] In *National Organization for Women v. Scheidler*, the Court declared that the "fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 262 (1994) (quoting Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi., 747 F.2d 384, 398 (7th Cir. 1984)). This was not the first time the Court had endorsed this language, and had directed the lower courts to follow it. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 499 (1985).

[25] *See* Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir. 2007); ORG. CRIME & RACKETEERING SECTION, CRIMINAL DIV., U.S. DEP'T OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS 70 (6th ed. 2016), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf.

[26] Coppola & DeMarco, *supra* note 12, at 241–42 (footnote omitted).

significance of RICO's evolution, it is necessary to examine key aspects of its juridical history and development. This Article begins with the Court's opinion in *Sedima, S.P.R.L. v. Imrex Co., Inc.*,[27] which posits and develops the legal principles, framework, and operative history that the Court has utilized in constructing a foundation for its RICO jurisprudence and how it has interpreted the liberty-security nexus.

Overall, since RICO's inception, Congress has sparingly modified RICO, substantively speaking, with the exception of explicitly expanding or restricting its circumference (e.g., acts of terrorism have been added and securities fraud has been removed from RICO predicate acts).[28] Additionally, the Court has played an active and primary role in reading RICO's encompassing language as permissibly expanding the scope of civil (and criminal) RICO by either remaining silent (as it did for over a decade after RICO's enactment) or "repeatedly interpreting the statute in a liberal, far-reaching manner."[29] During the Court's silence, use of civil RICO had already begun to eclipse the initial primary target of the Act, i.e., organized crime in the form of the Mafia.

> By 1985, the Supreme Court . . . had found that of the "known civil RICO cases at the trial court level, 40% involved securities fraud, 37%, common law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.'" An American institute of certified public accountants study of 132 published decisions "found that 57 involved securities transactions and 38 commercial and contract disputes, while no other category made it into double figures." Or, as Justice White put it for the majority of the Court[in *Sedima*], "it is true that private civil actions under the statute are being brought almost solely against [non-traditional] defendants rather than against the archetypal intimidating

[27] *Sedima*, 473 U.S. 479.

[28] *See* David Martinez, *Civil RICO—What Remains After Anza?*, ROBINS KAPLAN (June 26, 2006) http://www.robinskaplan.com/resources/articles/civil-rico-what-remains-after-anza. As Martinez notes, in 1995 Congress explicitly limited civil RICO by removing securities fraud as a predicate act. *Id.*; *see also* Private Securities Litigation Reform Act of 1995, Pub. L. 104–67, § 107, 109 Stat. 758. Additionally, the 2001 Patriot Act explicitly amended RICO to include terrorist activity. *See* Jack L. Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism* 10 (University of Chicago Pub. L. & Legal Theory Working Paper, Working Paper No. 26, 2002). Martinez also notes, however, that the Court narrowed RICO's scope. Martinez, *supra*. Seven years after *Sedima*, the Court found that in § 1964(c) there is a "demand for some direct relation between the injury asserted and the injurious conduct alleged." Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992). Recently, the Court strictly applied *Holmes*' proximate cause standard to a suit between competitors, further limiting civil RICO claims. *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 459–62 (2006).

[29] Coppola & DeMarco, *supra* note 12, at 242; *see also* Boyle v. United States, 556 U.S. 938, 944 (2009); Tafflin v. Levitt, 493 U.S. 455, 461–67 (1990).

> mobster."[30]

The stage was thus being set for civil RICO's expansive utilization and application over the course of the Court's protracted silence, and the encompassing nature of RICO was posited and affirmed in *Sedima*.

A. The Court & Civil RICO: An Exercise in Capacious Statutory Construction

RICO establishes very broad authority for imposing equitable remedies under 18 U.S.C. § 1964, authorizing public and private civil causes of action. Under § 1964(a), the U.S. Attorney General is empowered to file a civil suit seeking remedies against RICO enterprises engaged in patterns racketeering activity to prevent and restrain RICO violations by:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person . . . the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.[31]

Such penalties were intended to provide federal prosecutors with "new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[32] The application of this subsection has been construed liberally on a consistent basis. The Second Circuit, for instance, has "held that ordering a defendant to contribute to the cost of eliminating the vestiges of his racketeering activities in the enterprise he corrupted is a proper equitable remedy to prevent RICO violations."[33] In *United States v. Sasso*, the court emphasized "§ 1964(a)'s expansive language, its legislative history, and the traditional power of the district

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[30] David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145, 150 (1990) (footnotes omitted).

[31] 18 U.S.C. §§ 1964(a), (b) (2006). *See* Richard v. Hoechst Celanese Chem. Grp., Inc., 355 F.3d 345, 354–55 (5th Cir. 2003) (finding that equitable remedies such as disgorgement are available under § 1964(a), but only to "*prevent and restrain future conduct rather than to punish past conduct*") (emphasis added) (quoting United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995)).

[32] Russello v. United States, 464 U.S. 16, 26 (1983) (affirming a judgment of forfeiture against defendant for involvement in arson ring that resulted in fraudulent receipt of insurance proceeds for fire loss of building he owned).

[33] Sean M. Douglass & Tyler Layne, *Racketeer Influenced and Corrupt Organizations*, 48 AM. CRIM. L. REV. 1075, 1115 (2011).

courts to fashion equitable remedies. . . ."[34]

Civil RICO also provides private parties with a separate cause of action for damages.[35]

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.[36]

The court in *Bernath Plaintiff v. The American Legion* notes that the four basic elements of civil RICO liability are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The phrase 'racketeering activity' is defined as including any act which is indictable under a lengthy list of criminal offenses, including the federal statutes prohibiting mail and wire fraud."[37] It is this section in particular that has given rise to fears of civil RICO's encroachment upon First Amendment freedoms of speech and association. Indeed, "Civil RICO is an unusually potent weapon . . . ."[38] Some commentators argue that the federal courts have gone too far in construing RICO in a hyper-expansive manner that threatens to chill First Amendment freedoms,[39] and others have argued that, "[a]lthough RICO's purpose as originally proposed was to combat the infiltration of legitimate business by organized crime, Congress purposefully worded the statute broadly enough so that it could extend to anyone who committed the crimes enumerated in the predicate acts, regardless of their motivation."[40]

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[34] United States v. Sasso, 215 F.3d 283, 292 (2d Cir. 2000).

[35] 18 U.S.C. § 1964(c).

[36] *Id.*

[37] Bernath v. American Legion, No. 2:16–cv–596–Ftm–99MRM, 2016 WL 6822467, at *4 (M.D. Fla. Nov. 18, 2016) (citation omitted) (quoting Langford v. Rite Aid of Alabama, Inc., 231 F.3d 1308, 1311–12 (11th Cir. 2000)).

[38] Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) (quoting Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991)).

[39] *See* Anne Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?*, 56 UMKC L. REV. 287, 310, 312 (1988). Melley notes that, "[i]n the hands of attorneys with their eyes fixed upon the treble damages provision, the statute has become a tool by which to federalize common law fraud, contract disputes and even trespass actions, and to impose penalties whose severity far outweighs the nature of the offenses." *Id.* at 312; *see also* Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 833–34 (1990).

[40] Adam D. Gale, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1345 (1990).

B. Civil RICO: A Tool for Combatting Terroristic Violence or Threat to Liberty?

The liberty-security nexus can be observed in the interplay between § 1964(c)'s "support" of terroristic violence and First Amendment freedoms of speech and association.[41] The public policy issue that emerges upon observation of civil RICO's application, in light of how support of acts of terroristic violence are interpreted, is that if civil RICO continues "to be invoked against [expressive] organizations, a conflict could arise between the rights of citizens to express their views and the rights of other citizens to prohibit such expressive conduct through the threat of a RICO civil lawsuit."[42] The fundamental principles and rights implicated by speech and association in the context of expressive organizations (e.g., political, ideological, and religious organizations) can also be applied to organizations that, because of highly unpopular or controversial ideological messages and/or underpinnings, engage in speech and association that may be construed as directly supporting criminal acts of violence and terrorism. Although the Court has not directly addressed the issue, the lower courts have legal tools at their disposal to determine when there is civil RICO infringement on First Amendment rights of free speech and association vis-à-vis support of acts of terroristic violence.[43] As will be discussed below, the Court's First Amendment and RICO jurisprudence provides the lower courts with various tools and principles by which to adjudge when speech is shielded from civil RICO.

In emphasizing the security dimension of the liberty-security nexus, as a matter of public policy, the Court has relied heavily on congressional intent to construe RICO expansively. Namely, the Court has relied on the liberal construction clause Congress put forth when it initially enacted RICO. The clause states that the "provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."[44]

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[41] The relationship between Civil RICO and terrorism has been examined in the literature. *See, e.g.*, Irvin B. Nathan & Kenneth I. Juster, *Law Enforcement Against International Terrorists: Use of the RICO Statute*, 60 U. COLO. L. REV. 553, 570 (1989) ("RICO provides the United States government with . . . much broader and more effective [means of combating terrorism]."); Zvi Joseph, *The Application of RICO to International Terrorism*, 58 FORDHAM L. REV. 1071, 1073 (1990) ("RICO's unique characteristics suggest that it should be used as a weapon against international terrorist organizations.").

[42] Barry, *supra* note 7, at 901.

[43] *See, e.g.*, *id.* at 901–02 (examining the use of civil RICO against social activists in contravention of the First Amendment).

[44] Organized Crime Control Act of 1970, Pub. L. No. 91–452, § 904(a), 84 Stat. 922, 947

Overall, Congress' liberal construction clause has been actively applied to civil RICO, and the federal courts have interpreted RICO as

> "grant[ing the] courts broad discretion and latitude in enjoining violators" of RICO from activities that may lead to future violations. In fashioning penalties, the court must make due provision for the rights of innocent parties. While the courts have recognized that certain injunctions may implicate a defendant's First Amendment rights of association, the government's significant interest in eradicating organized crime may override such concerns.[45]

Part of that interest stems from the courts finding that "RICO treatment is reserved for conduct 'whose scope and persistence pose a special threat to social well-being.'"[46] The Court

> has repeatedly reinforced Congress's intent to construe civil RICO broadly by instructing the lower courts to heed the expansive language of the statute. . . . [For instance, in] *National Organization for Women, Inc. v. Scheidler* (*NOW I*) the Supreme Court rejected the Seventh Circuit's restrictions on private civil RICO claims by holding that RICO does not require that the racketeering enterprise be accompanied by an underlying economic motive.[47]

As will be discussed below, by dispensing with the economic motive requirement, *Scheidler* has created the potential to subject ideological speech and association pertaining to expressive speech, through supporting entities that may be perceived to support/promote terrorism, to possible civil RICO liability.

Jettisoning the economic motive requirement has potentially serious implications for the exercise of First Amendment freedoms, especially when the purlieus between pure speech and mere association and supporting acts of terroristic violence become blurred. Some courts have considered the question of civil RICO's relationship to free speech and expressive support of terrorism that is alleged to encompass material

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(1970).

