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American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control

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American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control

Benjamin Levin*

In an effort to reexamine legal and political decisions about criminalization and the role of the criminal law in shaping American markets and social institutions, this Article explores the ways in which criminal conspiracy laws in the United States have historically been used to subdue nonstate actors and informal markets that threatened the hegemony of the state and formal market. To this end, the Article focuses primarily on the Racketeer Influenced and Corrupt Organizations Act (RICO) as illustrative of broader trends in twentieth-century criminal policy. Enacted in 1970, RICO provides criminal sanctions for individuals engaged in unacceptable organized activities and has been used to prosecute Wall Street power players, labor leaders, activists, and others whose concerted actions violated the codes of the marketplace. Despite the broad scope of RICO's application, scholars who have written about RICO's passage have focused on the drafters' stated intent to target "organized crime." In these accounts, the specter of organized crime has generally been treated as a threat in a vacuum. I depart from traditional RICO scholarship by resituating the passage of RICO and subsequent RICO prosecutions in a cultural and historical narrative of politically inflected conspiracy prosecutions. In doing so, I suggest that RICO has created powerful socio-legal axes between lawful collectives and outlaws that map societal actors according to their adherence to a set of market-based norms.

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INTRODUCTION

With these omens, O Catiline, begone to your impious and nefarious war, to the great safety of the republic, to your own misfortune and injury, and to the destruction of those who have joined themselves to you in every wickedness and atrocity. Then do you, O Jupiter . . . repel this man and his companions from your altars and from the other temples — from the houses and walls of the city, — from the lives and fortunes of all the citizens; and overwhelm all the enemies of good men, the foes of the republic, the robbers of Italy, men bound together by a treaty and infamous alliance of crimes, dead and alive, with eternal punishments.¹

If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States.²

A “conspiracy” has traditionally been defined as a “combination of persons for an evil or unlawful purpose.”³ As a matter of law, this definition appears to suggest a rather straightforward two-part test: (1) a conspirator must be a member of a “combination,” and (2) the combination must be directed toward some “evil or unlawful purpose.”⁴ Read critically, this definition assumes much more than it illuminates and leaves us with two deeper questions: (1) what constitutes a combination, and (2) how do we identify an evil or unlawful purpose? Perhaps a “combination” is simply two or more people,⁵ and perhaps “evil or unlawful” is simply a designation announced by the lawmakers. Or, as the tension between this Article’s two epigraphs is meant to suggest, perhaps these two definitions are necessarily contingent upon the realities of the dominant political economy and upon

¹ Marcus Tullius Cicero, *The First Oration of M. T. Cicero Against Lucius Catilina*, in 2 THE ORATIONS OF MARCUS TULLIUS CICERO 278, 291 (C. D. Yonge trans., H.G. Bohn 1856).

² CLARENCE DARROW, THE STORY OF MY LIFE 64 (Charles Scribner’s Sons 1932).

³ OXFORD ENGLISH DICTIONARY (2d ed.), available at <http://www.oed.com>; see also BLACK’S LAW DICTIONARY 351 (9th ed. 2009) (“Conspiracy, *n.* (14c) An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose. 18 USCA § 371.”).

⁴ OXFORD ENGLISH DICTIONARY (2d ed.), available at <http://www.oed.com>.

⁵ See, e.g., HOMERSHAM COX, THE INSTITUTIONS OF THE ENGLISH GOVERNMENT 275 (1863), quoted in OXFORD ENGLISH DICTIONARY (2d ed.), available at <http://www.oed.com>.

decisions about how society should be structured and what role criminalization should play in that structuring.⁶

For Cicero, Roman consul in 63 B.C.E., the laws of conspiracy were powerful weapons against opponents of the status quo — a means of preserving order and stability in the face of an unruly challenge to the current regime and an appropriate vehicle to express opprobrium for antisocial behavior.⁷ For Clarence Darrow, however, who represented Eugene Debs and other labor activists and organizations in the late nineteenth and early twentieth centuries, the laws of conspiracy were a pretextual assault on dissidents, a means of using state violence to subdue marginal voices and political alternatives.⁸ Thus, depending on how we conceive of alleged conspirators and the legitimacy of state authority and market norms, the laws of conspiracy can represent either the polity's means of self-preservation or the dominant class's weapon of subjugation.

Using these conflicting framings of conspiracy law as a starting point, this Article will explore the ways in which criminal conspiracy laws in the United States have historically been used to subdue nonstate actors and informal markets that threatened the hegemony of state-supporting and state-derived formal markets and formal market actors.⁹ Criminal law has distinguished between collective actors that threaten the monolith of state-sanctioned market capitalism (organized crime, certain forms of organized labor, and unrestrained corporate actors) and those collective actors that exist in symbiosis with both the state and the formal market (corporate actors and some types of organized labor).¹⁰ This Article does not assert that formal markets are an inherently negative force and informal ones inherently posi-

⁶ Cf. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 81–87, 97–101 (1984) (emphasizing the importance of “contingency” to critical legal historical projects).

⁷ ANTHONY EVERITT, *CICERO: THE LIFE AND TIMES OF ROME'S GREATEST POLITICIAN* 87–112 (2001).

⁸ DARROW, *supra* note 2, at 66–73.

⁹ As used in this Article, the term “formal markets” refers to systems of transactions among legally recognized actors for the purchase or sale of legally approved goods or services. The term “informal markets” refers loosely to transactions involving either (1) otherwise uncommodified or unlawful/untaxed goods or services, or (2) otherwise unlawful actors who are not legally recognized. These definitions are meant to be somewhat fluid and uncertain, as an element of this Article will be an exploration of the vagueness and malleability of the distinction. For more on the informal/formal distinction and its relationship to the political economy of capitalist nations, see generally Michael Denning, *Wageless Life*, *NEW LEFT REV.*, Nov.–Dec. 2010, at 79. For a more general explanation of the “informal sector,” see Keith Hart, *Informal Income Opportunities and Urban Employment in Ghana*, 11 *J. MOD. AFR. STUD.* 62 (1973).

¹⁰ Judge Richard Posner has famously argued that “[t]he major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange — the ‘market[]’ . . .” Richard Posner, *An Economic Theory of the Criminal Law*, 85 *COLUM. L. REV.* 1193, 1195 (1985); see also BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 147 (2011) (discussing Judge Posner’s theory of criminal law and explaining that “[c]riminal activity is best understood as an end run around the market, and criminal law is therefore best understood as that which prevents this kind of market evasion”).

tive or even that it is possible to classify all actors and transactions as belonging to the formal or informal spheres. Rather, the Article argues that the power of criminal conspiracy law is to legitimate certain transactional and organizational models precisely *by* delegitimizing and exceptionalizing other, less state-friendly ones, and thereby this Article challenges the formal/informal distinction — the line between legal and illegal or extralegal systems of exchange.¹¹ That is, the criminal syndicate is no more a natural phenomenon than is the state or state-sanctioned collective unit; the two are supplemental — there is no *inlaw* without the *outlaw* and vice versa.¹²

This Article articulates the relationship between criminal conspiracy law and the preservation of the state and the state/market nexus in the specific context of the Racketeer Influenced and Corrupt Organizations Act¹³ (RICO). Enacted as Title IX of the Organized Crime Control Act of 1970,¹⁴ RICO provides broad criminal sanctions for individuals engaged in unacceptable organized activities. The statute has been used to prosecute Wall Street power players,¹⁵ labor leaders,¹⁶ and others whose concerted actions

¹¹ On legitimation, see RAYMOND GEUSS, *THE IDEA OF CRITICAL THEORY* (1981):

To say that the members of the society take a basic social institution to be “legitimate” is to say that they take it to “follow” from a system of norms they all accept . . . a set of general beliefs (normative beliefs and other kinds of beliefs) which are organized into a world-picture which they assume all members of the society hold. So a social institution is considered legitimate if it can be shown to stand in the right relation to the basic world-picture of the group.

Id. at 59; see also E.P. THOMPSON, *WHIGS AND HUNTERS* 258–69 (1975); ROBIN WEST, *NARRATIVE, AUTHORITY, & LAW* 5 (1993); LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127 (Ben Brewster trans., 1971); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 *MICH. L. REV.* 1 (2004); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *HARV. L. REV.* 355, 429–32 (1995); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 589–90 (1984).

¹² See JACQUES DERRIDA, *OF GRAMMATOLOGY* 141–64 (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1st Am. ed. 1976) (1967) (outlining the theory of supplemental relationships, which refers to the notion that certain words and theories do not have independent meanings, but instead derive their meanings from *what they are not*).

¹³ 18 U.S.C. §§ 1961–68 (2006).

¹⁴ Pub. L. No. 91-452, 84 Stat. 941 (1970).

¹⁵ See, e.g., *United States v. Regan*, 726 F. Supp. 447 (S.D.N.Y. 1989), *aff'd in part, vacated in part on other grounds*, 937 F.2d 823 (2d Cir. 1991).

Throughout this period Michael Milken was attempting to resolve the criminal charges the government had brought against him. On April 24, 1990 he pled guilty to six felony charges, including conspiracy to violate the federal securities laws, securities fraud, mail fraud, and assisting in the filing of a false tax return. In conjunction with this plea, Milken agreed to pay \$400 million to a restitution fund created in settlement of the Securities and Exchange Commission’s (SEC) civil enforcement action, and a \$200 million criminal fine.

Commercial Union Assurance Co. v. Milken, 17 F.3d 608, 611 (2d Cir. 1994).

¹⁶ See, e.g., *United States v. Browne*, 505 F.3d 1229 (11th Cir. 2007); *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006); *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997);

violated the codes of the marketplace.¹⁷ I have chosen to focus primarily on RICO as opposed to other statutory or common law doctrines outlawing concerted action because, due to its explicit relationship to the market, it provides a natural point of entry into an exploration of the political economy of criminal conspiracy law. I argue that, rather than serving as the exception to the general principles of criminal law, RICO serves as an illustration of how criminal law, especially conspiracy law, structures political and economic institutions.

As the legislative history suggests, RICO was passed to aid in “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”¹⁸ Because of its continually expanding scope, frequent use, and the unprecedented power that it gives to federal prosecutors, RICO has since garnered significant scholarly attention.¹⁹ Some commentators have praised the statute as an effective means of pursuing otherwise unassailable bad actors,²⁰ while others have been more critical of the law as an unrestrained departure from traditional principles of criminal punishment — a blunt and imprecise instrument for assigning culpability that eviscerates procedural protections and concentrates too much discretion in the hands of U.S. Attorneys.²¹ Additionally, a certain amount of scholarly attention has been paid to the scope of RICO and whether it was in fact intended to be used to prosecute criminal organiza-

Ehren Park Reynolds, *Protecting the Waterfront: Prosecuting Mob-Tied Union Officials Under the Hobbs Act and RICO After Scheidler*, 10 BOALT J. CRIM. L. 2 (2005).

¹⁷ See, e.g., *United States v. Fabel*, 312 F. App'x. 932 (9th Cir. 2009) (upholding a RICO conviction in part, based on the unlawful sale of motorcycle parts); *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995) (upholding RICO convictions based on the sale of and conspiracy to sell and import “contraband cigarettes”); *United States v. Stephens*, 46 F.3d 587 (7th Cir. 1995) (upholding the conviction of a police officer who had taken part in the operation of an unlawful gambling, drug dealing, and alcohol distribution ring).

¹⁸ S. REP. NO. 91-617, at 76 (1969).

¹⁹ See, e.g., Samuel A. Alito, Jr., *Racketeering Made Simple(r)*, in *THE RICO RACKET* (Gary L. McDowell ed., 1989); Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035 (1990); Benjamin M. Dooling & Marissa A. Lalli, *Federal Criminal Conspiracy*, 47 AM. CRIM. L. REV. 561 (2010); James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229 (2003); Scott Paccagnini, *How Low Can You Go (Down the Ladder): The Vertical Reach of RICO*, 37 J. MARSHALL L. REV. 1 (2003); Adam B. Weiss, Note, *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 (2010); Suzanne Wentzel, National Organization for Women v. Scheidler: *RICO a Valuable Tool for Controlling Violent Protest*, 28 AKRON L. REV. 391 (1995).

²⁰ See, e.g., JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* xxiv (2006); Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 281–84 (2004).

²¹ See, e.g., Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661–64 (1987); William Roquemore Taylor, Comment, *Federalizing Street Crime: The Improper Broadening of RICO's “Affecting Commerce” Requirement*, 46 HOUS. L. REV. 139, 140–42 (2009).

tions (as it has been) or only to prosecute criminal actors who had infiltrated “legitimate” businesses.²²

This Article takes a different tack insofar as it treats RICO as exemplary of criminal law generally and addresses the fundamental distinction between legitimate market actors and those criminal elements identified by RICO as subverters of legitimate market transactions. The pattern of federal RICO prosecutions and the cultural and historical context of the law’s passage suggest that RICO specifically and criminal conspiracy generally have served as effective means of vilifying extramarket transactions and social structures that might challenge state authority. That is, the stigmatizing vehicle of criminal law has served to define and emphasize distinct parameters for the ostensibly free market and for its relationship to the state.²³

Such a historicized treatment is necessary because scholarship in this area has often taken as a given that there is a clear distinction between the legitimate and the corrupt, the racketeer and the capitalist. The underlying attitude of the sometimes-conflicting scholarly discourse is that RICO specifically and the war on organized crime generally had admirable goals of protecting law-abiding citizens from dangerous extralegal or illegal actors. By resituating the passage of the Act and subsequent RICO prosecutions in a broader cultural and historical framework, this Article challenges that attitude and raises a fundamental set of questions about the criminal law as a tool for social structuring. Who does the law protect, and from whom are they being protected? If the law is meant to ensure public safety, then who or what is “the public”? This approach shows that RICO — like conspiracy law generally — has functioned to create axes between legitimate and illegitimate, and to map societal actors according to their adherence to a set of market-based norms.

This Article addresses the political economy of RICO in three, roughly chronological parts. Part I provides a background on the political dimensions and rhetoric associated with criminal conspiracy law in the United States prior to RICO’s passage. Common law criminal conspiracy cases from this period demonstrate that socially, economically, and politically marginalized groups (particularly communists and other opponents of Western market capitalism) have been targeted for conspiracy prosecutions. These cases — particularly the early labor conspiracy cases — introduce the concept of non-corporate concerted action by individuals as a crime against society.²⁴

²² See, e.g., Alito, *supra* note 19, at 1–3; Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819 (1996).

²³ See generally HARCOURT, *supra* note 10 (examining the relationship between ostensibly free markets and expansive criminal law).

²⁴ See CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 149 (1993); *People v. Faulkner* (N.Y. Ct. Oyer & Terminer 1836), *reprinted in* 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 315, 330–31 (John R. Commons et al. eds., 1910) [hereinafter 4 A DOCUMENTARY HISTORY]; *Commonwealth v. Grinder* (Pa. Rec’s Ct. 1836), *reprinted in* 4 A DOCUMENTARY HISTORY, *supra*, 335, 336 (identifying con-

Part II situates the passage of RICO in its historical context using congressional records and contemporary press coverage. This Part addresses the dominant narratives about the clearly defined legislative purposes behind RICO. Although RICO was in fact geared towards controlling violent actors, the war on organized crime emerged from a more complex set of circumstances. Using both the historical background from Part I and mass media sources as markers of public discourse, this Part suggests that RICO's broad-sweeping assault on collective actors can be seen as part of an alternative narrative rooted in both Cold War-era fear of political radicalism and the increasing power of corporate America, which sought to privilege and protect capitalism. To this end, the Part concludes that RICO and criminal conspiracy law contributed to the erosion of the increased class consciousness of New Deal-era America.²⁵

The third Part presents an overview of RICO's application. By examining how prosecutors select cases and which types of activity give rise to RICO prosecutions, this Part challenges the common perception that "organized crime" is necessarily violent and easily distinguishable from lawful, formal business dealings. In highlighting the way that RICO has contributed to bright-line distinctions between formal and informal, socially beneficial and socially detrimental, I will emphasize a critical understanding of the criminal justice system as inextricable from the market, which should, I hope, raise an important series of normative questions about the political economy of criminalization. By raising these questions in the context of RICO, I hope to suggest a broader critique of strands of criminal law scholarship and policymaking that embrace or regrettably accept widespread criminalization and incarceration out of an oversimplified understanding of clear, apolitical moral axes that distinguish between the socialized good and the sociopathic evil.

I. COLLECTIVE ACTION PROBLEMS: UNIONS, COMMUNISTS, AND OTHER CONSPIRACIES AGAINST THE MARKET

The conspiracy prosecution plays a powerful role in American history as a locus for suppressing dissent, political opposition, and socially unacceptable viewpoints. As Justice Jackson stated in his concurrence in *Krulewitch v. United States*:

The crime [of conspiracy] comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of

spiracies "against the public" as those that "violate public morals, insult public justice, destroy public peace, or affect public trade or business"); *Commonwealth v. Morrow* (Pa. Ct. Quarterly Sessions 1815), reprinted in 4 A DOCUMENTARY HISTORY 15, 86 ("Combinations amongst master workmen, in any of the mechanical arts, tending to . . . restrain the entire freedom of trade, would be equally reprehensible . . .").

²⁵ See MICHAEL DENNING, *THE CULTURAL FRONT: THE LABORING OF AMERICAN CULTURE IN THE TWENTIETH CENTURY XVI-XX* (1997).

treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. "Privy conspiracy" ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the *coup d'état*, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history.²⁶

Furthermore, like the crime of attempt, conspiracy does not require a criminal defendant to have committed a physical, unacceptable act or brought an unlawful plan to fruition.²⁷ Rather, conspiracy law is rooted in the defendant's complicity in some broader scheme or project.²⁸ Where U.S. legal culture (particularly until the rise of the New Deal and post-New Deal legal orders) generally evinced a focus on the individual as opposed to the collective,²⁹ criminal conspiracy law existed as a rare sphere in which collective action was explicitly regulated and in which individual rights were sub-

²⁶ *Krulewitch v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring) (footnote omitted). Justice Jackson continues:

Attribution of criminality to a confederation which contemplates no act that would be criminal if carried out by any one of the conspirators is a practice peculiar to Anglo-American law. "There can be little doubt that this wide definition of the crime of conspiracy originates in the criminal equity administered in the Star Chamber." In fact, we are advised that "[t]he modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the court of Star Chamber." The doctrine does not commend itself to jurists of civil-law countries, despite universal recognition that an organized society must have legal weapons for combatting organized criminality. Most other countries have devised what they consider more discriminating principles upon which to prosecute criminal gangs, secret associations and subversive syndicates.

Id. at 450 (footnotes omitted).

²⁷ Compare MODEL PENAL CODE § 5.01 (1962) (criminal attempt), with MODEL PENAL CODE § 5.03 (1962) (criminal conspiracy).

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

MODEL PENAL CODE § 5.01.

²⁸ The Court in *Krulewitch* describes the unique character of conspiracy crimes:

The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid . . . because it consists primarily of a meeting of minds and an intent. . . . Attribution of criminality to a confederation which contemplates no act that would be criminal if carried out by any one of the conspirators is a practice peculiar to Anglo-American law.

Krulewitch, 336 U.S. at 446–50 (Jackson, J., concurring) (footnotes omitted).

²⁹ See *Lochner v. New York*, 198 U.S. 45 (1905); *Vegeahn v. Guntner*, 44 N.E. 1077, 1078 (Mass. 1896) (emphasizing the importance of individual rights at the expense of collective worker action in the context of a labor dispute); see generally DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 1850–1940* (1975).

sumed in a broader concern about collective purposes.³⁰ As a result, conspiracy laws cast a wider net than other common law crimes, encompassing not only those whose bad actions satisfy traditional justifications for punishment as a matter of *actus reus*, but also those who have failed to act as agents of the state in discouraging or stopping the bad acts or bad thoughts of another.³¹

With this understanding of conspiracy law as a broad-reaching and malleable terrain for prosecution as a guide, this Part will provide a brief overview of the ways in which conspiracy law prior to RICO's enactment proved to be a particularly politicized institution. I do not intend to provide a comprehensive history of criminal conspiracy law. There is already a rich scholarly literature on nineteenth-century labor conspiracies and the more explicitly "political" conspiracies addressed in this Part.³² Instead, this Part roughly outlines the socio-legal conception of conspiracy as contingent on a range of cultural, political, and economic conditions.³³ By emphasizing the political valence of conspiracy prosecutions from the early nineteenth century through the dawn the Cold War, I suggest that we should view RICO not only as a broad statute destined to join earlier conspiracy doctrines as a "darling" for prosecutors,³⁴ but also as a statute that cannot and should not be divorced from conspiracy law's long history as a vehicle by which politi-

³⁰ See generally *Pinkerton v. United States*, 328 U.S. 640 (1946) (treating members of a conspiracy as vicariously liable for each other's actions and *mens rea*, even in the absence of evidence suggesting an agreement to commit specific acts); TOMLINS, *supra* note 24.

³¹ See, e.g., MODEL PENAL CODE § 5.03(6) ("It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."); *id.* at § 5.03(7)(c) ("[I]f an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein."); see generally *Pinkerton*, 328 U.S. at 640; TOMLINS, *supra* note 24.

³² On labor conspiracies, see generally 1 JOHN R. COMMONS ET AL., HISTORY OF LABOUR IN THE UNITED STATES 138–52 (1918); TOMLINS, *supra* note 24; CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985); MARJORIE S. TURNER, THE EARLY AMERICAN LABOR CONSPIRACY CASES: THEIR PLACE IN LABOR LAW, A REINTERPRETATION (1967); MORRIS D. FORKOSCH, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 TEX. L. REV. 303 (1962); Raymond Hogler, *Law, Ideology, and Industrial Discipline: The Conspiracy Doctrine and the Rise of the Factory System*, 91 DICK. L. REV. 697 (1987); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919 (1988); Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 574–87 (2012). On conspiracy prosecutions and criminal treatment of political dissenters, see generally AMERICAN POLITICAL TRIALS (Michael R. Belknap ed., 1994); FRANK DONNER, PROTECTORS OF PRIVILEGE, RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 104, 174–91 (1990); JAMES G. RYAN, EARL BROWDER: THE FAILURE OF AMERICAN COMMUNISM 12–15 (1997); MICHAEL J. SCHAACK, ANARCHY AND ANARCHISTS (1889); JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1964); Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649 (2006).

³³ Cf. Gordon, *supra* note 6, at 58–66 (discussing the importance of contingency as opposed to functionalism in historically rooted legal scholarship).

³⁴ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J., concurring).

cians and other powerful interests were able to identify, stigmatize, and neutralize actors who demonstrated disloyalty to the dominant order.

This focus on the politicized nature of criminal conspiracy law specifically and criminal law generally departs from a substantial scholarly discourse that has treated criminal prosecutions as “political” only in exceptional situations. In distinguishing between “regular” legal trials and “political trials,” for instance, Eric Posner has argued that “[p]olitical trials are uncommon in liberal democracies but not unknown.”³⁵ The “political trial,” he suggests, is:

[A] trial whose disposition — that is, usually, a finding of guilt or innocence, followed by punishment or acquittal, of an individual — depends on an evaluation of the defendant’s political attitudes and activities. In the typical political trial, a person is tried for engaging in political opposition or violating a law against political dissent, or for violating a broad and generally applicable law that is not usually enforced, enforced strictly, or enforced with a strict punishment, except against political opponents of the state or the government.³⁶

While Posner’s definition is not necessarily representative of the views of a criminal law orthodoxy, and its scope might be contested by scholars of varying political, ideological, or methodological commitments, his careful cabining of the political trial and his move to situate it as distinct from the “regular” trial is indicative of an entrenched belief that the criminal law’s use or existence as a political — or at least politically inflected — institution is an exception and not the rule. Such a view would necessarily appear to reject a more nuanced treatment of the political economy of the legal system. That is, if we were to accept an understanding of criminal prosecutions as fundamentally apolitical, we would need to deny that the actors involved in any given prosecution — the police, the prosecutor, and (more controversially) the judge — have political agency and are embedded in a deeper structure of governmentality.³⁷

³⁵ Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 76 (2005). Interestingly, from the point of view of this Article and from a realist perspective generally, Posner never actually defines the nonpolitical or “regular” trial. *See id.* at 152. We are clearly meant to identify a certain class of trials or prosecutions as existing in the political realm, and as a corollary we are presumably meant to consider regular criminal trials as apolitical. Yet Posner never provides a clear explanation of how a regular trial is apolitical. One of the primary purposes of this Part and this Article is to challenge this distinction and to suggest that picking out some trials as political while dismissing the mine run of political prosecutions as “regular” risks a myopic understanding of individual prosecutions in a vacuum and misses substantial cultural and historical dimensions that may ground even the most mundane prosecution in a distinct moment, political climate, or political trajectory.