[45] Douglass & Layne, *supra* note 33, at 1116 (footnotes omitted); *see also* United States v. Private Sanitation Indus. Ass'n, 995 F.2d 375, 377–78 (2d Cir. 1993) (permitting the curtailment of associational rights in furtherance of significant governmental interests); United States v. Local 560, 974 F.2d 315, 345 (3d Cir. 1992) (concluding that governmental interest in eliminating organized crime from unions justifies curtailment of associational rights).

[46] GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 551 (4th Cir. 2001) (quoting Menasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir.1989)).

[47] Douglass & Layne, *supra* note 33, at 1116–17; *see* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994).

support for criminal acts of terrorism.[48] Although this Article will explore additional rationales and available analytic tools to posit a uniform and coherent legal standard for reconciling civil RICO and the First Amendment, overall the courts' rationales in speech and terrorism cases arguably help rather than detract from implementing a workable distinction between what types of speech and association are protected vis-à-vis civil RICO. The *In re Terrorist Attacks on September 11, 2001* court, for example, entertained and then rejected a number of claims alleging civil RICO violations.[49]

> One holding was that there was no liability under RICO since it was not alleged that the defendant participated in the operation or management of any enterprise as was required under 18 U.S.C.A. § 1962(c) when, after the al Qaeda leader Osama bin Laden declared war on Americans, a defendant allegedly arranged for the delivery of a battery for a satellite phone used by Osama bin Laden.[50]

Another defendant was charged with financial support of terrorism.[51] In dismissing the RICO counts based on financial contribution as material support of criminal acts of terrorism, the court relied on the Seventh Circuit's reasoning that

> [f]oreseeability is the cornerstone of proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions. . . . To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation.[52]

The court's rationale thus serves to clarify and mollify rather than

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[48] *See, e.g.*, United States v. Al-Arian, 308 F. Supp. 2d 1322, 1341–49 (M.D. Fla. 2004); United States v. Arnaout, 236 F. Supp. 2d 916, 916–18 (N.D. Ill. 2003) (declining to dismiss the counts against Arnaout where they "sufficiently allege that Arnaout conspired to supply material support and benefits to [terrorist organizations] and others engaged in violent confrontations involving murder, kidnapping, maiming and injury . . . in violation of United States law," despite his arguments that the alleged recipients of his material support were lawful combatants).

[49] In Re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 575–76 (S.D.N.Y. 2005).

[50] Jay M. Zitter, *Application of Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961 et seq., to Terrorists and Acts of Terrorism*, 10 A.L.R. FED. 2d 461 (2006).

[51] *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d at 548.

[52] Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1012 (7th Cir. 2002).

obfuscate and agitate civil RICO's relationship to fundamental freedoms of speech and association. The next section will provide a working context within which to begin to assess whether or not civil RICO is fundamentally at odds with First Amendment freedoms of speech and association.

III. *SEDIMA, S.P.R.L. V. IMREX*: THE COURT SPEAKS

Although criminal RICO "was greeted with open arms by prosecutors as soon as it was enacted in 1970," civil RICO, on the other hand, "'sat virtually unused on the library shelf for some ten years after its enactment.' Since then, civil RICO's life . . . has been exhaustively chronicled and criticized by scholars as well as courts."[53] The Court's opinion in *Sedima* decisively brought civil RICO out of a state of near-dormancy.[54] *Sedima* explicitly laid out what the Court viewed as the most relevant principles and aspects of RICO's legislative history that the lower courts should consider and employ in analyzing and determining when to apply civil RICO, and what the Court considered integral aspects of RICO's language and the Act's overall scope, meaning, and purpose.[55] The Court, in interpreting RICO's language in an expansive manner, clearly privileged the security component of the liberty-security nexus. The Court's opinion in *Sedima* remains a definitive statement of the Court's structural understanding of RICO's breadth and depth, and continues to ground the Court's RICO jurisprudence.[56] Hence, it is necessary to consider *Sedima* because the logic underlying the decision is directly relevant when attempting to resolve the tensions between private civil RICO and First Amendment freedoms.

Sedima was part of the Court's initial foray into interpreting "the purpose, scope, and meaning of RICO and its legislative history, particularly as far as its civil applications [were] concerned."[57] One of the reasons why *Sedima* remains relevant to present appraisals of civil RICO is that the Court articulated what can be essentially characterized as an "expansionist, plaintiff-favorable review of the statute and its

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[53] Melley, *supra* note 39, at 291 (footnote omitted) (quoting Joan G. Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 RUTGERS L. REV. 285, 285 (1983)).

[54] Sedima, S.P.R.L. v. IMREX Co., Inc., 473 U.S. 479, 481 (1985).

[55] *Id.* at 486–90.

[56] Coppola & DeMarco, *supra* note 12, at 248–49.

[57] *Id.* (quoting PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL § 2.05 (3d ed. 2011)).

legislative history."[58] The Court found that

> the compensable injury necessarily is the harm caused by [RICO] predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. [Such] acts are . . . "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.[59]

It is important to note that, in laying the foundational schema for its RICO jurisprudence, the Court explicitly rejected a narrow interpretation of RICO's purpose and scope.[60] In doing so, public policy would thus reflect an emphasis on security, order, as opposed to placing the liberty interest at the forefront of interpretation and adjudication. The Court declared that

> *RICO is to be read broadly. This is the lesson not only of [its] self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.*[61]

In explicitly endorsing an expansionist construction of RICO, the Court found that "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime."[62] "Crime," as the Court employed, is a term of art, a state of affairs that implicates a non-restrictive construction of the Act.[63] As one commentator notes,

> [u]nder both its criminal and civil provisions, RICO proscribes infiltration of business by organized crime. Put another way, RICO does not proscribe organized crime; rather, it is aimed at organized criminal activity in all its multitudinous forms. Therefore, RICO's statutory language is necessarily broad. To provide the courts with interpretive guidance, Congress also included a liberal construction clause with RICO.[64]

"Crime" that is "organized" can thus be interpreted commodiously to

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[58] *Id.* at 249.
[59] *Sedima*, 473 U.S. at 497.
[60] *Id.* at 497–98.
[61] *Id.* (emphasis added) (citations omitted).
[62] *Id.* at 498.
[63] *Sedima*, 473 U.S. at 498.
[64] Betty Gloss, *The Continuing Conflict Over Limitations on RICO'S Civil Injury Element*, 20 VAL. U. L. REV. 531, 531–32 (1986), http://scholar.valpo.edu/vulr/vol20/iss3/5.

encompass enterprises and activity that surpass a restrictive notion relegated to a specific form of organized crime.

The Court's exposition of RICO in *Sedima*, including the dissent, touched upon what would become a major critique of civil RICO, i.e., RICO should be narrowly construed because an overly broad interpretation of the Act's sweeping language renders RICO even more ambiguous, protean, and thus more prone to government and private party abuse.[65] The dissenting opinions, for instance, claimed that the Court's interpretation of RICO—imbuing RICO with very high degrees of (unwarranted) elasticity—fundamentally and improperly altered the federal-state balance regarding civil remedies, and that the Act actually lent it itself to a restrictive reading, i.e., RICO "should be read narrowly to confine its reach."[66] In explicitly rejecting this line of argument, the Court's majority expounded upon the justification for interpreting RICO expansively, i.e., the "*fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.*"[67] While the Court did acknowledge that RICO was perhaps "evolving into something quite different from the original conception of its enactors,"[68] the majority nevertheless found that RICO's encompassing language, based on its history, purpose, and scope "inherent in the statute as written, and [any] correction [to the contrary] must lie with Congress."[69]

IV. POST-*SEDIMA*: REJECTING A CIRCUMSCRIBED APPROACH

Over the last three decades, civil RICO's juridical construction has experienced sustained continuity as well as some degree of change. Until relatively recently, continuity has, for the most part, characterized civil RICO's development. There are some notable exceptions. For example, in *Reves v. Ernst & Young*,[70] the Court dialed back civil RICO's expansiveness, yet still found that "the 'provisions of [RICO] shall be liberally construed to effectuate its remedial purposes.' This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, *but it is not an invitation to apply*

[65] *See Sedima*, 473 U.S. at 498–99, 501.

[66] *Id.* at 527 (Powell, J., dissenting).

[67] *Id.* at 499 (majority opinion) (emphasis added) (quoting Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi., 747 F.2d 384, 398 (7th Cir. 1984)).

[68] *Id.* at 500.

[69] *Sedima*, 473 U.S. at 499.

[70] Reves v. Ernst & Young, 507 U.S. 170 (1993).

RICO to new purposes that Congress never intended."[71] The *Reves* Court thus went against the general trend of the Court's overall RICO jurisprudence and applied a restrictive interpretation, focusing on the word "conduct."[72] The Court found that the statute's use of the term "conduct" as both noun and verb within the same sentence of § 1962(c) indicated Congressional intent that "conduct" requires "an element of direction."[73] Thus, one is not liable under § 1962(c) "unless one has participated in the operation or management of the enterprise itself."[74] The general trend of the Court's RICO jurisprudence, however, has been to retain a relatively expansive interpretation of RICO's scope, purpose, and meaning as posited in *Sedima*.[75] This ongoing continuity has direct implications for how to address the relationship between civil RICO and First Amendment freedoms when it comes to chilling speech if it is viewed as supporting terroristic violence.

In a post-*Sedima* context, the Court has augmented the circumference of RICO's applicability via an expansive interpretation of the Act's language. For instance, four years after *Sedima*, the Court decided *H. J. Inc. v. Northwestern Bell Telephone Co.*,[76] upholding and further reinforcing *Sedima*'s "treatment of RICO's legislative history and again reject[ing] the argument for a narrow construction."[77] In *H. J. Inc.*, the Court stated:

> To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the Act's operation concern, the predations of mobsters. Organized crime was without a doubt Congress' major target . . . . [T]he legislative history shows[, however,] that *Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime.*[78]

Sedima and *H. J. Inc.* are thus clear statements of the Court's approach to RICO interpretation that are indicative, at least implicitly, of the Court's privileging an expansive approach that is on par with other

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[71] *Id.* at 183 (emphasis added) (quoting Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922, 947 (codified as note to 18 U.S.C. § 1961 (1994))).

[72] *Id.* at 185.

[73] *Id*. at 178.

[74] *Reves*, 507 U.S. at 183.

[75] Christopher D. McDemus, *Reves v. Ernst & Young: The Supreme Court's Recent Restrictive Standard Concerning § 1962(c) of the Civil RICO Statutes*, 19 DEL. J. CORP. L. 1027, 1030–31 (1994).

[76] H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989).

[77] Coppola & DeMarco, *supra* note 12, at 251.

[78] *H. J. Inc.*, 492 U.S. at 245–46 (emphasis added).

potentially competing values, viz., First Amendment freedoms of speech and association. Arguably, the values embodied in RICO—preserving public safety, security—may be at odds with First Amendment freedoms. Yet, as will be discussed below, a commodious interpretation of crime does not necessarily involve casting First Amendment freedoms to the wayside.

In 1992, twenty two years after RICO was enacted, the Court restricted civil RICO in *Holmes v. Securities Investor Protection Corp.*[79] In *Holmes*, the Court analyzed and reinterpreted § 1964(c), which had previously been "read to mean that a plaintiff is injured 'by reason of' a RICO violation," and that a plaintiff may recover treble damages "simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury."[80] In *Holmes*, the Court restricted civil RICO by stating that proximate cause was, henceforth, required for a plaintiff to recover treble damages.[81] The Court stated that

> [w]e may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them. Proximate cause is thus required [when claiming treble damages under private civil RICO].[82]

The Court thus rejected the contention that a civil RICO violation need only be a "but for" cause of plaintiff's injury: "This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades [the Court] that RICO should not get such an expansive reading."[83]

It is interesting to note that *Holmes*, in conjunction with *Sedima* and *H. J. Inc.*, serves to better clarify the relationship between civil RICO and the First Amendment in the latter's favor by providing a less expansive notion of causation. With proximate cause being requisite to recover treble damages, it actually becomes more difficult to chill freedom of speech and association. In *Anza v. Ideal Steel*, for instance, the Court applied *Holmes*, stating that "[w]hen a court evaluates a RICO

[79] Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992).
[80] *Id.* at 265–66 (footnote omitted).
[81] *Id.* at 268.
[82] *Id.* (citations omitted).
[83] *Holmes*, 503 U.S. at 266 (footnote omitted).

claim for proximate causation, the central question it must ask is *whether the alleged violation led directly to the plaintiff's injuries*."[84] If an act(s) has to be the proximate cause of harm, then civil RICO lessens threats to protected speech and association because direct harm would involve more than just protected speech and expressive activity to trigger the treble damages provision.[85] Plaintiffs have to prove how an organization's or individual's speech and association activities *directly* lead to injury, thus better insulating First Amendment freedoms from improper application of private civil RICO.[86]

Whenever the Court expands civil RICO's reach, it is not unreasonable for security and public safety concerns to surface, which can pose a menace to First Amendment freedoms. Being secure in one's place, person, and effects, as famously enumerated in the U.S. Declaration of Independence and U.S. Constitution, is an overarching theme articulated in a security configuration such as civil RICO.[87] Notions of security embedded in the liberty-security nexus significantly impact public policy.[88] Liberty is a secondary interest, at best, in light of how the Court has interpreted RICO.[89] Granted, the Court has imposed some restrictions on civil RICO; yet, the post-*Sedima* context, with notable exceptions, entails more continuity than change, arguably endowing civil RICO with the potential to chill First Amendment freedoms.[90] The restrictions that have been instated, such as a re-interpretation of civil RICO to contain the requirement of proximate cause to recover treble damages, have not significantly altered the broader character of the Court's RICO jurisprudence. Yet, it does not have to be the case that security and public safety trump liberty; each can coexist with the other in the same legal universe.

Within the working context discussed so far, the most relevant Court pronouncement on the relationship between private civil RICO

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[84] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006) (emphasis added).

[85] *Id.* at 458–60.

[86] Catherine Reid, *Limiting Political Expression by Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 RUTGERS L.J. 201, 224 (1988).

[87] *See* U.S. CONST. amend. IV; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[88] *See* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 215–37 (A. M. Sheridan Smith trans., 1972).

[89] *See, e.g.*, Reid, *supra* note 86, at 203 (arguing that civil RICO has begun to erode "vital constitutional rights").

[90] *See, e.g.*, Melley, supra note 39, at 312 (calling for Congressional intervention to curtail the court's continued broad reading of civil RICO).

and First Amendment freedoms comes from Justice Souter's concurring opinion in *National Organization for Women v. Scheidler*.[91] In *Scheidler*, the Court did not directly address the question of when does civil RICO impermissibly encroach upon constitutionally protected freedoms of speech and association.[92] The decision, however, in conjunction with the Court's First Amendment jurisprudence, does provide guidance as far as fleshing out the relationship between civil RICO and freedom of speech and association, how these freedoms apply to support of acts of violence and terrorism, and how civil RICO may or may not cabin such freedoms. Before addressing *Scheidler* and the post-*Scheidler* context vis-à-vis civil RICO, freedom of speech, and support of terroristic violence, a selective exposition of the Court's First Amendment jurisprudence is presented, including cases that define protected and unprotected speech, as well as the alleged harms that civil RICO poses to First Amendment freedoms. This is necessary because RICO does not operate within a vacuum; the Court's First Amendment jurisprudence provides a backdrop for ascertaining what types of speech and association are shielded from civil RICO liability.

A. Encroaching on the First Amendment: Critiquing Civil RICO

When analyzing liberty from a speech and association perspective, it is important to note that the Court has declared that, "[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."[93] The fear is that civil RICO encroaches upon liberty under the aegis of security. Such fears, however, while not unreasonable, are nonetheless attenuated in light of the Court's First Amendment jurisprudence, which RICO must comply with given the superiority of the U.S. Constitution over congressional statutes.[94] The Constitution

> protects peaceful assembly, even if members of the assembly commit crimes in

[91] Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 263–64 (1994) (Souter, J., concurring).

[92] *Id.* at 262 n.6 (majority opinion).

[93] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[94] *See* Califa, *supra* note 39, at 823 ("Indeed, the Court repeatedly has held that statutes which punish speech or conduct solely because it is offensive or unseemly are constitutionally overbroad.").

> other contexts. Assembly is an integral part of the freedoms guaranteed by the first amendment, [as is] association . . . .
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> . . . .
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> Obnoxious and harassing speech is protected. Indeed, the Court repeatedly has held that statutes which punish speech or conduct solely because it is offensive or unseemly are constitutionally overbroad.[95]

The Court's First Amendment jurisprudence is robust. The Court has endowed First Amendment freedoms with a high degree of protection.[96] Thus, any potential chilling effect(s) that civil RICO may have must contend with the Court's formidable protection of free speech and association. "The doctrine of chilling effect reflects the view that the harm caused by the chilling of free speech is comparatively greater than the harm resulting from the chilling of other activities."[97] In *Speiser v. Randall*, the Court, in applying the chilling effects doctrine, found that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools . . . ."[98] Within the context of civil RICO, some commentators agree with Justice Marshall's dissent in *Sedima* that civil RICO does in fact pose a serious threat to free speech and association because it lacks clear restraints in its language and how it has been interpreted by the Court.[99] Justice Marshall notes that civil RICO

> litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud.
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> . . . .
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> . . . Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. . . . [C]ivil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.[100]

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[95] *Id.* (footnotes omitted); *see also* Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *see also* Houston v. Hill, 482 U.S. 451, 472 (1987) ("[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.").

[96] Califa, *supra* note 39, at 832.

[97] *Id.* at 833.

[98] Speiser v. Randall, 357 U.S. 513, 525 (1958).

[99] *See* Califa, *supra* note 39, at 833–34.

[100] Sedima, S.P.R.L. v. IMREX Co. Inc., 473 U.S. 479, 504, 506 (1984) (Marshall, J.,

Justice Marshall's reasoning has provided a basis for critics alleging that civil RICO's treble damages and attorney's fees provisions may have a chilling effect on First Amendment freedoms, especially because it has the potential of deterring

> noneconomically motivated organizations and grossly overdeterring borderline activity. . . . The self-censorship that will likely occur as a result of the threat of RICO's civil penalties will certainly deter otherwise protected First Amendment activity. . . . [T]he imposition of treble damages, costs, and attorney's fees significantly chill free speech . . . .[101]

In light of the highly unpopular and controversial nature of speech and association that can be construed as support of terroristic violence, it is not implausible to suggest that, because of the close relationship between pure speech and expressive speech related to and/or that traverses protected speech via material support, i.e., conduct, civil RICO could have serious implications for First Amendment freedoms related to ideological (as opposed to material) support of acts of violence and terrorism.

> The line between protected and unprotected protest activity is not easy to draw. At one end of the spectrum of activity, [subjects] are engaged in pure political speech to which RICO [clearly] cannot apply. Criminal conduct lies at the opposite end of the spectrum and it is clear that the First Amendment is not a refuge for violence or law-breakers. Somewhere in between, however, lies a category of mixed speech and conduct that includes both protected and unprotected expression.[102]

According to some critics, within this nebulous area of hybrid activity, composed of both protected and unprotected activity, lurks the potential for the abrogation of protected freedoms in the course of trying to chill and punish unprotected speech-as-conduct.

> When the tool of prosecution is RICO . . . the stakes are at their highest . . . [those] engaging in protected activity risk losing their protected status when later they or others with whom they are associated engage in unprotected acts, since the line between protected and unprotected activities is fuzzy. The effect

dissenting).

[101] Bryn K. Larsen, *RICO's Application to Noneconomic Actors: A Serious Threat to First Amendment Freedoms*, 14 REV. LITIG. 707, 728–29 (1995).

[102] *Id.* at 718–19.

is a chilling of free speech.[103]

The transected dimension, it is alleged, is most vulnerable to civil RICO's chilling effect. This fear, however, can be allayed by the rich and robust protections that the Court has accorded liberty in the form of freedom of speech and association. "Civil RICO plaintiffs must sufficiently plead both racketeering activity *and* that the activity caused them some injury."[104] Critics of civil RICO's expansive construction claim that "[i]t is clear that RICO was intentionally written broadly to encompass the myriad of businesses infiltrated by organized crime. However, ... [i]t is important to note that serious constitutional issues are raised when RICO is extended into areas for which it was not intended," i.e., application of civil RICO to fundamental First Amendment freedoms of speech and association.[105] Critics argue that private civil RICO has no inherent restraints, as does criminal RICO, and thus is prone to abuse.[106] This is the case because security becomes the controlling framework in policy formulations based on public safety at the forefront of competing values. While it is certainly the case that it is profoundly difficult to draw a bright line between protected and unprotected speech, especially in light of the highly controversial issue of speech that is linked to support of violence or acts of terrorism, it seems that application of civil RICO does not necessarily have to inevitably traverse the line between protected and unprotected speech. As will be discussed below, using the federal court cases of *United States v. Marzook*,[107] *United States v. Warsame*,[108] and *Savage v. Council on American-Islamic Relations, Inc.*,[109] the courts do have tools at their disposal to construct and follow a relatively uniform legal standard to determine whether civil RICO does or does not apply vis-à-vis First Amendment considerations, quelling fears that civil RICO may displace First Amendment freedoms.[110]

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[103] Brian J. Murray, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 743 (1999).

[104] Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1351 (11th Cir. 2016).

[105] Barry, *supra* note 7, at 909 (footnote omitted).

[106] *See* Weiss, *supra* note 14, at 1158.

[107] United States v. Marzook, No. 03 CR 0978, 2005 WL 3095543 (N.D. Ill. E.D., Nov. 17, 2005).

[108] United States v. Warsame, 537 F. Supp. 2d 1005 (D. Minn. 2008).

[109] Savage v. Council on Am.-Islamic Relations, Inc., No. C 07–6076 SI, 2008 WL 2951281 (N.D. Cal., July 25, 2008).