³⁶ *Id.* at 76.

³⁷ *See* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977–1978 339, 349 (Michel Senellart ed., Graham Burchell trans., 2007); *cf.* ALTHUSSER, *supra* note 11 (discussing the embedding of ideology in structures of power).

Despite its ambiguous use of the political/apolitical distinction, however, Posner's formulation still serves as a useful point of departure in a treatment of conspiracy law as a politically laden institution.³⁸ Indeed, part of understanding RICO's historical place within a longer narrative of conspiracy laws lies in situating it within the group of "broad and generally applicable" laws that Posner argues are essential to a political prosecution.³⁹ In other words, "governments that seek to harass or eliminate political opponents through the judicial process usually resort to generally applicable laws against subversion, conspiracy, disorderly conduct, incitement to violate the laws, and so forth."⁴⁰ This Part, then, will briefly discuss the use of conspiracy and analogous "generally applicable laws" to prosecute and discredit labor unions and other nonstate and noncorporate collective actors in the centuries leading up to the codification of these norms in RICO.⁴¹ It will first address labor conspiracies, then consider the criminal law's response to the communist and anarchist threat in the early to mid-twentieth century, and conclude by examining the prosecution of dissenters and radicals in the 1960s that immediately preceded RICO's passage.

A. *Labor Conspiracies*

Prior to the adoption of the National Labor Relations Act⁴² (NLRA) in 1935 — which ushered in at least a modicum of legal protection for American workers seeking to organize⁴³ — unionization, use of economic weapons, and attempts collectively to influence conditions of employment were generally treated under the paradigm of criminal conspiracy law.⁴⁴ A relic of

³⁸ I do not mean to overstate the extent to which this distinction is actually at play in Posner's article. After setting forth his conception of the political prosecution, he does suggest that the political/apolitical distinction operates along a spectrum. Posner, *supra* note 35, at 82.

³⁹ *Id.* at 76.

⁴⁰ *Id.* at 82.

⁴¹ For organizational purposes, in this Part, I will address prosecutions of organizing workers separately from prosecutions of political dissenters under conspiracy or seditious libel laws. That being said, as will be explained further, these two sets of legal events or institutional practices largely overlap. Indeed, as I will argue, in distinguishing between the political and the apolitical application of criminal law in the way that Posner and other scholars of RICO have consistently done, *see generally* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (Marshall, J., dissenting); Judah Best et al., *The Racketeer Influenced and Corrupt Organizations Act: Hardly a Civil Statute*, in RICO: EXPANDING USES IN CIVIL LITIGATION 3–59 (Arthur F. Matthews ed., 1984); Jack B. Weinstein, *RICO and Federalism*, in THE RICO RACKET, *supra* note 19, at 69, we miss the significant ways in which criminalization can structure social and economic interactions, both intentionally and incidentally.

⁴² Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

⁴³ Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1424 (1993); *see generally* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 175–77 (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

⁴⁴ *See, e.g.*, Kennedy v. Treillou (Pa. Ct. Quarter Sess. 1829), *reprinted* in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 265, 267 ("For all parties concerned ought to be convinced

the English common law, the criminal prosecution of workers who staged a strike or joined a combination that was geared towards affecting trade or the power dynamics of the marketplace became a hallmark of nineteenth-century United States labor relations.⁴⁵

In some jurisdictions — particularly in the early part of the nineteenth century — it was unnecessary for prosecutors to prove that organized workers had used or threatened to use force to coerce their employers or other workers; simply organizing to demand higher wages was deemed a criminal act.⁴⁶ Over time, these states tended to join with others that imposed a higher bar, requiring proof of violence or threats in order to convict workers.⁴⁷ However, even after the general shift away from per se criminalization of collective action by workers, which was embodied most famously in the acquittal on appeal of striking members of the Boston Journeymen Bootmakers' Society in *Commonwealth v. Hunt*,⁴⁸ states continued to prosecute unions aggressively.⁴⁹

that combinations and conspiracies of this character [to agitate for higher wages] are illegal, and we have seen in numerous instances the dangerous tendency of such conduct.”); *Commonwealth v. Morrow* (Pa. Ct. Quarter Sess. 1815), *reprinted in* 4 A DOCUMENTARY HISTORY, *supra* note 24, at 15, 86 (“Combinations amongst . . . workmen, in any of the mechanical arts, tending to . . . restrain the entire freedom of trade, would be equally reprehensible.”); TOMLINS, *supra* note 24, at 189.

⁴⁵ See, e.g., *Baltimore Weavers* (1829), *reprinted in* 4 A DOCUMENTARY HISTORY, *supra* note 24, at 269; *Buffalo Tailors* (1824), *reprinted in* 4 A DOCUMENTARY HISTORY, *supra* note 24, at 93; *Philadelphia Cordwainers* (1806), *reprinted in* 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (John R. Commons et al. eds., 1910) [hereinafter 3 A DOCUMENTARY HISTORY]; *Vegeahn v. Guntner*, 167 Mass. 92 (1896); *People v. Kostka*, 4 N.Y. Crim. Rep. 429 (1886); *Commonwealth v. Hunt*, 45 Mass. 111, 121 (1842); GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* 48–54 (1999); TOMLINS, *supra* note 24, at 115 (quoting *An Act Touching Victuallers and Handicraftsmen*, (1548) c.15, 3 THE STATUTES AT LARGE OF ENGLAND AND OF GREAT BRITAIN 540, 540–42 (Eng.)); PERCY HENRY WINFIELD, *THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* 111 (1921) (“[B]y far the commonest use of conspiracy and confederacy is in connection with combinations to restrain or interfere with trade.”); Levin, *supra* note 32, at 574–87.

⁴⁶ E.g., *Old Dominion S.S. Co. v. McKenna*, 30 F. 48, 50 (C.C.S.D.N.Y. 1887) (“All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex, or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members . . . are *pro tanto* illegal combinations or associations”); *Morrow*, *reprinted in* 4 A DOCUMENTARY HISTORY, *supra* note 24, at 15, 86; *Commonwealth v. Pullis* (Pa. Mayor’s Ct. 1806), *reprinted in* 3 A DOCUMENTARY HISTORY, *supra* note 45, at 59, 233–36.

⁴⁷ E.g., *Hunt*, 45 Mass. at 121; *People v. Cooper* (N.Y. Ct. Gen. Sess. 1836), *reprinted in* 4 A DOCUMENTARY HISTORY, *supra* note 24, at 277; *Commonwealth v. Grinder* (Pa. Rec’s Ct. 1836), *reprinted in* 4 A DOCUMENTARY HISTORY, *supra* note 24, at 335; TOMLINS, *supra* note 24, at 180–221 (discussing the impact of *Hunt* on the legal and political treatment of organized labor).

⁴⁸ 45 Mass. 111 (1842). The Court in *Hunt* held that workers joining together to strike had not committed a crime unless they had used or were conspiring to use physical force (as opposed to economic force) to coerce a concession from employers. *Id.* at 121.

⁴⁹ See, e.g., *State v. Dyer*, 32 A. 814 (Vt. 1895); *Crump v. Commonwealth*, 6 S.E. 620 (Va. 1888); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 61 (1991); TOMLINS, *supra* note 24, at 216; White, *supra* note 32, at 667 (“[T]he [labor conspiracy] doctrine did not make criminal all strikes or other acts of labor protest, but what it

Additionally, and perhaps more importantly for an understanding of the political economy of conspiracy law, conspiracy cases continued to be framed by prosecutors and unsympathetic judges against the backdrop of a particular relationship between the state and the market.⁵⁰ The rhetoric prevalent in these cases speaks to a preoccupation with private property and notions of laissez-faire, suggesting a principle of noninterference.⁵¹ The prosecutor in *Commonwealth v. Moore*, for instance, alluded to a general consensus regarding the primacy of property rights: “*Without turning to books, therefore, or detaining you by an elaborate exposition of the law on the subject of conspiracies, we assume at once, that ‘All confederacies wrongfully to prejudice another are misdemeanours at common law, whether the intention be to injure his person, his property, or his character.’*”⁵² Similarly, in upholding a conviction based on a worker boycott, the Virginia Supreme Court in *Commonwealth v. Crump* concluded that the laws of the state were meant to embody the libertarian motto “*sic utere tuo, ut alienum non laedas.*”⁵³ Viewed through the lens of American Legal Realism and the critical legal histories of the latter part of the twentieth century, the background rules and accepted validity of the established system underlying these decisions serve to subsidize and to protect industry or the growing capitalist class.⁵⁴ That is, the free market rhetoric of noninterference belied the use of ultimate state coercion in the form of criminal law.

surely did do was render just about any such activity on the part of labor *potentially* criminal.”).

⁵⁰ See TOMLINS, *supra* note 24, at 216 (“[D]ecriminalization’ of unions had effect only as long as they fell within the ambit set by the market economy’s discourse of efficiency.”).

⁵¹ See, e.g., *Commonwealth v. Moore* (1827), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 99, 105; *Dyer*, 32 A. at 815. The court’s language in *Crump* is illustrative:

The acts alleged and proved in this case [relating to a boycott] are unlawful, and incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpetrated with impunity by combinations of irresponsible cabals or cliques, there will be the end of government and of society itself. Freedom, individual and associated, is the boon and the boasted policy and *peculium* of our country, but it is liberty regulated by law

Crump, 6 S.E. at 630. For a broader discussion of the libertarian rhetoric of these cases, see generally Levin, *supra* note 32, at 574–87.

⁵² *Moore*, reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 99, 105 (emphasis added). That is, legal (and perhaps cultural) assumptions about the wrongfulness of worker combinations were viewed as being so widely shared that they did not even require authoritative support to serve as the basis for legal arguments.

⁵³ *Crump*, 6 S.E. at 680. The phrase identified as the overarching “motto” of the legal system by the court in *Crump* translates to “use yours so as not to harm another’s.”

⁵⁴ See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 8–13 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991); William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752 (2008).

What is particularly striking about these conspiracy cases — and what differentiates them from other Classical Legal Thought–era⁵⁵ cases that have generally been the focus of realist and post-realist critical legal scholars — is the overtly public nature of the suits. The state as a party is acting in its sovereign capacity to impose criminal sanctions.⁵⁶ While American Legal Realism famously focused on the ways in which ostensibly private legal decisions necessarily had public outcomes and played a substantial role in social and economic structuring,⁵⁷ it largely did not engage with the explicitly public areas of law.⁵⁸

In some situations (perhaps even in most situations), we may be comfortable with the private interests that are served (e.g., of the victim of an assault) or we may feel as though the private interests are sufficiently representative of broader societal interests (e.g., we are all potential victims). Because the public interest that the criminal law serves is simply a conglomeration of private interests, the criminal law — like other ostensibly public institutions — can be both designed and implemented in such a way as to have a substantial social and economic structuring effect, to skew the balance of power heavily in favor of a given interest, or to marginalize and to delegitimize an opposing interest.

That is, these cases present an additional dynamic complicating the ostensible binaries between state and market, regulation and freedom, collective and individual: the nature of state authority. It is not just that the supplemental relationships are deconstructed — that the market collapses into the state, regulations into freedom, and so forth.⁵⁹ By emphasizing *power* and the ability or right of a collective agent to wield it, these cases and the rhetoric on which they are built frame the union or the workers' collective as an alternative quasi-state apparatus.⁶⁰ “Self-created societies are unknown to the constitution and laws . . . ,” stated Judge Ogden Edwards in convicting a group of tailors in *People v. Faulkner*.⁶¹ This explicit hostility to unions as a challenge not only to the market but also to the state was not uncommon.⁶² In their forceful rejection of the nonstate agent of power

⁵⁵ See generally KENNEDY, *supra* note 29; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006).

⁵⁶ Cf. TOMLINS, *supra* note 24, at 216 (discussing continuing uses of criminal law doctrine to subdue unions); White, *supra* note 32, at 667 (discussing the use of the labor conspiracy doctrine by prosecutors).

⁵⁷ See generally sources cited *supra* note 54.

⁵⁸ My reading of these cases, then, borrows more from Morton Horwitz's post-realist critical study of eminent domain, which suggests that public actors and public action often advanced private interests. That is, like takings, prosecutions, while ostensibly public, necessarily serve private interests. HORWITZ, *supra* note 54, at 51–52, 63–66.

⁵⁹ See DERRIDA, *supra* note 12, at 141–64.

⁶⁰ See Levin, *supra* note 32, at 574–87.

⁶¹ *People v. Faulkner* (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 315, 330–31.

⁶² See, e.g., *id.*; *Commonwealth v. Morrow* (Pa. Ct. Quarter Sess. 1815), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 15, 79–80; *People v. Cooper* (N.Y. Ct. Gen. Sess.

and collective will, these cases may actually tell us something much more vital about the state and market as codependents. By challenging the structure of the labor market, workers' combinations were also treated as posing a challenge to the authority of the state and the public order.⁶³ That is, the greatest threat to the market is the greatest threat to state authority and vice versa.

In the hyperbolic language of these conspiracy cases and of contemporary press coverage, the concern voiced by those hostile to organized labor is not just that free contract or private property rights will be upset.⁶⁴ It is that the law itself — the structure that supports both contract and property, both state and market — will be displaced by an alternative system.⁶⁵ By wielding the collective power of workers, the trade union poses the threat of an alternative hegemon, potentially one that did not advance publicly shared values.⁶⁶ As an 1898 article from *The Oshkosh Times* stated in describing the local prosecutor's argument in a conspiracy trial against Thomas Kidd, the General Secretary of the Amalgamated Wood-Workers International Union of America (and his attorney Clarence Darrow): "The realization of the dreams of Kidd and Darrow, whom he painted as the rankest anarchist, would mean the most wretched desolation and ruin, and [he] tried to impress the jury with the idea that a verdict of not guilty would be upholding such doctrines as the gentlemen advocated."⁶⁷ Similarly, the Supreme Court of Virginia concluded in *Crump v. Commonwealth* that the alleged agitating by a workers combination was "incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpetrated with impunity by

1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 277, 307 (In decrying the use of collective action as a means of attempting to improve working conditions, the prosecution argues that "[i]n our country the protection against such a partial operation of the laws, is to be found in our courts of justice . . .").

⁶³ E.g., *Crump v. Commonwealth*, 6 S.E. 620, 680 (Va. 1888); *Cooper*, reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 277.

⁶⁴ See, e.g., *Apprentices and Trades Unions*, N. Y. TIMES, Aug. 30, 1868, at 4, available at ProQuest Historical Newspapers: New York Times (1851–2008) (applauding the conviction of five bricklayers for conspiracy, identifying unions as "injurious combinations," and arguing that unions interfered with the proper functioning of the market and society because "workmen, if not bolstered up by their [u]nions, would soon find their proper spheres, and employers would not have unskilled workmen forced upon them"); *The Folly of the Eighthour Strikers*, THE INDEPENDENT, July 1872, at 8, available at ProQuest Historical Newspapers: The Independent (1848–1921).

⁶⁵ E.g., *Cooper*, reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 307; *Faulkner*, reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 267, 330–31; cf. *Kennedy v. Treillou* (Pa. Ct. Quarter Sess. 1829), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 265, 268 ("These individuals ought to know that their proper course is to seek redress for their injuries . . . in the courts of justice, which are as open to them as to employers.").

⁶⁶ See, e.g., *Crump*, 6 S.E. at 680; *Treillou*, reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 265, 267–68 ("For all parties concerned ought to be convinced that combinations and conspiracies of this character are illegal, and we have seen in numerous instances the dangerous tendency of such conduct. In our country, but more especially abroad, combinations like these have led to consequences the most disastrous.").

⁶⁷ *They're Not Guilty*, OSHKOSH TIMES (WI), Nov. 3, 1898, available at The Clarence Darrow Digital Collection, University of Minnesota.

combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself.”⁶⁸ In this rhetorical space, the veneer of the state/market distinction nearly peels away to reveal a symbiotic relationship threatened by an interloper: the unrestrained collective. In some sense, the rhetoric of the courts and contemporary commentators suggests that these collectives stand to displace or disassemble the background hierarchies and power dynamics from which both the public (government) and the private (industrialists) draw their power. The characterization of organized labor as conspiracy, then, does not just reassert the primacy of the individual over the collective as the legal actor; it asserts the primacy of the legal regime — from which both the state and the formal market derive their authority — over other potential systems of loyalty, power, authority, and perhaps even democracy as embodied by the workers’ combination.

*B. Red Flags and Black Flags: The First Waves of
Twentieth-Century Conspiracies*

While cases involving labor conspiracies have not necessarily been identified as “political trials,” the use of criminal conspiracy as a weapon against communists, socialists, anarchists, and other radical leftist groups in the early to mid-twentieth century has been more clearly recognized by scholars as being politically motivated.⁶⁹ Many of these groups had ties — explicit or implicit — to the labor movement or worker activism,⁷⁰ but unlike the labor conspiracy cases, the charges against Communist Party members and other leftist radical groups were rarely traced to one labor struggle

⁶⁸ *Crump*, 6 S.E. at 680.

⁶⁹ See Posner, *supra* note 35, at 84. As discussed above in note 41, the distinction between the labor union and the radical or leftist political organization, particularly in the early twentieth century, is not a clear one. See generally JAMES GREEN, *DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA* (2006); HOWARD KIMELDORF, *REDS OR RACKETS: THE MAKING OF RADICAL AND CONSERVATIVE UNIONS ON THE WATERFRONT* (1988). Interestingly, Posner does in fact identify three labor-related prosecutions as “political” prosecutions (Eugene Debs, members of the Industrial Workers of the World, and those implicated in the Haymarket Tragedy), but he makes no mention of the involvement of any of the groups in labor activism, instead citing their opposition to World War I and allegedly violent activities. Posner, *supra* note 35, at 84.

⁷⁰ See generally GREEN, *supra* note 69; KIMELDORF, *supra* note 69; SCOTT LASH, *THE MILITANT WORKER: CLASS AND RADICALISM IN FRANCE AND AMERICA 1–66*, 168–241 (1984); FRED THOMPSON & PATRICK MURFIN, *THE I.W.W.: ITS FIRST SEVENTY YEARS* (Industrial Workers of the World ed., 1976); JOHN CLENDININ TOWNSEND, *RUNNING THE GAUNTLET: CULTURAL SOURCES OF VIOLENCE AGAINST THE I.W.W.* (1986); see also *Form Red Party; Leader Arrested*, N.Y. TIMES, Sept. 3, 1919, at 8, available at ProQuest Historical Newspapers: New York Times (1851–2005); *Square Deal As I.W.W. Antidote*, BOS. DAILY GLOBE, May 21, 1919, at 6, available at ProQuest Historical Newspapers: Boston Globe (1872–1979).

or one set of market interactions.⁷¹ Rather, they were traced to an attitude toward the state and the U.S. economic system as a whole.⁷²

Indeed, even when courts expressed reservations about the unfettered application of conspiracy law to political dissenters and radicals, they remained firm in their rhetorical commitment to the concept of conspiracy as a potential threat to the state and to capital. “The Constitution does not make conspiracy a civil right,” observed Justice Jackson in upholding the conviction of Eugene Dennis, the leader of the Communist Party USA (CPUSA).⁷³ “While I consider criminal conspiracy a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary,” Jackson continued, “it has an established place in our system of law, and no reason appears for applying it only to concerted action claimed to disturb interstate commerce and withholding it from those claimed to undermine our whole Government.”⁷⁴

In upholding the 1921 criminal anarchy conviction of Benjamin Gitlow, the business manager of *The Revolutionary Age*, a New York City newspaper that represented “the Left Wing of the Socialist Party,”⁷⁵ the Appellate

⁷¹ Cf. White, *supra* note 32, at 650–51.

This repression [of labor activists] took many forms. In some instances it involved authorities’ manipulation of laws of general relevance. Such was the case, for example, with the large scale and totally unfounded prosecution of IWW members for conspiracy to interfere with the war effort. In 1918, over 100 members, including most of the union’s top leadership and a handful of supporters and ex-members, were convicted of these charges and, in most cases, sentenced to substantial terms of imprisonment. Hundreds of other members and affiliates were subjected to deportation and other forms of immigration-related harassment because of their links to the organization.

Id.

⁷² E.g., *Whitney v. California*, 274 U.S. 357, 371 n.14 (1927) (In addressing a criminal syndicalism and conspiracy prosecution against Communist Party members, the Court states that it is indisputable “that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means.”); *Gitlow v. New York*, 268 U.S. 652, 665–66 (1925) (“The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government . . . necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order.”); 2 *Communist Leaders Held As Anarchists*, N.Y. TRIB., Nov. 15, 1919, at 2, available at ProQuest Historical Newspapers: New York Tribune (1841–1922); *Revolution in U.S. is Being Fostered by Reds in Moscow*, PHILA. INQUIRER, Dec. 4, 1922, at 13, available at Archive of Americana, America’s Historical Newspapers (Readex, NewsBank, Inc.).

⁷³ *Dennis v. United States*, 341 U.S. 494, 572 (1951) (Jackson, J., concurring).

⁷⁴ *Id.*

⁷⁵ *Gitlow*, 268 U.S. at 655–56. The New York state criminal anarchy statute in question amounted to a ban on advocating for the overthrow of the government, conspiring to overthrow the government, or conspiring to advocate for the overthrow of the government. *Id.* at 654–55. While Gitlow’s prosecution does not fall under the rubric of common law conspiracy, for the purpose of this Article, the criminal anarchy statute has sufficient focus on concerted action to make it a vital part of historicizing and contextualizing RICO in the broader framework of laws targeting nonstate collective action. For a more detailed discussion of criminal syndicalism and criminal anarchy prosecutions, see generally White, *supra* note 32.

Division of the Supreme Court of New York provided one of the most striking examples of judicial rhetoric rooted in this discourse of ideological warfare.⁷⁶ The opinion, written by Justice Frank C. Laughlin, a highly regarded Republican jurist,⁷⁷ begins with an in-depth, five-page description of the revolutionary “Manifesto and Program of the Left Wing” published in *The Revolutionary Age*.⁷⁸ Throughout the description, with its lengthy explication of leftist thought,⁷⁹ Justice Laughlin repeatedly draws attention to the state as emblematic of and inherently related to the market.⁸⁰ He quotes passages from the manifesto in which Gitlow and his co-conspirators suggest that “the political state should be destroyed and a new proletarian state of the organized producers constructed in order to realize socialism,” and suggests that in response to “American Capitalism,” Gitlow and his co-conspirators were “developing ‘the mass political strike against Capitalism and the State.’”⁸¹

As in the rhetoric surrounding the labor conspiracy cases, the discourse here is one of a state/market nexus challenged by a collective seeking to act as or establish an alternative state or apparatus of political economy. In applying the criminal anarchy statute to the facts, Justice Laughlin states:

It is perfectly plain that the plan and purpose advocated by the appellant and those associated with him in this movement contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution . . . but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it.⁸²

⁷⁶ *People v. Gitlow*, 195 A.D. 773 (N.Y. App. Div. 1921), *aff’d sub nom. Gitlow v. New York*, 268 U.S. 652 (1925).