[110] Reid, *supra* note 86, at 203, 219–20 (noting that, because "free expression remains a fundamental right, the [government] must carefully tailor its regulations to achieve its ends

Civil RICO certainly has the potential for chilling First Amendment freedoms.[111] In addition to Justice Marshall's admonition that the sheer cost of defending private civil suits presents a serious issue as to civil RICO's reach, its significant sanctions—treble damages, costs, and reasonable attorneys' fees—in conjunction with the possible "stigmatic label of 'racketeer' affix[ing] to anyone against whom a RICO claim is brought—even if that person's First Amendment rights are ultimately vindicated,"[112] create profound disincentives to exercise free speech and association that is unpopular. Critics allege that entities sued under civil RICO

> might well have to bear the enormous costs of litigation (the detailed discovery—necessary in most types of civil litigation—would impose crushing costs . . .) . . . [making RICO] a formidable weapon in its expanded form. The threat of RICO . . . necessarily chills constitutionally protected free speech.[113]

B. Civil RICO and First Amendment Freedoms: Mutually Exclusive or Reconcilable?

Although some may feel that civil RICO's application beyond traditionally defined organized criminal enterprises is incompatible with First Amendment freedoms of speech and association, is it necessarily the case that one must choose one to the exclusion of the other? RICO, criminal and civil, was never explicitly intended to combat terrorism. Yet the Court has endowed RICO with expansiveness. Civil RICO has become, for some commentators, a logical addendum to civil remedies available to combat terroristic violence.[114] The answer is not clear cut. As Harold Koh, notes, regarding

> legal responses to terrorism, civil remedies are far and away the least

without unduly restricting speech," protecting one who "vigorously advanc[es] his political, social, or religious views, [and] causes incidental harm, to a business concern").

[111] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964) (discussing the potential for a lawsuit to chill protected speech); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1192 (2005) ("Speakers who are genuinely not intending to facilitate crime might nonetheless be deterred by the reasonable fear that a jury will find the contrary."); *see also* Ana Maria Marin, *RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores*, 43 U. MIAMI L. REV. 419, 446–47 (1988) (arguing that use of RICO to regulate obscenity presents constitutional problems).

[112] Murray, *supra* note 103, at 744.

[113] *Id.* at 744, 747.

[114] *See* Weiss, *supra* note 14, at 1124 (remarking that RICO's expansive reading may help to combat terrorist organizations).

> understood. . . . Broadly construed, the term "civil remedies" encompasses all nonforcible [sic], noncriminal means of sanctioning terrorists and states who support terrorists. Unlike direct action, civil responses to terrorism raise questions that are quintessentially legal, not political and logistical. . . . Moreover, unlike criminal remedies, which look solely toward punishment and deterrence, civil remedies additionally contemplate making terrorists "pay up"—that is, directly or indirectly compensating the victims of terrorist crimes by affording victims or their governments an economic recovery from terrorists or their state supporters.[115]

In light of the nature and character of civil RICO as a remedy, does civil RICO's mandate to provide injured plaintiffs with treble damages explicitly and inevitably chill freedom of speech and association? Treble damages, within the greater scheme of RICO, aids in punishing and dismantling criminal enterprises that engage in racketeering activity. In the context of terrorism, however, does making terrorists "pay up" for speech acts that may be construed as supporting terrorism have the unintended yet serious consequence of attenuating freedom of speech? Indeed, the Court has alluded to, but has not directly addressed the general question, and has not answered the specific question of civil RICO regarding what exactly constitutes support of terror. It is the case that "[t]hroughout this nation's history, the civil litigation system has frequently served as a regulatory check on both private and public actors; there is no reason why it could not supplement—to the extent practical, possible, and desirable—America's arsenal in the war on terror."[116] Furthermore, the Court's articulated standards in its First Amendment and civil RICO jurisprudence (and the lower courts' interpretation of the Court's case law) provide an adequate basis for distinguishing which types of speech and association are and are not protected when such freedoms concern support for acts of violence and terrorism. The courts' inquiry can begin with adoption of a standard of review based on whether speech is "actually malicious" and poses an "imminent threat of harm" to provide clarity as to what types of speech are exempt from civil RICO application.

The tension between security, broadly defined, and civil liberties is palpable, and requires the courts' careful deliberation. Indeed, "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."[117] Yet the courts' First Amendment

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[115] Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 173 (2016).

[116] Weiss, *supra* note 14, at 1144.

[117] Arcara v. Cloud Books, Inc., 478 U.S. 697, 706 (1986).

jurisprudence provides a workable and effective bulwark against overreach of civil RICO. The First Amendment prohibits criminal liability based on an individual's mere association with a group.[118] Yet it is the case that "violence has no sanctuary in the First Amendment . . . under the guise of 'advocacy.'"[119] The courts have found that

> it is well-settled that "true threats" of violence are not protected by the First Amendment. True threats, in contrast to mere "political hyperbole," have been characterized by the Supreme Court as statements made by a speaker who "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group."[120]

The "actually malicious" and "imminent threat of harm" standard (hereinafter, AMITH) on its face does an effective job of balancing the competing dimensions of the liberty-security nexus, adhering to the Court's declaration that because a "dim and uncertain line" separates protected speech from unprotected speech, "freedoms of expression must be ringed about with adequate bulwarks."[121] Even courts that are skeptical of civil RICO[122] may be less hostile to its employment if the "dim and uncertain line" can be made a little less of each. Reconciling liberty and security is not beyond the ken of the courts. That is, the overarching need for government to protect the U.S.'s citizenry and integrity against terroristic violence does not have to ride rough shod over First Amendment freedoms, nor does the government's goal need to be completely frustrated by the First Amendment. The remaining sections will build upon the previous discussion and demonstrate how civil RICO is not at odds with the various standards that the federal courts (and the Supreme Court in particular) have articulated regarding First Amendment freedoms and one's right to voice support for groups and causes that advocate for and carry out acts of violence and terrorism

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[118] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918–19 (1982) (noting that although states have broad power to regulate economic activities, they cannot prohibit peaceful advocacy of a politically-motivated boycott).

[119] Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring).

[120] Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union, 585 F. Supp. 2d 804, 804 (E.D. Va., 2008) (citation omitted) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).

[121] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

[122] *See, e.g.*, Schmidt v. Fleet Bank, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) ("[C]ourts must always be on the lookout for the putative RICO case that is really 'nothing more than an ordinary fraud case clothed in the Emperor's trendy garb.'") (quoting In re Integrated Res. Real Estate, 850 F. Supp. 1105, 1148 (S.D.N.Y. 1993)).

as part of their ideological program.

In *Brandenburg v. Ohio*, the Court found the following:

> [freedom of speech] do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the . . . First . . . Amendment[.][123]

Thus, the Court has found that "mere advocacy" of the use of force or violence does not in and of itself preclude speech and association from First Amendment protection.[124] Civil RICO is precluded from punishing mere speech and association that advocates, as a general principle, support of violence and terrorism in conjunction with religious and ideological mantras. Under the *Brandenburg* framework, the AMITH standard provides the courts with a feasible and objective legal standard to apply when assessing whether civil RICO would unconstitutionally intrude on First Amendment freedoms. "Under *Brandenburg*, the [S]tate must prove that (1) the speaker subjectively intended incitement; (2) in context, the words used were likely to produce imminent, lawless action; and (3) the words used by the speaker objectively encouraged and urged incitement."[125] Although civil RICO's language is broad, the language fits into the AMITH standard while balancing liberty rights of speech and association because "support" as an expressive exercise loses protection when it morphs into material support equivalent to actual "conduct." Conduct that falls within the AMITH standard is not mere espousal of views or affiliation. The courts could thus use this test to adhere to the letter and spirit of civil RICO while concomitantly respecting protected speech and association.

In *McMonagle v. Northeast Women's Center, Inc.*,[126] the Court denied certiorari of a Third Circuit decision "that allowed a civil RICO action to be brought against an anti-abortion group that had conducted protest activities against an abortion clinic."[127] Justice White dissented,

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[123] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (footnote omitted) (citations omitted) (quoting Noto v. United States, 367 U.S. 290, 297–98(1961)).

[124] *Id.*

[125] Larsen, *supra* note 101, at 734.

[126] McMonagle v. Ne. Women's Ctr., Inc., 493 U.S. 901 (1989).

[127] Barry, *supra* note 7, at 901.

opining that certiorari was necessary, but he did not directly address any First Amendment issues regarding speech and association.[128] Because the Court permitted the suit to stand—a suit that claimed a RICO violation based on what could be considered a relatively minimal amount of damage to property and business[129]—the courts have, generally speaking, adhered to a "low threshold" of "wrongful" activity when assessing whether or not to permit a civil RICO suit to proceed. According to some commentators, *McMonagle*'s "low threshold" actually encourages chilling of speech because it is possible that individuals or groups opposed to an organization's activities or policies may face potential civil RICO liability whenever it takes steps which can be considered "wrongful" in relation to a pattern of racketeering.[130] Ostensibly, "crime" is expansively defined under RICO, emphasizing the values encompassed within a security framework. The low threshold of "wrongful" activity allegedly creates a very real potential for the chilling of speech and association, because under a low threshold standard, it may be possible to chill speech through "the use or threat of a RICO suit."[131]

> [This may be the case because] a plaintiff in a RICO suit does not have to show that the defendant's actions actually constituted a violation of a criminal statute in order to prove that the conduct was "wrongful," and that the defendant extorted his property through the "wrongful use of fear." It is sufficient merely to demonstrate that the defendant acted without a lawful claim or right. Furthermore, the plaintiff is given the benefit of only having to prove the "wrongfulness" of the defendant's conduct by a "mere preponderance" standard as opposed to the more stringent "beyond a reasonable doubt" standard as is required in criminal trials.[132]

Critics of civil RICO are not limited to First Amendment lawyers and academics. Criticism of civil RICO also emanates from the bench. Some time ago, Judge Sentelle of the Court of Appeals for the District of Columbia articulated what he felt was the most troubling aspect of civil RICO when considering First Amendment freedoms of speech and association. In short, Judge Sentelle states that, "judicial hatred of RICO arises not only from its amorphous mass, but also from the fact that this amorphous mass is a voracious monster. RICO devours traditional and

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[128] *See McMonagle*, 493 U.S. at 901 (White, J., dissenting).
[129] *Id.*
[130] *See* Barry, *supra* note 7, at 907–08.
[131] *Id.* at 907.
[132] *Id.* at 908 (footnotes omitted).

basic concepts of American jurisprudence, including . . . First Amendment rights of free speech and association."[133] Judge Sentelle's evaluation of the federal courts' treatment of labor unions faced with private civil RICO suits leads him to "question the legitimacy of a statutory remedy that includes as an essential element First Amendment protected association, where the other elements are as vague, nebulous, and as easily subject to creative allegation as the elements of civil RICO."[134]

Judge Sentelle points to the application of civil RICO to union enterprises as an example of how RICO's expansive application has a very high potential to chill First Amendment freedoms.[135] Sentelle's assertion combined with the *Scheidler* Court's later finding that no economic motive is necessary for establishing the viability of RICO enterprises,[136] serves to justify fears that civil RICO may in fact be used against a group's political/ideological activities. Such application supposedly has serious implications for freedom of speech and association.[137] Yet, a closer analysis of the contexts within which civil RICO was found applicable lends support to the contrary contention that civil RICO is being applied to *conduct* rather than to mere *affiliation* or *espousal* of views, which, as a matter of law, constitute protected speech and activity.