⁷⁷ See Editorial, *Mr. Justice Laughlin*, N.Y. TIMES, Nov. 21, 1919, at 10, available at ProQuest Historical Newspapers: New York Times (1851–2005).

⁷⁸ *Gitlow*, 195 A.D. at 777–82; see also *Gitlow v. New York*, 268 U.S. at 655–56.

⁷⁹ *Gitlow*, 195 A.D. at 777–82.

⁸⁰ *Id.*

⁸¹ *Id.* at 777–79.

⁸² *Id.* at 782. Interestingly, it remains unclear in Justice Laughlin’s opinion whether the greater fear is of anarchy and the dissolution of order, or of socialism and an alternative theory of governance. Cf. MICHAEL BAKUNIN, STATISM AND ANARCHY (Marshall S. Shatz ed., 1990) (advocating revolution and statelessness and critiquing Marxist doctrine as favoring or leading to a new hierarchy or state apparatus).

By invoking the democratic processes of the Constitution, the opinion evokes a sense of unity and solidarity among the citizenry and those most directly challenged by the class-conscious and pro-union arguments advanced by Gitlow and the Left Wing⁸³ — presumably the wealthy and the industrial-capitalist class. Like the condemnation of Kidd and Darrow,⁸⁴ then, the language used to describe these radical leftist organizations suggests that the conspiracy or organization is intent on undermining not just the current regime but the entire socio-economic and socio-political structures in which the nation is embedded, on which the populace relies, and from which the current regime derives its power.

While Justice Laughlin's treatise-like primer on left-wing socialism appears to be an extreme example, *Gitlow* was hardly an outlier in the early-twentieth-century case law, in terms of its on-the-record engagement with the specific philosophical commitments of conspirators, alleged anarchists, or communists and concomitant focus on the relationship of these ideological tenets to the state and the state-supported brand of "American Capitalism."⁸⁵ Indeed, prosecutions under the Smith Act,⁸⁶ the Espionage Act,⁸⁷ and other laws rooted in a fear of nonstate collective action were commonly used weapons against members of antiwar and radical labor communities throughout much of the first half of the twentieth century.⁸⁸

These cases have long been treated as key components of First Amendment jurisprudence,⁸⁹ but in focusing on them here, my aim is not to enter into a broader discourse on the constitutional basis for protecting radical speech and private associational groups. Rather, I mean to take up the project introduced by Ahmed White in his recent work on the International Workers of the World (IWW) of examining the cases' "social meaning."⁹⁰

⁸³ See *Gitlow*, 195 A.D. at 777–82.

⁸⁴ See *They're Not Guilty*, *supra* note 67.

⁸⁵ See, e.g., *United States v. Flynn*, 216 F.2d 354, 377 n.15 (2d Cir. 1954) (discussing the beliefs of the alleged members of the Communist Party being prosecuted, including "that the Government was at all times exploiting the workers for the benefit of the trusts and monopolies" and "that what they call the democracy of Russia is superior in all respects to American democracy"); see generally *Schaefer v. United States*, 251 U.S. 466 (1920); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); JOHN SOMERVILLE, *THE COMMUNIST TRIALS AND THE AMERICAN TRADITION: EXPERT TESTIMONY ON FORCE AND VIOLENCE, AND DEMOCRACY* (1956) (discussing the use of expert testimony and the courtroom arguments relating to the explication of Marxist doctrine and the beliefs of alleged violators of the Smith Act); White, *supra* note 32.

⁸⁶ Alien Registration Act of 1940, Pub. L. No. 670-439, 54 Stat. 670 (codified as amended at 18 U.S.C. § 2385 (2006)).

⁸⁷ Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 792-94 (2006)).

⁸⁸ See, e.g., *supra* notes 70, 72–74, 85, and accompanying text.

⁸⁹ See, e.g., Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 182–86 (1956); Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, WM. & MARY BILL RTS. J. 125, 166 (2004); Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 349–50 (1995).

⁹⁰ White, *supra* note 32, at 653. White argues that:

These cases and the judicial rhetoric of their opinions were “imbricated” in and helped to shape a broader cultural discourse on political and economic engagement, organizing, and ideology.⁹¹ The lengthy treatments of the political ideology of the defendants and the framing of their concerted action as inherently opposed to American and democratic values exist in dialogue with the extensive and often inflammatory and sensationalistic media coverage of contemporary radicalism.⁹² The rhetorical trope of conspiratory radi-

Scholars have not completely neglected the role of criminal syndicalism laws in influencing the fate of the IWW and early twentieth-century radicalism more generally. However, they have come close. Despite its obvious relevance to the topic, many important accounts of the evolution of modern civil liberties ignore completely the history of criminal syndicalism. Those that do deal with criminal syndicalism tend to reduce the relevance of these laws to their impact on the development of rights of speech and association and to focus more on these laws’ influence on the evolution of constitutional doctrine than on their social meaning. This perspective diminishes the fact that these were *serious criminal laws concerned far more with destroying the IWW and punishing its members for their radicalism than with regulating speech and association rights in any abstractly juridical sense.*

Id. at 653–54 (citations omitted) (emphasis added).

⁹¹ Gordon, *supra* note 6, at 125.

⁹² See, e.g., *11 Union Members on Trial in Denver*, N.Y. TIMES, Nov. 3, 1959, at 18, available at ProQuest Historical Newspapers: New York Times (1851–2005) (reporting on conspiracy charges against union officials who had allegedly failed to resign from the Communist Party); *Charges Plot by Reds*, WASH. POST, Jan. 13, 1917, at 1, available at ProQuest Historical Newspapers: The Washington Post (1877–1995) (“Alexander Berkman, editor of the *Blast*, an anarchist publication, and seven others prominent in labor circles here were charged with having directed a conspiracy to assassinate Senator-elect Hiram W. Johnson, ‘blow up the state’ and to overthrow the government.”); Clarence S. Darrow, Letter to the Editor, THE CAUSE, Oct. 6, 1897, at 55, available at The Clarence Darrow Digital Collection, University of Minnesota (criticizing media coverage of Debs and the IWW); *Force Disavowed for Communists*, N.Y. TIMES, July 26, 1956, at 6, available at ProQuest Historical Newspapers: New York Times (1851–2005) (describing the defense counsel in a trial of alleged Communist Party members as characterizing his clients as “misguided idealists” not actually bent on governmental overthrow); *Gitlow’s Defense is a ‘Red’ Speech*, N.Y. TIMES, Feb. 5, 1920, at 3, available at ProQuest Historical Newspapers: New York Times (1851–2005) (describing Gitlow’s statements to the court about his beliefs and the situation in Russia); *Ole Hanson Would Hang All I.W.W.’s*, N.Y. TRIB., May, 2, 1919, at 3, available at ProQuest Historical Newspapers: New York Tribune (1841–1922) (In decrying the activities of the I.W.W. before a meeting of the Topeka, Kansas Chamber of Commerce, the mayor of Seattle claimed that “[t]he conspiracy to overthrow the government is widespread. It permeates every state in the Union.” He went on to declare that “[y]ou may be willing to take the trouble to deport these traitors . . . but I am ready to hang them to the first convenient light pole.”); *Red Literature Read At Blumberg Trial*, WASH. POST, Feb. 11, 1956, at 2, available at ProQuest Historical Newspapers: The Washington Post (1877–1995) (“The Government today read excerpts from Communist Party literature at the conspiracy trial of Dr. Albert Blumberg . . . Dr. Blumberg is on trial on charges he was a member of the conspiracy to teach and advocate the violent overthrow of the United States Government.”); *Reds Accused of Stirring Up Negro Rioters*, N.Y. TRIB., July 29, 1919, at 6, available at ProQuest Historical Newspapers: New York Tribune (1841–1922) (describing government investigation into socialist and communist involvement in disseminating material questioning America’s racial policies); George E. Sokolsky, Editorial, *These Days: The Communist Lawyers*, WASH. POST, Feb. 21, 1959, at A11, available at ProQuest Historical Newspapers: The Washington Post (1877–1995) (commending the House Committee on Un-American Activities for its report on the conspiracy trials of alleged Communists that identified defense attorneys as being complicit in the anti-statist conspiracies); *Trial of 20 Reds on at Chicago Today*, BOS. DAILY GLOBE, May 10, 1920, at 16, available at ProQuest Historical Newspapers: Boston Globe (1872–1979); cf. Lisa McGirr, *The Passion of*

calism as oppositional to culturally “shared ‘world views’”⁹³ should be seen as a form not only of delegitimation of the political organizations, but as a further legitimation of the dominant social order and political economy. By emphasizing the otherness of the radicals (the foreignness of ideas, the association with foreign powers),⁹⁴ these cases also affirm a collective American identity and the wholesomeness not only of the American *democratic* system, but also the American *economic* system.⁹⁵ That is, in rejecting collective challenges to the state and market as an assault on national identity, these cases and the broader cultural rhetoric of the radical conspiratory threat served to elide the state and the market more powerfully in the collective consciousness, legitimating all that the leftist outsiders threatened.

C. *Making Conspiracy, Not War: 1960s Radicals in Court*

Before finally moving on to the passage of RICO and its statutory content, the final section of this Part will address a third group or class of conspiracy prosecutions — those of radical student and activist groups in the 1960s.⁹⁶ As U.S. involvement in Vietnam escalated, and as domestic social tensions mounted amid assassinations and racial unrest, the student movement and political activism that would later define the decade escalated,

Sacco and Vanzetti: A Global History, 93 J. AM. HIST. 1085 (2007) (discussing the societal impact of trials of political radicals).

⁹³ Trubek, *supra* note 11, at 589.

[S]ocial order depends in a nontrivial way on a society’s shared “world views.” Those world views are basic notions about human and social relations that give meaning to the lives of the society’s members. Ideas about the law — what it is, what it does, and why it exists — are part of the world view of any complex society. These ideas form the legal consciousness of society.

Id.

⁹⁴ Cf. Stuart Hall, *Cultural Identity and Diaspora*, in COLONIAL DISCOURSE AND POST-COLONIAL THEORY 392, 394–95 (Patrick Williams & Laura Chrisman eds., 1994) (arguing that marginalized groups and peoples are “constructed as different and other within the categories of knowledge of the West by those regimes”).

⁹⁵ Cf. MICHAEL DENNING, *CULTURE IN THE AGE OF THREE WORLDS* 169–73 (2004) (describing the way that market capitalism, individualism, and American national identity became interwoven, making American exceptionalism the natural enemy of Marxist or other oppositional ideologies); Leon Samson, *Americanism as Surrogate Socialism*, in FAILURE OF A DREAM? ESSAYS IN THE HISTORY OF AMERICAN SOCIALISM 426 (John H.M. Lasslett & Seymour Martin Lipset eds., 1974) (arguing that the ideal of “America” or “Americanism” prevented Marxism and redistributionist or revolutionary ideologies from attracting support in the United States).

⁹⁶ While this section addresses the student movement and a variety of radical groups simultaneously, I do not mean to suggest that the 1960s radicalism was in any way monolithic. Certainly the interests of varying groups — Hippies, Yuppies, Black Panthers, etc. — were very different and perhaps even conflicted at times. That being said, an extensive literature on these various social movements exists, and a detailed account of the groups and their differing views of the state, the market, and the social ordering falls outside of the scope of this Article. As a result, I refer generally to these groups in an effort to clarify my argument and *not* in an effort to lump together a disparate universe of activists and causes.

leading to rioting, turmoil, and a harsh legal response.⁹⁷ Faced with the specter of a divided and disenchanting nation, Congress passed the Anti-Riot Act on April 11, 1968, just seven days after the assassination of Martin Luther King, Jr.⁹⁸ As violence and disorder erupted in predominantly black, inner-city neighborhoods, the Act took aim at rioters and those sympathetic to their cause.⁹⁹ In language similar to that of the Smith Act,¹⁰⁰ the Espionage Act,¹⁰¹ and the conspiracy cases of the earlier periods, Congress created the sort of “generally applicable law” that allowed for highly selective application.¹⁰²

Where the prosecutions in the nineteenth and earlier part of the twentieth centuries were explicitly traced to attitudes towards capitalism,¹⁰³ the politically laden conspiracy trials in this moment had a more attenuated relationship to the market. The 1960s radical groups rarely had significant ties to organized labor, and the rhetoric at issue in the conspiracy trials and popular discourse of this period was generally not focused on workers rebel-

⁹⁷ See generally MICHAEL KAZIN & MAURICE ISSERMAN, *AMERICA DIVIDED: THE CIVIL WAR OF THE 1960s* (2000).

⁹⁸ Anti-Riot Act of 1968, Pub. L. No. 90-284, 82 Stat. 75 (codified as amended at 18 U.S.C. §§ 2101–2102 (1996)); see generally Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 CARDOZO STUD. L. & LITERATURE 381, 383–84 (2004).

⁹⁹ See, e.g., Lonnie T. Brown, Jr., *A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokely Carmichael*, 62 S.C. L. REV. 1, 22 n.137 (2010); Thomas K. Prevas, *Schlamp v. State: Reading the Riot Act: The Vagaries of Maryland’s Common Law Riot Require Codification of the Crime*, 66 MD. L. REV. 1013, 1027 (2007).

Frustration over the inability to federally prosecute Stokely Carmichael for his alleged involvement with the riots helped inspire subsequent legislation specifically designed to cover “inciteful” activities, such as his and Brown’s. Indeed, the Anti-Riot Act of 1968, which was enacted as a part of the Civil Rights Act of 1968, was originally referred to interchangeably as the “Stokely Carmichael Act” or the “Rap Brown Act.”

Brown, *supra*, at 22 n.137 (citations omitted).

The tumult of the late 1960s and early 1970s challenged Congress to modernize riot legislation to give the federal government an effective tool to prosecute violent protestors. What followed — D.C. Code section 22-1322, and the Federal Anti-Riot Act, 18 U.S.C. sections 2101–02 — were attempts by Congress to codify riot law to permit United States Attorneys to prosecute riot [sic] by focusing on the conduct of the actors.

Prevas, *supra*, at 1027 (citations and footnotes omitted).

¹⁰⁰ Alien Registration Act of 1940, Pub. L. No. 670-439, 54 Stat. 670 (codified as amended at 18 U.S.C. § 2385 (2006)).

¹⁰¹ Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 792-94 (2006)).

¹⁰² See, e.g., 18 U.S.C. § 2102(b) (2006):

As used in this chapter, the term “to incite a riot”, or “to organize, promote, encourage, participate in, or carry on a riot”, includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.

¹⁰³ See *supra* sections I.A–B.

ling against employers.¹⁰⁴ Instead, the Vietnam War was both the focal point of radical rhetoric and the definitive element of the cultural imagination of the late-1960s activists who were charged under conspiracy statutes.¹⁰⁵ Thus, the protests of the late 1960s and the ensuing conspiracy prosecutions can be seen as analogous to those of the IWW and other radical groups during the 1910s insofar as those groups had similarly been targeted for opposing the First World War.¹⁰⁶

What connects these cases with the cultural and legal framework of the earlier conspiracy trials is the political economy of the market/state alliance. Much like the members of the IWW, many of the 1960s protesters in Chicago, Boston, and elsewhere often identified a link between U.S. foreign policy and capitalism, between the war and some broader system of oppression.¹⁰⁷ The challenge to the war was a part of a broader challenge — or at least a broader rhetoric of challenge — to the dominant socio-political order, thus threatening the relationship between the state, the market, and a set of actors embedded in both who were deeply invested in the conflict in Vietnam.¹⁰⁸ That is, as in previous moments, the alleged conspiracies were per-

¹⁰⁴ See, e.g., DENNING, *supra* note 95, at 228; Alan Dershowitz, *They Were Virtual Strangers, Yet the Government Charged Them with Conspiracy*, N.Y. TIMES, Sept. 14, 1969, at BR3, available at ProQuest Historical Newspapers: New York Times (1851–2005) (reviewing a book about the conspiracy prosecution of Dr. Benjamin Spock arising out of anti-Vietnam War protest); J. Anthony Lukas, *Chicago Witness Backs Violent Revolt*, N.Y. TIMES, Dec. 17, 1969, at 37, available at ProQuest Historical Newspapers: New York Times (1851–2005) (discussing the political ideology of alleged conspirators in the 1968 Chicago riots); Bernard D. Nossiter, *The Men Behind the Protest; Long on Ardor, Short on Planning*, WASH. POST, Nov. 9, 1969, at 1, available at ProQuest Historical Newspapers: The Washington Post (1877–1995).

¹⁰⁵ See, e.g., Dershowitz, *supra* note 104; Donald Janson, *Trial of 12 Accused of Burning Draft Files Opens in Milwaukee*, N.Y. TIMES, May 15, 1969, at 10, available at ProQuest Historical Newspapers: New York Times (1851–2005); Lukas, *supra* note 104; Nossiter, *supra* note 104.

¹⁰⁶ For a discussion of the prevalence of such prosecutions in the 1910s, see White, *supra* note 32.

¹⁰⁷ See, e.g., Philip Hager, *War in Vietnam Becomes Issue in Oakland Trial*, L.A. TIMES, Mar. 11, 1969, at A3, available at ProQuest Historical Newspapers: Los Angeles Times (1881–1988) (discussing a conspiracy trial where antiwar protesters argued that they were on the side of those trying to free themselves from unlawful and immoral controls).

¹⁰⁸ For example, a 1969 *Chicago Defender* article heralding a new alliance between the Black Panthers and Students for a Democratic Society, which espoused solidarity for members of the Black Panther Party who were on trial for conspiracy, refers to the two groups as sharing a commitment to helping “working people” while opposing the “imperialism” of the war in Vietnam. S. R. W. Smith, *Panthers Snatch Victory From SDS Factional Row*, CHI. DAILY DEFENDER, June 24, 1969, at 3, available at ProQuest Historical Newspapers: Chicago Defender (1910–1975); see also ABBIE HOFFMAN, *SOON TO BE A MAJOR MOTION PICTURE 100–02* (1980) (describing a protest at the New York Stock Exchange arranged by Yippies and other antiwar activists); SEYMOUR MELMAN, *PENTAGON CAPITALISM: THE POLITICAL ECONOMY OF WAR 8* (1970) (highlighting the financial ties between the Vietnam War and Department of Defense officials); Barry Grier, Editorial, *Stokely Speaks at Cuban Summit*, L.A. SENTINEL, Aug. 10, 1967, at A4, available at ProQuest Historical Newspapers: Los Angeles Sentinel (1934–2005) (quoting Stokely Carmichael as decrying “the conspiracy of white racism and capitalism” and describing Detroit as “also Vietnam”). As J. A. C. Hetherington describes:

ceived as antithetical to certain values underlying the U.S. system of economic and political governance.¹⁰⁹

This conflict was embodied perhaps most compellingly in the four-and-a-half month jury trial of the so-called “Chicago 7” — a diverse group of activists accused of conspiring to incite the massive riots that occurred in 1968 outside the Democratic National Convention.¹¹⁰ All seven defendants were acquitted on the conspiracy charges, but five were convicted of charges under the Anti-Riot Act.¹¹¹ While the convictions were reversed on appeal, the trial itself became a major public spectacle, attracting massive media attention and inspiring popular books, films, and songs.¹¹² Significantly, testimony at the trial frequently made reference to an abnegation of American state capitalism. On the witness stand, for instance, Abbie Hoffman claimed to live outside of the state superstructure:

I live in . . . a nation of alienated young people. We carry it around with us as a state of mind in the same way as the Sioux Indians carried the Sioux nation around with them. It is a nation dedicated to cooperation versus competition, to the idea that people should have better means of exchange than property or money, that there should be some other basis for human interaction. . . . It is in the state of mind, in the mind of myself and my brothers and sisters. *It is a conspiracy.*¹¹³

Those outside the system perceive the situation very differently. They see little of the stresses within the system, but they clearly see the effects of the system as a whole on society. And the sharpness of their vision is enhanced when they disagree with the priorities and values that the system adopts and implements. This is particularly true when the policies adopted by the system affect them directly. . . . The protest movements share many common aims and attitudes, but most importantly they share a common conception of the power structure in society. Criticism by these dissident groups is not aimed primarily at either the corporate employers or the universities; it is aimed at the system of which they are functioning parts. On the question of Negro rights, for example, the issue is not the social responsibility of industry; it is the social responsibility of the establishment as a whole. The war protests similarly attack a policy that industry did not originate but one that, as a part of the system, it nevertheless helps to implement.

J. A. C. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 289–90 (1969) (footnotes omitted).

¹⁰⁹ See Hetherington, *supra* note 108, at 289–90.

¹¹⁰ The riots resulted from a belief among antiwar activists that the two major political parties had been responsible for an unlawful and unacceptable war in Southeast Asia. See, e.g., *Testimony of Rennie Davis*, UNIVERSITY OF MISSOURI-KANSAS CITY, http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Davis_testimony.html (“[T]here may be people in this room who do believe that the Democratic Convention, which is responsible for the war, should be physically disrupted, torn apart”); *United States v. Seale*, 461 F.2d 345, 385 (7th Cir. 1972); *In re Dellinger*, 370 F. Supp. 1304, 1310 (N.D. Ill. 1973); see generally *infra* note 121.

¹¹¹ *Dellinger*, 370 F. Supp. at 1307.

¹¹² E.g., E.L. DOCTOROW, *THE BOOK OF DANIEL* 151 (1971); BANANAS (United Artists 1971); GRAHAM NASH, *Chicago, on SONGS FOR BEGINNERS* (Atlantic Records 1971); see also Lahav, *supra* note 98, at 385 (discussing the case’s impact on popular culture).

¹¹³ *Testimony of Abbie Hoffman*, UNIVERSITY OF MISSOURI-KANSAS CITY, <http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Hoffman.html> (emphasis added).

The prosecution, meanwhile, argued that the alleged conspirators were “evil men,” who had “take[n] advantage of,” “used,” and “corrupted” the “kids” in furtherance of anarchy, violence, and destruction.¹¹⁴

It might be tempting to dismiss the exchanges in the Chicago conspiracy trials as a sort of theater — markers of a cultural disconnect or artifacts of a unique moment of social turmoil in American history. But while the language of the arguments may speak to a specific cultural context, the core of the arguments resonates in a broader history of conspiracy as a check on threats to the dominant political and economic order. As a means of emphasizing the importance of the rhetoric of law and illegality, state and statelessness, it might also be useful to look to another contemporary conspiracy trial — *United States v. Spock*.¹¹⁵

In reversing the criminal conspiracy conviction of Dr. Benjamin Spock for drafting a paper encouraging draft resisters, the First Circuit focused on the alleged conspirators’ characterization of state authority.¹¹⁶ The document in question was titled “A Call to Resist Illegitimate Authority,” and a substantial portion of the court’s analysis revolved around how the unlawful intent of the alleged conspirators was shaped by their understanding of the interaction between the legitimacy of the state and the justness of war.¹¹⁷ Thus, even though the court in *Spock* applied a different doctrinal framework than that of *Dennis, Gitlow*, and the earlier labor conspiracy cases, the focus of the court still seemed to center on the alleged conspirators’ attitude toward the state apparatus.

It is worth noting, however, that by framing his arguments in the language of constitutional analysis and mainstream political discourse, Dr. Spock was able to make his inciting activity palatable to the court in a way that the political dissidents discussed in the previous sections could not. Whereas earlier conspirators evinced (or had been seen as evincing) hostility toward the very *structure* of the state, Dr. Spock in his “A Call to Resist Illegitimate Authority” had focused on the Constitution and the “legality” of the war.¹¹⁸ Despite referring to “illegitimate authority,” and thus risking the

¹¹⁴ *Closing Arguments on Behalf of the Government by Mr. Thomas Foran*, UNIVERSITY OF MISSOURI-KANSAS CITY, <http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Foranclose.html>.