In *United States v. Sasso*, where union officials had committed RICO violations by threatening company representatives, whose employees were union members, as a means for obtaining cash payments, the court found that the lower court had the authority to order those officials to contribute to the costs of monitoring the union.[138] In *United States v. Carson*, the court held that an order of disgorgement of "ill-gotten gains" against a union officer prosecuted for committing racketeering acts benefiting organized crime should be limited to sums intended solely to prevent and restrain future RICO violations.[139] Although open-ended as to what future violations encompass, this penalty was found to be in accord with the letter and spirit of RICO.[140] Perhaps the case of *United States v. International Brotherhood of*

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[133] Sentelle, *supra* note 30, at 161.
[134] *Id.* at 165.
[135] *Id.*
[136] *See* Douglas & Layne, supra note 33, at 1116–17.
[137] *See, e.g.*, Larsen, supra note 101, at 718–19.
[138] United States v. Sasso, 215 F.3d 283, 285, 292 (2d Cir. 2000).
[139] United States v. Carson, 52 F.3d 1173, 1181–84 (2d Cir. 1995).
[140] *Id.* at 1182.

Teamsters, wherein the court upheld disciplinary actions against a union official for associating with an organized crime figure pursuant to consent decree reforming a union's electoral and disciplinary processes after it was infiltrated by organized crime,[141] may be held out as improperly punishing one for mere association. The association, however, was explicitly connected with organized crime—an illegal association nexus which criminal and civil RICO was initially established to address and abrogate in the first place.[142] In *Bayou Steel Corp. v. United Steel Workers of America*,[143] plaintiffs filed a civil RICO lawsuit against a group of unions for waging a "corporate campaign" of harassment and violence after failed labor negotiations.[144] Interestingly, prior to the parties reaching a settlement agreement, the court had held that the plaintiff had sufficiently alleged proper facts for establishing a RICO claim, denying a motion to dismiss the complaint.[145]

The foregoing cases suggest that a finding of factual sufficiency to sustain an action is not necessarily determinative, and that by allowing such actions to go forward, the relationship between civil RICO and First Amendment freedoms can be further fleshed out and better defined. Either way, it may be somewhat of an exaggeration to allege that civil RICO is poised to voraciously consume any speech and association that a plaintiff may find repugnant. The facts of a case must be taken into account, with the Court's First Amendment jurisprudence as the backdrop for adjudging which type of speech the Constitution protects. In addition, speech and association alone are insufficient for sustaining a civil RICO action; the plaintiff must also *prove* actual harm.

C. Weathering the Storm: Civil RICO & NOW v. Scheidler

Generally speaking, civil RICO has successfully weathered First Amendment challenges to its application to contexts outside of organized crime. Regarding the question of whether providing support for acts of violence and terrorism falls within the purview of the

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[141] United States v. Int'l Bhd. of Teamsters, 19 F.3d 816, 818–19 (2d Cir. 1994).

[142] Mainly, the defendant knowingly associated with those engaging in illegal activity. *Id.* at 819.

[143] Bayou Steel Corp. v. United Steel Workers of Am., No. Civ. A. 95–496–RRM, 1996 WL 76344, at *1 (D. Del. Jan. 11, 1996).

[144] *See* Herbert R. Northrup & Charles H. Steen, *Union "Corporate Campaigns" as Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771, 773 (1999).

[145] Bayou Steel Corp., 1996 WL 76344, at *2.

"shadow of the First Amendment," the federal courts' handling of civil RICO suggests that, if the Court were to directly address the issue, chilling speech and association may perhaps be justified (i.e. found constitutional). This is because "constitutional safeguards do not extend to an 'association' that is part of a plan to commit a crime."[146] The Court has stated that, the "First Amendment, which guarantees individuals freedom of conscience and prohibits governmental interference with religious beliefs, does not shield from government scrutiny practices which imperil public safety, peace or order."[147] It is important to note, however, that the government's asserted interest when impinging upon First Amendment freedoms must be "substantial."[148] Although distinct, criminal RICO and civil RICO are part of the same statutory framework, and thus the Court's pronouncements in one realm may be viewed as persuasive/applicable in the other.[149] In light of the Court's pronouncement and general First Amendment jurisprudence, there is limited precedent and measured policy support for civil RICO to restrict and/or cabin speech and association when such speech—as in the case of material support for acts of violence and terrorism—morphs into (or can be substantially considered) conduct, satisfying the AMITH standard of review.

The closest the Court has come to addressing the relationship between private civil RICO and the First Amendment occurred in *National Organization for Women v. Scheidler*.[150] In that case, the Court briefly alluded to civil RICO's First Amendment implications in Justice Souter's concurrence. Justice Souter noted that certain types of speech and association are simply beyond the First Amendment's protections, and as such, there exists speech and association that "we need not fear chilling."[151] In light of the Court dispensing with the economic motive requirement for sustaining a private civil RICO action, the concurrence noted that, "an economic-motive 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*

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[146] Bryan et al., *supra* note 12, at 1017.

[147] Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989) (quoting United States v. Dickens, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983)).

[148] United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

[149] *See* G. Robert Blakey, *Time-Bars: Rico-Criminal and Civil Federal and State*, 88 NOTRE DAME L. REV. 1581, 1596–97 (2013).

[150] Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).

[151] *Id.* at 263–64 (Souter, J., concurring).

violence we need not fear chilling."[152] Generally speaking, *Scheidler* has implications for the relationship between speech and association and for expanding the circumference of civil RICO's applicability, because without economic motive being necessary, it allows for ideology to potentially be brought into the scope of civil RICO application. This development, however, does not necessarily produce the illimitable "voracious monster" Judge Sentelle described.[153]

Granted, the Court significantly expanded private civil RICO's application in *Scheidler* when it permitted a private civil RICO claim to stand against anti-abortion groups that were allegedly members of nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity.[154] In *Scheidler*, the Court unanimously held that, for purposes of 18 U.S.C. §§ 1961 and 1962(c), enterprises need not have an economic motive to be subject to RICO actions; "[n]owhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required."[155] The Court found that civil RICO is not constrained by economic motive; that is, economic motive is neither necessary nor sufficient for an entity to be subject to civil RICO. Lack of an economic motive, as the critics note, does create the possibility to restrict speech and association that is organized (i.e., an enterprise), political, and that slightly interferes with interstate commerce in any way.[156] *Scheidler's* holding—while perhaps potentially opening the door, so to speak, to infringement of speech based on the ideological underpinnings of said speech—does not necessarily result in infringement when civil RICO is employed. When speech and/or association manifests itself as material support (i.e., conduct, as opposed to mere affiliation and espousal of beliefs), that is "actually malicious" and poses an "imminent threat of harm," private civil RICO does not chill protected speech and association.

Scheidler involved private civil RICO's application to anti-abortion groups engaged in alleged racketeering activity.[157] The Court did not address potential First Amendment constitutional challenges to RICO claims against ideological organizations because such issues had not

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[152] *Id.* (emphasis added).

[153] Sentelle, *supra* note 30, at 161.

[154] *Scheidler*, 510 U.S. at 252–53, 262.

[155] *Id.* at 257.

[156] *See, e.g.*, Larsen, *supra* note 101, at 735 ("RICO's threat to the First Amendment is easily alleviated by lifting its applicability to noneconomic actors.").

[157] *Scheidler*, 510 U.S. at 252–53.

been explicitly raised in the courts below.[158] Justice Souter noted in his concurrence that:

> An economic motive requirement is . . . unnecessary, because legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise. . . . [N]othing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense . . . . RICO predicate acts may turn out to be fully protected First Amendment activity . . . . And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression.[159]

Subsequently, when conduct has allegedly violated RICO, as opposed to the cause of action merely being speech and affiliation, private civil RICO claims have been upheld or allowed to proceed based on the Court's abrogation of an economic motive requirement.[160] For example, in *Tompkins v. Cyr*, the court found that plaintiffs had valid grounds for a civil RICO complaint against anti-abortion protestors who tried to stop doctors from performing abortions by harassing and threatening them and their families with violence.[161] It is interesting to note that the court denied a motion on appeal to sanction the plaintiffs for filing a frivolous RICO claim.[162] In *Huntingdon Life Sciences, Inc. v. Rokke*, the court upheld a civil RICO claim against the People for the Ethical Treatment of Animals ("PETA") organization where the defendant was alleged to be an undercover PETA operative who surreptitiously obtained employment to gain access to the plaintiff's laboratory to investigate its animal testing practices.[163] PETA employed the fraudulently obtained information to launch a public relations campaign against the plaintiff.[164] In both *Tomkins* and *Huntingdon*, the defendants engaged in conduct beyond mere speech. Granted, the conduct intersected with speech and association, but the fact remains that the civil RICO suits were permitted to go forward based on conduct, not on speech grounds.

With the explicit repudiation of an economic motive, civil RICO

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[158] *Id.* at 262 n.6.

[159] *Id.* at 264 (Souter, J., concurring); *see also* Mike Robinson, *Racketeer Verdict Goes Against Abortion Foes*, BOS. GLOBE, Apr. 21, 1998; Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404–05 (2003).

[160] *See* Douglass & Layne, *supra* note 33, at 1122–23.

[161] Tompkins v. Cyr, 202 F.3d 770, 775, 787–88 (5th Cir. 2000).

[162] *Id.* at 787–88.

[163] Huntingdon Life Scis., Inc. v. Rokke, 986 F. Supp. 982, 984–85, 992 (E.D. Va. 1997).

[164] *Id.* at 985.

has been used to encompass other enterprises that are usually viewed as being shielded by the First Amendment's protection of affiliation and espousal of views. Some courts have attempted to reconcile civil RICO with First Amendment freedoms by clearly distinguishing the substantive difference between mere affiliation and espousal of views and support of terrorism that is material and thus qualifies as actual conduct.[165] Although a criminal RICO case, the court's rationale in *United States v. Beasley*[166] can be applied to civil RICO when assessing the relationship between civil RICO and the First Amendment. In *Beasley*, the Eleventh Circuit found that a religious organization could indeed be subject to RICO liability.[167] The court noted that

> [t]he evidence admitted was highly relevant to the jury's understanding of the existence, motives, and objectives of the RICO conspiracy and the means by which it was conducted. . . . *[R]eligion [was employed] as a means of exhorting followers to commit the racketeering acts, and appellants cannot hide behind . . . the First Amendment.*[168]

In assessing protections from non-protected speech and association, the court found that

> affiliation with a religious group is properly admissible where probative . . . . The evidence regarding the religion was relevant, because religious teachings were used to justify, rationalize, and promote crime. . . . The First Amendment's protection of beliefs and associations does not preclude such evidence where relevant to a trial issue.[169]

The rationale of *Beasley* is in line with and supports the application of civil RICO to enterprises that, though shielded by the First Amendment when it comes to affiliation and espousal of protected (unpopular) views (political, ideological, social, and/or religious), engage in conduct effectuating acts of violence and terrorism not entitled to the aegis of the First Amendment, because the conduct is part of expressive speech that "we need not fear chilling." The court noted that RICO is thus legitimately triggered because for it "[t]o satisfy the interstate commerce requirement, only a slight effect on interstate

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[165] *See, e.g.*, United States v. Al-Arian, 308 F. Supp. 2d 1322, 1336–39, 1341–43 (M.D. Fla. 2004).

[166] United States v. Beasley, 72 F.3d 1518 (11th Cir. 1996).

[167] *Id.* at 1525–27.

[168] *Id.* at 1527 (emphasis added).

[169] *Id.*

commerce is required."[170]

Granted, it is possible to construe the *Beasley* rationale as facilitating RICO's capacity to impose "unconstitutional prior restraint on speech, rather than a permissible criminal punishment,"[171] upon ideological enterprises that espouse highly unpopular views. It is also a valid contention, however, that speech and association that encompass (manifest) "force, threats of force, fear and violence"[172] are unprotected and subject to civil RICO because such conduct results in damages to financial interests and property, and negatively affects interstate commerce. Support of terror that is subject to civil RICO can thus be distinguished from mere espousal of views and affiliation that support terror, in that actual conduct transected with or that goes beyond speech is not protected and thus is subject to civil RICO. Speech that provides tangible or material support for acts of terrorism equals conduct.[173] Such conduct arguably falls under the purview of civil RICO. Civil RICO "does not punish protected acts of expression. Peaceful picketing, protesting, and other non-violent acts of expression protected under the First Amendment are not predicate acts under RICO, and will not subject individuals to RICO liability. *RICO punishes only unlawful conduct* such as murder, arson, robbery, extortion, and fraud."[174] As the Court noted in *Alexander v. United States*, RICO-based

> criminal and civil sanctions having some incidental effect on First Amendment activities are subject to First Amendment scrutiny "only where it was conduct with a significant expressive element that drew the legal remedy in the first place, . . . or where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity . . . ."[175]

Intended conduct that facilitates, substantively and directly, and furthers the illegal goals of terrorist organizations is thus, at best, incidental to

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[170] *Beasley*, 72 F.3d at 1526.

[171] Alexander v. United States, 509 U.S 544, 549 (1993).

[172] Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989).

[173] *See* John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C.L. REV. 526, 542 (2008); Christopher W. Robbins, *Finding Terrorists' Intent: Aligning Civil Antiterrorism Law with National Security*, 83 ST. JOHN'S L. REV. 1201, 1237 (2009).

[174] Timothy S. Millman, *Civil RICO, Protesters, and the First Amendment: A Constitutional Combination*, 60 MO. L. REV. 239, 255 (1995) (emphasis added) (footnote omitted). *See* Robbins, *supra* note 173, at 1237 ("The amendment [contained in the Patriot Act] expanded RICO's predicate felonies to include many federal crimes related to terrorism, including, inter alia, financing and providing material support.").

[175] *Alexander*, 509 U.S. at 2774–75.

expressive activity, and unprotected by the First Amendment. The Court's rationale, in conjunction with the AMITH standard, further clarifies and distinguishes civil RICO from First Amendment freedoms, allowing each to function without unduly impinging on the other.[176]

In cases dealing with First Amendment challenges to RICO's application, such as social protest as constitutionally protected exercises of free speech and association, the courts have found that significant government interests may, as a matter of law, curb such freedoms.[177] This principle of restriction on First Amendment freedoms can be readily applied to civil RICO and its potential curbing of speech and association that manifests itself as actual conduct prohibited by law. For example, acts of terrorism, murder, extortion, and kidnapping extolled by, and facilitated through, religious-ideological enterprises are not protected speech, and thus are subject to civil RICO liability. Even when a terrorist organization's agenda possesses legal and illegal components, and expressive activity is amalgamated with illegal aspects of an organization's agenda, such as carrying out acts of violence and terrorism, material support of terrorism in the form of intended substantive conduct is expressive activity that "we need not fear chilling." The courts have recognized that the application of certain laws may impact a "defendant's First Amendment rights of association, [but] the government's significant interest in eradicating organized crime may [as a matter of law] override such concerns."[178] If "crime" that is organized is construed liberally, then religious-ideological terrorist

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[176] The court in *Smithfield Foods, Inc. v United Food & Commercial Workers Int'l* stated:

> There can be no question that meetings, speeches, petitions, nonviolent picketing, and boycotts are all forms of speech and conduct that are entitled to protection under the First Amendment. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process, and citizens must be able to make their views known by collective effort, lest their voices be faint or lost." Such speech may cajole others to boycott businesses without losing its protected character, and governmental abridgement of such discussion can only occur to prevent "clear danger of substantive evils." Indeed, it is abundantly clear that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."

Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union, 585 F. Supp. 2d 789, 803 (E.D. Va. 2008) (citations omitted).

[177] United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

[178] Douglass & Layne, *supra* note 33, at 1116. The Second Circuit Court of Appeals has noted that "it is well established that an individual's right to freedom of association may be curtailed to further significant governmental interests[, b]ecause the public has a compelling interest in eliminating the 'public evils' of 'crime, corruption, and racketeering.'" United States v. Int'l Bhd. of Teamsters, 941 F.2d 1292, 1297 (2d Cir. 1991) (citations omitted).

organizations can be viewed as organized criminal enterprises subject to civil RICO liability.

V. CIVIL RICO, ACTS OF VIOLENCE AND SUPPORT OF TERRORISM

In light of the case law and principles discussed above, the courts can, as a matter of law, consistently distinguish between protected and unprotected speech and conduct regarding acts of violence and support of terrorism. This is a desirable devolvement if policy is to reflect a balance between liberty and security. Balance is desirable because security lends itself to being expansive in nature and application. Security can encompass a variety of dimensions that transcend a limited preoccupation with physical safety. Public safety can entail the political, economic, cultural, literary, agricultural, social, and media aspects of a polity, which are all potential fodder for securitization. Thus, a robust First Amendment jurisprudence helps cabin civil RICO.

In *Scales v. United States*, the Court held unconstitutional a statute making it unlawful to be a knowing member in any organization that advocated the violent overthrow of the U.S.[179] The Court held that:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt . . . . Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.[180]

Thus, an individual cannot be punished for merely belonging to, or espousing sympathies with, a political organization, even if said organization has legal as well as illegal goals. The Court has held that a "blanket prohibition of association with a group having both legal and illegal aims . . . [would pose] a real danger that legitimate political expression or association would be impaired."[181] Association and advocacy are protected by the First Amendment. To impose liability on an individual for association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a

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[179] Scales v. United States, 367 U.S. 203, 224–25 (1961).

[180] *Id.*

[181] *Id.* at 229. *See also* United States v. Hammoud, 381 F.3d 316, 328 (4th Cir. 2004) ("[I]t is a violation of the First Amendment to punish an individual for mere membership in an organization that has legal and illegal goals.").

specific intent to further those illegal aims.[182]

The lower federal courts have entertained suits filed under civil RICO regarding support of terrorism. Specifically, the courts have considered whether or not private civil RICO's severe penalties can be applied to support of terrorism.[183] Although different statutory contexts and rationales are involved, the general notion that emerges from the case law is that conduct in support of terrorism does not fall within the purview of First Amendment protection.[184] The law can criminalize—i.e., chill—speech and association that fall outside of the First Amendment. Civil RICO targets conduct. Material support of terrorism is conduct, not speech;[185] therefore, conduct that poses an immediate threat of harm to public safety enjoys no protection from the aegis of the First Amendment and is subject to civil RICO liability.

Enterprises that facilitate or carry out acts of violence and terrorism are thus potentially subject to private civil RICO liability because, as the Court found in *Scheidler*, "[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having . . . profit-seeking motives."[186] The remainder of this Article will focus on how the courts can develop a more consistent and uniform modality of determining when speech and association are protected from private civil RICO liability. The rationales of three specific lower court decisions dealing with RICO and support of terrorism in light of First Amendment protections will be explored in order to accomplish this

[182] Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1022 (7th Cir. 2002).

[183] *See, e.g.*, In re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 546, 575–76 (S.D. N.Y. 2005) (rejecting a number of claims under RICO against financial supporters of charities who funneled money to terrorist organizations); In re Terrorist Attacks on September 11, 2001, 464 F. Supp. 2d 335, 340–41 (S.D.N.Y. 2006) (rejecting as speculative RICO claims that the defendants should have known that charitable investments were being used to support terrorist activities); In re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 826–28 (S.D.N.Y. 2005) (dismissing RICO claim for failure to show that injury was result of the defendants' alleged investment of racketeering income and failure to show that defendants were actively participating in the conduct of the enterprise); United States v. Bagaric, 706 F.2d 42, 54 (2d Cir. 1983); United States v. Marzook, 426 F. Supp. 2d 820, 826 (N.D. Ill. 2006); United States v. Al-Arian, 308 F. Supp. 2d 1322, 1348–50 (M.D. Fla. 2004); Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 91, 100–02 (D.D.C. 2003) (dismissing RICO claims because of failure to show injuries to business or property); Doe I v. State of Israel, 400 F. Supp. 2d 86, 117–18 (D.D.C. 2005) (finding that plaintiff must demonstrate that the defendant had intent to further the terrorist acts, for allowing a more expansive interpretation of RICO would "constitute an omnipresent blanket of liability that could chill a wide range of economic and First Amendment activity").

[184] *See, e.g.*, *Marzook*, 426 F. Supp. 2d at 826; *Al-Arian*, 308 F. Supp. 2d at 1341–43.

[185] *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 25–26 (2015).

[186] Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 258 (1994).

aim. The courts' rationales, in conjunction with application of the AMITH standard, provides the courts with an effective, clear, and legitimate means of determining when First Amendment freedoms are exempt from private civil RICO actions.

A. Developing a Framework for Distinguishing Speech and Association From Support and Conduct

1. *United States v. Marzook*: Protected and Unprotected Speech

The court's analysis in *United States v. Marzook*[187] provides a basis and starting point for developing a framework for assessing when support of terrorism is subject to civil RICO liability. The *Marzook* court specifically addressed the question of RICO's application to, and possible "criminalization" of, mere ideological affiliation vis-à-vis First Amendment freedoms of speech and association.[188] Although conducted in a criminal context, the court's analysis is quite helpful in establishing a clear framework for adjudging when First Amendment freedoms are protected from civil RICO. The court's analysis provides a working basis from which to analyze private civil RICO's implications to speech and association. In particular, the court's analysis helps distinguish between mere espousal of views and affiliation that supports terrorism, i.e., protected speech, and material support of terrorism that is equivalent to conduct, i.e., unprotected speech subject to private civil RICO liability.[189]

In *Marzook*, the defendant,

> [a]s part of his role as a Hamas administrator and in furtherance of the RICO conspiracy, . . . participated in a number of phone conversations related to Hamas activity both in the United States and abroad. . . . in furtherance of Hamas's goals . . . including . . . control and minimization of damage to Hamas from the arrest and loss of members *involved in terrorist actions*.[190]

In addition, in furtherance of the RICO conspiracy, the defendant also provided the following types of support of terrorism (as opposed to mere espousal of political views) in the form of disseminating documents

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[187] United States v. Marzook, No. 03 CR 0978, 2005 WL 3095543 (N.D. Ill. Nov. 17, 2005).

[188] *Id.* at *4.

[189] *Id.* at * 5–7.