¹¹⁵ 416 F.2d 165 (1st Cir. 1969).

¹¹⁶ *Id.* at 174.

¹¹⁷ *Id.* at 168.

¹¹⁸ *Id.* at 174. In part, the document argues for oppositional activity because:

We further believe that the war is unconstitutional and illegal. Congress has not declared a war as required by the Constitution. Moreover, under the Constitution, treaties signed by the President and ratified by the Senate have the same force as the Constitution itself. The Charter of the United Nations is such a treaty. The Charter specifically obligates the United States to refrain from force or the threat of force in international relations. It requires member states to exhaust every peaceful means of settling disputes and to submit disputes which cannot be settled peacefully to the Security Council. The United States has systematically violated all of these Charter provisions for thirteen years.

specter of anti-state collective action, the offending document itself was actually much more a document of liberal legalism than any sort of state- or market-challenging ideology.¹¹⁹ Dr. Spock may have acted in a combination, and he may have been a dissenter, but he also appears to fit more easily into a practice of legal argument that supports state legitimacy than do many of the other dissenters. That is, by appealing to notions of legality and constitutionality, Dr. Spock — unlike many of the radical conspirators discussed earlier — offered an internal critique of the dominant order and mainstream political decisionmaking. His was not a critique of “the system” or “the power structure,” but rather an argument that government officials were not observing the laws and processes on which American democracy depended.¹²⁰

Unlike the previous two groups of cases, the cases discussed in this section have received relatively little attention in legal scholarship outside of the First Amendment framework.¹²¹ These cases are generally disregarded in the criminal law context as the descendants of the earlier conspiracy prosecutions. However, one of the keys to understanding conspiracy law as a

Id. at 192.

¹¹⁹ See *id.* at 174 (focusing on the legality and constitutionality of the Vietnam War). Cf. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1101–02 (2009) (describing the link between “liberal legalism” and reliance on the concept of “rule of law”).

¹²⁰ Compare *Spock*, 416 F.2d at 192 (“The Charter specifically obligates the United States to refrain from force or the threat of force in international relations. It requires member states to exhaust every peaceful means of settling disputes and to submit disputes which cannot be settled peacefully to the Security Council. The United States has systematically violated all of these Charter provisions for thirteen years.”), with Art Buchwald, Opinion, *Knocking Establishment Won’t Beat “The System.”* L.A. TIMES, Jun. 23, 1968, at F7 (“Everybody talks about ‘The System’ these days. The moderate people want to change ‘The System,’ the militants want to destroy it and set up their own.”); *Gregory Backed at Rutgers*, N.Y. TIMES, Nov. 4, 1968, at 16, available at ProQuest Historical Newspapers: New York Times (1851–2008) (“The editorial urges students to opt out of the system by voting for Dick Gregory, who is running a symbolic campaign against the very power structure that ignores us.”) (internal quotation marks omitted), and Steven V. Roberts, *College Walkout Loosely Organized*, N.Y. TIMES, Apr. 27, 1968, at 20 (quoting a college student involved in antiwar activism as saying that “[f]or the first time people are not just saying no to the system, they’re actively engaged in rebellion”).

¹²¹ While the trials arising out of the 1968 riots in Chicago have received substantial scholarly attention, see, e.g., DAN BERGER, *OUTLAWS OF AMERICA: THE WEATHER UNDERGROUND AND THE POLITICS OF SOLIDARITY* (2006); *IT DID HAPPEN HERE: RECOLLECTIONS OF POLITICAL REPRESSION IN AMERICA* (Bud Schultz & Ruth Schultz eds., 1989); JOHN SCHULTZ, *THE CHICAGO CONSPIRACY TRIAL* 112 (1993); Janice E. Schuetz & Kathryn Holmes Snedaker, *Courtroom Drama: The Trial of the Chicago Eight*, in *COMMUNICATION AND LITIGATION: CASE STUDIES OF FAMOUS TRIALS* 217 (Janice E. Schuetz & Kathryn Holmes Snedaker eds., 1988), they are generally underrepresented in legal history and doctrinal studies. Cf. Posner, *supra* note 35, at 84–85. Of the twenty-two domestic trials or sets of trials since 1798 that Posner identifies as being political in nature, *id.*, three are from the 1960s. Two are from 1968 and one is from 1969, and all three involve radical responses to the Vietnam War, see Phina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1328–29 (2000) [hereinafter Lahav, *Character and Judicial Discretion*]; Lahav, *supra* note 98, at 385–86; John Schultz, “*The Substance of the Crime was a State of Mind*” — *How a Mainstream, Middle Class Jury Came to War with Itself*, 68 UMKC L. REV. 637, 637–41 (2000).

legitimizing mechanism for the state/market nexus is rejecting the historical fragmentation and exceptionalization of collective threats.¹²² It is important that we understand each of these waves as reliant on and rooted in previous ones, both as a doctrinal matter of precedent and as a discursive and ideological matter of cultural history.¹²³ To view RICO as a response to a unique, distinct, and insular threat is to disregard, as the next Part contends, the longstanding history of legal hostility to nonstate collective action. This Part, therefore, has suggested that these cases and the 1960s, as a moment of crisis in dominant culture and American political economy, are a missing link in our narrative chain.

II. PUBLIC ENEMIES: RICO IN CONTEXT

Given that RICO was passed as a part of the Organized Crime Control Act of 1970,¹²⁴ it may seem somewhat peculiar that — with the exception of a fleeting reference in the Introduction — this Article has yet even to use the term “organized crime,” let alone discuss the role of the Mafia in twentieth-century U.S. history. But, I suggest, even more striking is the fact that engagement with RICO by legal scholars outside of the framework of Free Expression has not addressed any of the waves of prosecution or statutory schemes explored in Part I — that the prosecutions of labor leaders, political radicals, or even the widely publicized conspiracy trials of the late 1960s are not treated as even remotely relevant to the passage of one of the most expansive statutes ever directed at discouraging concerted action. In order to highlight this tension between my narrative and the dominant narratives of

¹²² Cf. HARCOURT, *supra* note 10, at 44 (arguing that accounts of neoliberal penal institutions are best studied through a “longer view of the relationship between economy and punishment”).

¹²³ By cultural history, I mean the formation of popular or social discourse. While there is certainly no one monolithic *cultural consciousness* or *cultural imagination*, this Article does advocate a view of the law as embedded in the social to the extent that legal doctrinal evolution should not be divorced from other areas of legal evolution or from broader socio-political trends. For other manifestations of related methodological tactics, see generally ATLESON, *supra* note 43; MINDA, *supra* note 45; Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1 (2010); Bernard E. Harcourt, *On the American Paradox of Laissez Faire and Mass Incarceration*, 125 HARV. L. REV. F. 54, 54 (2012); Levin, *supra* note 32; Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010). As Bernard Harcourt has argued:

[B]rilliant and well-regarded thinkers have proposed a range of theories and methods to emancipate us from these figments of our imagination. They have offered genealogies and archaeologies, psychoanalysis, *Ideologiekritik*, poststructuralism, and deconstruction — to name but a few. Their writings are often obscure and laden with a jargon that has gotten in the way of their keen insights, but their central point continues to resonate loudly today: our collective imagination has real effects on our social condition and on our politics.

Harcourt, *supra*, at 54.

¹²⁴ Pub. L. No. 91-452, 84 Stat. 941 (1970).

RICO's history, this Part will first briefly outline the (varying) traditional accounts of RICO's passage and purposes. Using the historical framework of Part I, however, and a broader engagement with the political and economic conditions of 1970, this Part will argue that RICO should be understood as the product of a much more complex and longstanding legal struggle to address nonstate collective action and its relationship to American market capitalism.

A. *Mob Stories: RICO as Societal Safeguard*

Before attempting to reframe RICO as a part of the narrative traced in Part I and attempting to explicate the political economy of the Act's passage in context, this Part will situate my revisionist account by summarizing the dominant narratives of RICO's passage and by providing the doctrinal specifics of the statute itself. Passed on October 15, 1970, Senate Bill 30 — the Organized Crime Control Act of 1970 — was explicitly directed at organized criminal activity that had grown in the wake of Prohibition.¹²⁵ That RICO was the direct descendant of 1960s crime commissions and of earlier Prohibition-era assaults on the criminal underworld is largely unchallenged in traditional scholarly accounts.¹²⁶ The generally articulated contextual frame, then, is not one that involves the “political” conspiracy trial or the social unrest of the 1960s, but rather the world of the Mafia. While still a federal prosecutor, Justice Samuel Alito described RICO as the “culmina[tion of] four decades of congressional efforts to combat organized crime.”¹²⁷ “After Prohibition, *La Cosa Nostra* [the American Mafia] consolidated power by moving successfully into . . . gambling, extortion, and labor racketeering.”¹²⁸ Already in the midst of a war on communist infiltration in American society, the government also sought to control the reach of the Mafia and other organizations devoted to doing business in illegal or extralegal markets.¹²⁹ Commissions and legislative efforts, like the Hobbs Anti-Racketeering Act,¹³⁰ attempted to corral the power exerted by criminal syndicates in these formal and informal sectors.¹³¹ Like the threat of radical

¹²⁵ See Pub. L. No. 91-452, 84 Stat. 941 (1970); Alito, *supra* note 19, at 1–3.

¹²⁶ See, e.g., Robert G. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249–54 (1982); Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 AM. J. COMP. L. 671, 687–88 (2006); see generally Craig M. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Henry Chi, *Tired of Hidden Charges? Use RICO!*, 9 U.C. DAVIS BUS. L.J. 199, 201–02 (2009); Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 340–44 (1998).

¹²⁷ Alito, *supra* note 19, at 1.

¹²⁸ *Id.*

¹²⁹ By “extralegal markets,” I mean modes of exchange that (1) might not rely on formal contractual relationships, or (2) might not enjoy or rely on the recognition of the courts or other official institutional actors.

¹³⁰ Pub. L. 79-486, 60 Stat. 420 (1946).

¹³¹ Cf. Alito, *supra* note 19, at 2–3.

political organizations, the menace of gangsters dominating American society captured public attention, garnering substantial media coverage and mass cultural engagement.¹³²

In 1967, the President's Commission on Law Enforcement and Administration of Justice¹³³ (the Katzenbach Commission) outlined the presence, structure, and activities of organized crime in America, described the threats posed by these syndicates, and made preliminary policy proposals.¹³⁴ The 1967 report, coupled with the successful law-and-order campaign run by Richard Nixon in the 1968 presidential election, helped to strengthen this assault on organized crime and to bring the issue to even greater national attention, ultimately leading to new legislative control.¹³⁵ The final version of the Act was based on a series of factual findings that borrowed from the assorted commission reports, primarily that:

[M]oney and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; [that] organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and [that] organized crime continues to grow because of defects in the evidence-gather-

¹³² See, e.g., ALSON J. SMITH, SYNDICATE CITY: THE CHICAGO CRIME CARTEL AND WHAT TO DO ABOUT IT 271–74 (1954); *Italy May Seek Extradition of 4 in U.S. Linked to Raids on Mafia*, N.Y. TIMES, Aug. 4, 1965, at 25, available at ProQuest Historical Newspapers: New York Times (1851–2008); Helen Johnson, *The Mafia Menace: Growing With County: New Wealth Offers Lure to Crime*, L.A. TIMES, Aug. 10, 1958, at OC6, available at ProQuest Historical Newspapers: Los Angeles Times (1881–1988); Tom McNamara & Jack Anderson, *The Washington Merry-Go-Round: Mafia Behind Organized Crime*, WASH. POST, Aug. 20, 1950, at B5, available at ProQuest Historical Newspapers: The Washington Post (1877–1995) (reporting on “sensational testimony, given behind closed doors by Narcotics Commissioner Harry Anslinger” about the Mafia); *President Sees Abuses As ‘National Disgrace,’* BOS. DAILY GLOBE, Aug. 7, 1959, at 1, available at ProQuest Historical Newspapers: Boston Globe (1872–1981); Harry J. Stathos, *All-Out War Called Against Interstate Crime*, ATLANTA DAILY WORLD, Jan. 21, 1958, at 3, available at ProQuest Historical Newspapers: Atlanta Daily World (1931–2003); Lloyd Wendt, *Crime, Secret Cancer of Nation's Life Today*, CHI. TRIB., Mar. 14, 1954, at B3, available at ProQuest Historical Newspapers: Chicago Tribune (1849–1988); ON THE WATERFRONT (Columbia Pictures 1954).