[190] *Id.* at *2 (emphasis added).

relating to the following activities: "Hamas terrorist attacks;[ ] security training and directives, including counter-surveillance techniques, secrecy protocols, and interrogation issues; . . . The movement of money for Hamas activities; . . . [and] Policies and activities of various terrorist organizations or anti-Israeli groups . . . ."[191]

The court explicitly rejected the defendant's claim that "the Indictment impinges on his First Amendment rights of freedom of speech and association."[192] Defendant claimed that the RICO charge criminalized his social and political views and affiliation in violation of the First Amendment.[193] The court, however, rejected the defendant's argument.[194] The court found that the RICO indictment, in light of the defendant's conduct, which included supporting "a group that used terrorism to further its goals, . . . did not violate the defendant's First Amendment rights . . . . [T]he First Amendment recognizes that an individual cannot be punished for mere membership in an organization, even if that organization has legal as well as illegal goals, unless there was a showing that the defendant specifically intended to further the organization's unlawful goals."[195] Mere espousal of views in the form of support for groups that advocate terrorism is not sufficient for RICO liability; conduct—material support as distinct from mere support—that goes beyond mere association or advocacy is sufficient to subject one's expressive activity to civil RICO liability.[196]

The court's analysis was based on clearly distinguishing mere speech and affiliation from actual conduct in support of terrorism.[197] This crucial distinction provides courts with an initial point of inquiry when determining which type of speech and association are either directly protected or which reside somewhere within the "shadow of the First Amendment."[198] In *United States v. Dellinger*, the court noted why it is important to begin with a clear distinction between protected and unprotected speech; stating its necessity

> [w]hen the group activity out of which [an] offense develops [may] be described as a bifarious undertaking, involving both legal and illegal purposes

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[191] *Marzook*, 2005 WL 3095543, at *2.
[192] *Id.* at *4.
[193] *Id.*
[194] *Id.* at *5.
[195] Zitter, *supra* note 50; *see Marzook*, 2005 WL 3095543, at *4.
[196] *Marzook*, 2005 WL 3095543, at *5.
[197] *Id.*
[198] United States v. Dellinger, 472 F.2d 340, 392 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

> and conduct, and [thus may be] within the shadow of the first amendment . . . This is . . . to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means.[199]

The *Dellinger* formulation thus points to the efficacy of employing the AMITH legal standard in conjunction with an actual conduct versus mere espousal of views/affiliation test, because the test is sensitive to First Amendment freedoms while allowing private civil RICO to operate as Congress intended—to aid in dismantling and punishing enterprises engaged in patterns of racketeering activity. Speech and association that involve the provision of material support for terrorist groups, causes, movements, etc., go beyond protected speech, and do not lie either directly within, or in the shadow of, the First Amendment. Rather, material support of terrorism constitutes conduct—active conduct that seeks to intentionally and substantively facilitate the goals of enterprises that operate and implement their agendas illegally through acts of violence and terrorism, which are thus subject to private civil RICO.

Private civil RICO does not criminalize mere membership, association, and/or advocacy on behalf of a group that embraces illegal violence and acts of terror to implement a particular religious and/or politico-ideological agenda. As mentioned above, the Court has explicitly held that the First Amendment prohibits criminal liability based on an individual's mere association with a group.[200] An individual's mere association with a group that advocates violence and acts of terrorism does not constitute support of terror for the purposes of First Amendment protection.[201] The *Marzook* court, therefore, found that association with organizations that engage in legal as well as illegal acts requires that a defendant not only associate with, but also specifically intend to support the illegal activities and goals of a particular organization.[202] As mentioned previously, "in order to impose liability on an individual for association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[203]

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[199] *Id.*

[200] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918–19 (1982).

[201] *See* United States v. Hammoud, 381 F.3d 316, 328–29 (4th Cir. 2004) ("[I]t is a violation of the First Amendment to punish an individual for mere membership in an organization that has legal and illegal goals.").

[202] *Marzook*, 2005 WL 3095543, at *4.

[203] Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1022 (7th Cir. 2002).

Ascertaining what constitutes support of terrorism thus involves distinguishing between speech and conduct and the manifestation of specific intent to actually further those organizations' goals of illegally perpetuating and engaging in acts of terrorism, which converts protected speech into unprotected speech subject to civil RICO. When subject to civil RICO liability, it should be clear that a defendant's speech and affiliation with groups that are engaged in or support terrorism is not being criminalized; rather, conduct that specifically intends to further and facilitate the carrying out of terrorism is what is being punished.[204] Chilling of First Amendment freedoms thus occurs in "situations where the government seeks to impose liability on the basis of association alone, i.e., on the basis of membership alone or because a person espouses the views of an organization that engages in illegal activities."[205] This is not the case in the application of civil RICO to material support of terrorism. Speech and association that materially supports terrorism via active conduct is not mere membership, but active participation that is actually malicious and poses an imminent threat of immediate harm.

Conduct is the key. Taking the step of providing actual material support for acts of violence and terrorism constitutes conduct, and that is what civil RICO punishes. Additionally, an agreement to intentionally carry out illegal conduct within protected speech activity, to hide illegal conduct within legitimate protected speech activity, is covered in the conspiracy provision of RICO.[206] RICO's conspiracy provision is informative for this discussion because it bases liability on an agreement to engage in conduct as opposed to mere espousal of views and/or affiliation.[207] As noted by the court in *United States v. Glecier*,

> Section 1962(c), the familiar "substantive" RICO provision, criminalizes the participation in the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity. Section 1962(d), like all conspiracy provisions, has as its target the act of agreement—here, the agreement to engage in activity[, i.e., conduct,] that implicates section 1962(c).[208]

Affiliation and espousal of politico-ideological views that support terrorism is protected speech and association, conduct that acts upon

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[204] *See Marzook*, 2005 WL 3095543, at *4–7.
[205] *Boim*, 291 F.3d at 1026.
[206] 18 U.S.C. § 1962(d) (2006).
[207] *Compare* 18 U.S.C. § 1962(d), *with* 18 U.S.C. § 1962(c) (2006).
[208] United States v. Glecier, 923 F.2d 496, 500 (7th Cir. 1991).

such views is not. Under the AMITH standard, courts can identify which category of analysis applies.

2. *United States v. Warsame*: Refining the Notion of Material Support

The court's analysis in *United States v. Warsame*[209] provides additional clarity for developing a framework to determine when speech and association are protected from private civil RICO liability. As in the case of *Marzook*, the *Warsame* court also analyzed when mere espousal of views and affiliation become material support and thus conduct facilitating the illegal goals of terrorist organizations.[210] The court's analysis of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[211] provides a viable and clear basis, within the context of civil RICO, to determine when speech and association morph into material support of terrorism, i.e., conduct facilitating terrorism.[212] Under AEDPA, "material support or resources" is defined as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[213]

The AEDPA definition, when applied to material support of terrorism, is useful for fleshing out a framework for adjudging whether or not speech is subject to private civil RICO, because it builds upon the dichotomy of protected speech/association is not equivalent to unprotected support/conduct. While the AEDPA definition does not need to be applied as is, the definition, at a minimum, does provide an exemplar of a standard that adheres to the distinction between speech and conduct, in that material support is viewed as involving one having specific intent to facilitate and further a terrorist enterprise's illegal goals through conduct.

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[209] United States v. Warsame, 537 F. Supp. 2d 1005 (D. Minn. 2008).

[210] *Id.* at 1014.

[211] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1250 (1996) (codified at 18 U.S.C. § 2339B(a)(1) (2012)).

[212] *Warsame*, 537 F. Supp. 2d at 1010.

[213] 18 U.S.C. § 2339B(b)(1).

The *Warsame* court's analysis of 18 U.S.C. § 2339(B)(a)(1)[214] also aids in further clarifying a framework for analyzing and adjudging whether speech and association are exempt from civil RICO liability. In particular, the court addresses the issues of potential criminalization (chilling) of First Amendment freedoms vis-à-vis association and expressiveness via financial contributions to organizations (i.e., the equivalent of RICO enterprises) that engage in legal advocacy and implementation of illegal acts of violence and terrorism to obtain religious and/or politico-ideological goals.[215] The Court's First Amendment jurisprudence has consistently held that "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not."[216] Civil RICO is not an exception. Civil RICO does not chill—does not criminalize—speech and association. Indeed, it would be far-fetched to claim that Congress intended civil RICO to chill First Amendment freedoms. It is plausible, however, to contend that Congress intended to punish criminal behavior (conduct) and compensate victims of illegal conduct under § 1962(c). This being the case, mere expression, espousal of views, affiliation, and advocacy can be carried out on behalf of terrorist groups; private civil RICO does not chill First Amendment freedoms to associate with and advocate on behalf of terrorist organizations—free speech and association allow membership in terrorist groups or groups that advocate terrorism as part of a politico-ideological program, and allows espousal of or sympathizing with the views of such organizations, however unpopular the views might be. Material support of terrorism, however, is equivalent to conduct, and thus "does not implicate associational or speech rights."[217]

As far as financial contribution being an expressive component of speech and association, the *Warsame* court found that support of terrorism in the form of action (conduct) is not entitled to protection.[218] This rationale also supports the contention that civil RICO can be reconciled with First Amendment freedoms. Financial contributions to political organizations generally receive heightened First Amendment

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[214] A person "must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism." *Warsame*, 537 F. Supp.2d at 1010–11 (quoting 18 U.S.C. § 2339B (a)(1)).

[215] *Id.* at 1013–15.

[216] Healy v. James, 408 U.S. 169, 192 (1972).

[217] Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1026 (7th Cir. 2002).

[218] *Warsam*e, 537 F.Supp.2d at 1015.

protection because, as the *Warsame* court notes, "they have an expressive component and demonstrate the donor's association with the candidate or organization."[219] There is, however, a qualification; i.e., contributions are deemed protected speech only when made to an organization "whose overwhelming function [is] political advocacy."[220] Arguably, financial support of terrorist groups—even those with a political component—are not to be considered advocacy groups with an "overwhelming" (legal) political function in that acts of violence and terrorism are patently illegal, criminal, and thus not entitled to protection like legitimate speech.[221] The *Warsame* court's rationale that financial contributions to terrorist organizations that openly and actively advocate and carry out acts of violence and terrorism is not protected speech, but rather conduct that invokes the intermediate scrutiny standard articulated in *United States v. O'Brien*.[222] Thus, in the case of permitting civil RICO to potentially negatively impact First Amendment freedoms, speech and association should be subject to civil RICO when: (1) the government's interest in preventing the spread of terrorism is substantial, and (2) the government's interest in preventing terrorism does not directly relate to, or target, free speech and association, with the caveat that "any incidental restrictions on . . . freedom of expression [should thus be] no greater than necessary to further the government's substantial interest" in combating terrorism.[223]

The Court's reasoning in *Dennis v. United States*, which addressed the issue of conspiracy in light of the First Amendment, further bolsters the *Warsame* court's reasoning.[224] In *Dennis*, the concurrence noted that:

> The defense of freedom of speech . . . has often been raised . . . because . . .

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[219] *Id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 16–17 (1976) (per curium); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 189–94 (2003).

[220] Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134–35 (9th Cir. 2000).

[221] *See, e.g.*, United States v. Hammoud, 381 F.3d 316, 328 n.3 (4th Cir. 2004) (rejecting the argument that financial contributions to Hizballah are protected as political speech because Hizballah is not a political advocacy group, but rather a criminal terrorist organization).

[222] *Warsame*, 537 F. Supp. 2d at 1015. As the *Warsame* court noted, under the Court's *O'Brien* standard of review, a statute is valid if

> it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

[223] *Warsame*, 537 F. Supp. 2d at 1016.

[224] *See* Dennis v. United States, 341 U.S. 494, 575–76 (1951) (Jackson, J., concurring).

> it usually consists of words written or spoken . . . . Communication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved. . . . " . . . But it has never been deemed an abridgement of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against . . . conspiracies deemed injurious to society."[225]

Material support of terrorism, as in the case of conspiracies to commit crimes, is not only actually malicious, but also poses an imminent threat of harm, and is thus quite "injurious to society." Furthermore, the courts have not allowed claims of freedom of speech to insulate entities from the criminal (and civil) implications and consequences that stem from speech and association being converted into material support, i.e., conduct, that facilitates acts of violence and terrorism.

3. *Savage v. Council on American-Islamic Relations*: Balancing Competing Interests

The last case to be analyzed is *Savage v. Council on American-Islamic Relations, Inc.*[226] The *Savage* court's logic goes furthest in substantively addressing critics' concerns about the potential voraciousness of civil RICO and First Amendment freedoms. While the *Marzook* and *Warsame* courts addressed the chilling of such freedoms within a criminal context, providing insight into constructing a framework for identifying what type of speech is or is not subject to private civil RICO liability, the court in *Savage* directly addresses the issue within a civil RICO context. In *Savage*, the court was confronted with the issue of sustaining a private civil RICO suit.[227] At the outset of its opinion, the court noted the very serious First Amendment implications of the private civil RICO suit.[228] The court found that nearly all of defendants' activities implicated in the RICO charge—in particular, public use and critique of the plaintiff's public radio commentary (which accused defendant of being a terrorist organization) to counter the charges levied by plaintiff—"are related to speech and thus may have First Amendment protection. . . . *the gravamen of*

[225] *Id.* (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

[226] Savage v. Council on Am.-Islamic Relations, Inc., No. C 07–6076 SI, 2008 WL 2951281 (N.D. Cal., July 25, 2008).

[227] *Id.* at * 2.

[228] *Id.* at *10.

plaintiff's dispute is with the ideas that defendants may or may not espouse. As plaintiff should no doubt be aware, this is fertile First Amendment territory . . . ."[229] The court followed Justice Souter's admonition in *Scheidler*, with the result being that private civil RICO was found not to apply to protected speech.[230]

The *Savage* court was sensitive to, and took into account, the First Amendment issues that the initiation of a civil RICO suit implicated.[231] By engaging in an initial First Amendment analysis, the court was able to immediately identify and quash the misuse of civil RICO to impinge First Amendment freedoms of speech. Upon a careful analysis of the facts, the court was acutely aware that the plaintiff was employing civil RICO in such a way as to chill protected speech. Application of the AMITH standard, in conjunction with determining whether speech is formally protected (mere speech/affiliation) or is not protected (actual material support/conduct) further bolsters an operative framework by which the courts can reconcile civil RICO and First Amendment freedoms. In *Savage*, defendant's speech was deemed not actually malicious and not posing an imminent threat of harm to plaintiff or the public.[232] The court's rationale and subsequent dismissal of the suit supports the contention that private civil RICO and the First Amendment can be reconciled. *Savage* directly addresses and dispenses with fears of civil RICO as a voracious monster with illimitable application.

In *Savage*, the court found that the suit at bar presented the following First Amendment issue; i.e., the issue of *Noerr-Pennington* protection vis-à-vis freedom of speech.[233] The court found that "[a]lthough the Supreme Court has not extended the *Noerr-Pennington* doctrine to speech-related activities other than petitioning, the doctrine

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[229] *Id.* at *10 (emphasis added).
[230] *Savage*, 2008 WL 2951281, at *12.
[231] *Id*. at *10.
[232] *Id*. at *12.
[233] As the *Savage* court noted:

> "The Supreme Court has long recognized that for the Petition Clause [of the First Amendment] to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way." This doctrine is referred to as the *Noerr-Pennington* doctrine, which has its origins in the Supreme Court's decision that a party could be immune from liability under the Sherman Act for efforts to influence the legislative or executive branches of government.

Id. at *11 (quoting Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1059 (9th Cir. 1998)) (citing E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965)).

demonstrates that defendants may use the First Amendment as a shield to defend against claims alleging antitrust and civil RICO violations."[234] The First Amendment may be used as a "shield" to protect parties engaged in "petitioning" via civil lawsuits and pre-litigation demand letters.[235] In *Savage*, the court found that applying civil RICO would indeed chill the defendant's freedom to respond to the plaintiff's initial allegations of it being a terrorist organization by filing lawsuits.[236] "To the extent the actions complained of involve defendants' filing of lawsuits . . . defendants are entitled to *Noerr-Pennington* protection. . . . [a] RICO claim may not be sustained on the basis of [defendant filing] lawsuits and pre-litigation demand letters."[237]

Like the *Marzook* and *Warsame* courts, the *Savage* court, to some degree, addressed issues of free speech and association by distinguishing protected speech from unprotected conduct, and then determining whether that conduct took place while furthering a terrorist organization's illegal goals. Furthermore, the *Savage* court also found that the injury complained of was based entirely on protected speech, and thus the plaintiff's suit was dismissed.[238] The court's rationale thus directly addresses the critics' allegations that civil RICO should be severely restricted due to the threat it poses to First Amendment freedoms.

> Plaintiff's injury is entirely founded upon defendants' speech-related activities. It appears beyond dispute that plaintiff is a public figure and that plaintiff was discussing matters of public concern when he discussed the role of Islam in the United States and whether those of Islamic faith should be permitted to emigrate here.[239]

If the AMITH standard of review is added to the courts' analysis pertaining to First Amendment freedoms and private civil RICO, a framework begins to emerge that reconciles the purpose, scope, and meaning of RICO with the protection of First Amendment freedoms from being chilled.

Lastly, it is also important to note that civil RICO, despite any attempts to construe it as such, is not a punitive measure. The courts

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[234] *Savage*, 2008 WL 2951281, at *12.
[235] *Id.* at *11.
[236] *Id.* at *11–12.
[237] *Id.* at *11.
[238] *Savage*, 2008 WL 2951281, at *12.
[239] *Id.*

have found that part of civil RICO's purpose—which, along with First Amendment freedoms, is fundamental to American law—is to compensate parties that have suffered harm because of the defendant's illegal conduct.

> Although the treble damages provisions of a civil RICO suit may suggest a punitive element, the overriding purpose of RICO is to provide a remedy to persons injured as a result of racketeering activity. . . . [C]ivil RICO recovery runs to a private individual, and the mere inclusion of treble damages within a statutory scheme does not operate to make it punitive.[240]

The Court, citing hearings held in the House of Representatives, has explicitly stated that the "legislative history of § 1964(c) reveals [an] emphasis on the remedial role of the treble-damages provision . . . 'those who have been wronged by organized crime should at least be given access to a legal remedy.' The policing function of § 1964(c), although important, was a secondary concern."[241]

The remedial nature of private civil RICO, although tinctured with a degree of "prosecutorial" power, is nevertheless non-punitive in nature, and thus poses much less of a threat to First Amendment freedoms of speech and association as critics allege. In enacting RICO, the Court has found that Congress intended to augment and enhance the government's capacity to dismantle enterprises that engage in racketeering activity via civil RICO by vesting prosecutorial power in private parties victimized by racketeering enterprises. This is the case because civil RICO meets Congress'

> objective of encouraging civil litigation to supplement Government efforts to deter . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, "private attorneys general," dedicated to eliminating racketeering activity. . . . [T]reble damages is accordingly justified by the expected benefit of suppressing racketeering activity . . .[242]

VI. CONCLUSION

When examining the liberty-security nexus, each dimension is

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[240] First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1122 (D.D.C. 1996).

[241] Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 240–41 (1987) (citations omitted) (quoting Hearings on S. 30 and Related Proposals before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970)).

[242] Rotella v. Wood, 528 U.S. 549, 557–58 (2000) (footnote omitted) (citations omitted).

revealed to be part and parcel immanent in Order. Each is premised on opposing, but fundamental, aspects of a democratic society. Law is an instrumentality that enables freedom and order to coexist in the same space. Civil RICO values security, order, and public safety. Additionally, civil RICO illustrates the law's ability to reconcile competing societal values. In light of the Court's initial construction of RICO, subsequent RICO jurisprudence, and its overall First Amendment jurisprudence, civil RICO can coexist and be reconciled with First Amendment freedoms of speech and association. In sum, conduct that supports terrorism is unprotected, and is distinct from mere espousal of views and affiliation, which is protected speech. When one gives up on speech and adopts violence as a primary means of "expressing" an ideology, political position, and/or worldview, then any protections afforded speech and expression are forfeited.[243] The courts (and the Court in particular) have interpreted the First Amendment as protecting lawful speech. Lawful speech, generally speaking, has been defined and characterized as encompassing non-violent conduct. Such speech does not fall within the purlieus of civil RICO.[244] Violent conduct committed in the name of speech, expression, do not fall within the protective zone of First Amendment freedom of speech and expression.[245]

Civil RICO thus applies to conduct in support of terrorism, and thus does not pose a prima facie threat to First Amendment freedoms. Speech has to be actually malicious and must pose an imminent threat of harm; i.e., speech must manifest itself into conduct to be subject to civil RICO. Deterring and punishing the material support of terrorism is in line with the scope, meaning, and purpose of private civil RICO. With acts of terrorism being made part of criminal RICO predicate acts, the courts have an incentive to reconcile private civil RICO with the First Amendment in a uniform, clear, efficient, and constitutionally acceptable manner. As noted in *United States v. Al-Arian*, the Court has declared that protecting society is "of great importance," and that "other courts have concluded that the government's interest in stopping the spread of . . . terrorism is 'paramount' or 'substantial' . . . stopping the spread of terrorism is not just a sufficiently important governmental

[243] *See* Fay Clayton & Sara N. Love, *NOW v. Scheidler: Protecting Women's Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 993–94 (1999) (referring to *Scheidler*).

[244] *See* Alexander v. United States, 509 U.S. 544, 555 (1993) (stating that RICO does not prohibit speech that is constitutionally protected).

[245] *See* Wisconsin v. Mitchell, 508 U.S. 476, 483–84 (1993) (conduct that causes harm distinct from its communicative aspect does not receive constitutional protection).

interest, but is a compelling governmental interest."[246] Liberty need not be adversely affected by security. Thus, as in the case of criminalization, subjecting facilitators of terrorism to civil liability enhances and reifies RICO's overall efficacy regarding the goal of dismantling enterprises that pose a profound threat of harm to public safety and in compensating the victims of illegal acts of terrorism.

[246] United States v. Al-Arian, 308 F. Supp. 2d 1322, 1343 (M.D. Fla. 2004).