¹³³ PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); see also Lynch, *supra* note 21, at 666–73.

¹³⁴ See generally James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 744–47 (2010); Lynch, *supra* note 21, at 666–73.

¹³⁵ See S. 1861, 91st Cong. § 1 (1969) (describing the purpose of a RICO predecessor as to “eradicate the baneful influence of organized crime in the United States”); Barry M. Goldwater, Editorial, *Liberals and Their Issues*, L.A. TIMES, Sept. 27, 1970, at F1, available at ProQuest Historical Newspapers: Los Angeles Times (1881–1988) (discussing the importance of the war on crime and the myopia of politicians and advocacy groups opposing it). On the rise of law and order politics in the 1960s, see generally MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S (2005).

ing process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.¹³⁶

Faced with a powerful vehicle of systemic infiltration, therefore, the state required a special set of tools to quash challenges to the formal market ordering.¹³⁷

As a centerpiece of the Act, RICO provided new substantive crimes and created a relaxed procedural framework for federal prosecutors. RICO itself is composed of four parts.¹³⁸ Section 1962(a) makes it a crime to “use or invest” money derived from “racketeering” behavior to affect interstate commerce.¹³⁹ Section 1962(b) criminalizes the use of money derived from racketeering in the maintenance of an interstate enterprise.¹⁴⁰ Section 1962(c) makes it a crime “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”¹⁴¹ Finally, Section 1962(d) criminalizes conspiracies to commit acts that would violate sections (a) through (c).¹⁴² Because of its expansive language and the large number of statutorily defined “predicate acts” that can be used to show racketeering behavior,¹⁴³ RICO is remarkably broad, even for the realm of conspiracy law. As the Fifth Circuit observed in *United States v. Elliot*¹⁴⁴ (“[T]he decision that popularized the notion of RICO as a super-conspiracy statute”¹⁴⁵), “RICO

¹³⁶ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970).

¹³⁷ The Act’s purpose was stated as follows:

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

Id. See also *United States v. Turkette*, 452 U.S. 576, 591 (1981) (“[T]he legislative history forcefully supports the view that the major purpose of Title IX is to address the infiltration of legitimate business by organized crime. The point is made time and again during the debates and in the hearings before the House and Senate.”); 116 CONG. REC. 591, 602 (1970) (remarks of Sen. Hruska) (“Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods.”).

¹³⁸ 18 U.S.C. § 1962 (1970).

¹³⁹ *Id.* at § 1962(a).

¹⁴⁰ *Id.* at § 1962(b).

¹⁴¹ *Id.* at § 1962(c).

¹⁴² *Id.* at § 1962(d).

¹⁴³ 18 U.S.C. § 1961(1) (1970) (cataloguing predicate offenses that constitute “racketeering activity”).

¹⁴⁴ 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979).

¹⁴⁵ Gerard E. Lynch, *The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 949 (1987).

has displaced many of the legal precepts traditionally applied to concerted criminal activity. Its effect in this case is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes.”¹⁴⁶

Commentators and courts have been engaged in a decades-long debate about how broadly the Act was meant to be read.¹⁴⁷ Did the drafters intend for RICO to be a tool used for a narrow purpose — weeding criminal activity and criminal actors out of “legitimate” interstate transactions?¹⁴⁸ Or did they conceive of RICO as an important expansion of a growing legal arsenal for federal investigators and federal prosecutors — a way to increase the power of the government to reach collective criminal action that was otherwise difficult to stop and bring to justice (e.g., criminal enterprises that operated independent of and unrelated to “legitimate” business)?¹⁴⁹ In a world where RICO has become a staple of federal prosecutors’ repertoire, should we be disturbed by the expansion of a clearly directed statute, or should we simply view the frequently questionable application of the law to be the

¹⁴⁶ *Elliot*, 571 F.2d at 900; see also *id.* at 949–50.

¹⁴⁷ See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., dissenting); Douglas L. Bandow, *The Obscenity of Federal RICO Law*, in *THE RICO RACKET*, *supra* note 19, 33; Ira Glasser, *RICO Chickens Come Home to Roost*, in *THE RICO RACKET*, *supra* note 19, at 55; Weinstein, *supra* note 41, at 69–70.

¹⁴⁸ See, e.g., *Sedima*, 473 U.S. at 502 (Marshall, J., dissenting); 116 CONG. REC. 591, 601 (1970) (remarks of Sen. Hruska); 116 CONG. REC. 591 (1970) (remarks of Sen. McClellan); Rick Boucher, *Civil RICO: A Statute Out of Control*, in *THE RICO RACKET*, *supra* note 19, at 43; Lynch, *supra* note 21; Caroline N. Mitchell et al., *Returning RICO to the Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 *FORDHAM J. CORP. & FIN. L.* 1 (2008); Parker, *supra* note 22.

¹⁴⁹ See, e.g., *United States v. Turkette*, 452 U.S. 576, 590 (1981) (“In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, only the infiltration of legitimate business.”); Larry McShane, *RICO Law Lives on Despite Two High-Profile Case Losses Against Mob*, *STAR NEWS ONLINE*, Dec. 26, 2006, <http://www.starnewsonline.com/apps/pbcs.dll/article?AID=/20061226/NEWS/612260321/-1/State> (quoting Notre Dame law professor G. Robert Blakey, “the creator of the law,” as saying that “a good RICO is virtually impossible to defend”). According to Goldsmith:

Congress consciously crafted the statute to encompass a broader range of “enterprise criminality.” Thus, Congress defined “racketeering activity” broadly to include a spectrum of offenses ranging from those commonly identified with organized crime to others more characteristic of white-collar crime. Similarly, Congress consciously chose to define other crucial elements in terms that transcend organized crime

Goldsmith, *supra* note 20, at 284–85 (footnotes omitted). Although supporters of this reading may still view some applications of RICO as inappropriate in some contexts (particularly certain civil actions), they tend to accept the general proposition that, as a broadly written federal criminal statute, RICO was intended to grant prosecutors significant discretion and therefore is appropriately viewed as a statute that may reach both general collective criminal action and organized crime that explicitly interferes with “legitimate business.” See, e.g., Michael O. Garvey, *Blakey’s Interpretation of RICO Vindicated*, *NOTRE DAME NEWS WIRE*, Feb. 25, 2003, <http://newsinfo.nd.edu/news/6045-blakeys-interpretation-of-rico-vindicated/>.

natural evolution of a broadly written criminal statute designed to give prosecutors an advantage in taking on collective action?¹⁵⁰

This debate takes as its starting point two assumptions, one implicit and one explicit.¹⁵¹ First, those who study RICO tend to state outright that the statute has grown broader in scope; the question is not whether the Act has been used to reach more activities since its passage, but whether this extensive application is appropriate.¹⁵² The second assumption, which goes unstated in judicial opinions and in the substantial literature on RICO, is that

¹⁵⁰ It is worth pausing briefly to attempt to distinguish my project from those of a number of scholars who have argued for a more expansive reading of the statute. These commentators — supporters of RICO and skeptics of RICO who support its general aims — tend to suggest that the federal government requires flexibility and leeway to pursue those suspected of criminal activities, particularly conspiratorial or collectivized offenses. See, e.g., Alito, *supra* note 19. Although this Article rejects the argument that we can read RICO as having a narrow target and that we can effectively cabin “organized crime” off from a broad range of other activities, and may therefore resemble more closely arguments that RICO has been correctly applied expansively, I neither adopt the normative posture that RICO specifically and federal criminal law generally has been appropriately drafted broadly, nor argue that we should be comfortable with federal statutes that relax procedural protections or traditionally accepted theories of criminal punishment in order to pursue potentially unlawful behavior that is wide-ranging or difficult to detect. That is, just because I treat RICO as a broad, generally applicable statute in the vein of those discussed earlier, does not mean that I would advocate for courts’ and prosecutors’ broad application of RICO.

Rather, my argument, which will be explained further in the second section of this Part and in the next Part, is that such a broadly drafted statute, reliant on a nebulous and undefined conception of “legitimate” business or un-corrupted markets, transcends traditional debates about and understandings of criminal law. That is, at its core, the Act can be seen as a means of enforcing market norms under the guise of social norms. Going back to my earlier discussion of Horwitz and the public/private distinction in the context of the criminal law, see *supra* notes 54–58 and accompanying text, the argument advanced by Justice Alito and other proponents of federal criminal law is only compelling to the extent that we view the interests being advanced by prosecutorial discretion to be sufficiently representative of the “public interest.”

¹⁵¹ This discussion of the assumptions implicit in legal argument, particularly arguments unsupported by clear authorities, borrows from a strand of legal scholarship that focuses less on the *intent* of legal actors to reach a particular result or the instrumental use of the law in furtherance of political goals, and more on the implicit *ideological conclusions and beliefs* that underlie the structure and rhetoric of legal argument. See, e.g., ATLESON, *supra* note 43, at 3–16; DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: Fin de Siècle* 405 (1997); RICHARD D. PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* 53–115 (1994); Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court’s Political Imagery Legitimizes the Privatization of Everyday Life*, 52 *Geo. Wash. L. Rev.* 263, 268 (1984); Gordon, *supra* note 6, at 93–100.

¹⁵² See, e.g., Boucher, *supra* note 148, at 43–44; Coffey, *supra* note 19, at 1035–38. As Green explains:

While RICO has been an effective weapon for the Justice Department in fighting organized crime, it has disrupted the labor-management relationship. While once disputes were resolved by a swift punch in the nose, the provisions mandating treble damages and attorney’s fees now allow the parties to bring loaded guns into a school yard fight. The issue is not whether RICO is abused. The issue is whether it places into the hands of both management and labor a weapon which each can use against the other to upset the tenuous balance of power that is the hallmark of labor-management relations.

Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 *St. Thomas L. Rev.* 309, 309 (1995).

we (students, scholars, practitioners, legislators, judges, and members of the polity at large) can meaningfully distinguish between *organized crime* and other collective enterprises — between the industry that has been influenced or infiltrated by an unlawful organization and the industry that operates “freely” and legitimately, uninfluenced and uncorrupted.

The first point — that as a practical matter RICO has expanded in scope — is fairly straightforward and is not one that I mean to challenge here.¹⁵³ Instead, it is the second assumption that this Article seeks to challenge — that we can clearly delineate the boundary between organized crime or the criminal syndicate, on the one hand, and other nonstate collective action, on the other. Certainly, at the margins, we can identify criminality with ease and distinguish it from the everyday and the generally acceptable. But is it accurate to read such a broad statute, which encompasses so much activity, through the lens of these easily identifiable extremes? By reinserting RICO’s passage into the history of conspiracies against the market discussed *supra*, the next section will seek to emphasize the inherently political nature of this line-drawing exercise, as rooted in a set of views about state authority and market structuring. The section will begin to blur further the distinction between modes of collective action.

B. What Public and Whose Enemies?: A Different RICO Story

The legislative history of RICO recites that the statute grew out of the need to curb the power and influence of organized crime.¹⁵⁴ Given the cultural familiarity with and hostility to the Mafia and other criminal organizations discussed in the previous section, it is tempting to accept the dominant narrative of the Act as a piece of crudely drafted but necessary law, which directly responded to the serious threat posed by the discrete, pernicious post-Prohibition criminal underworld. However, this section suggests that such a narrative, embraced by courts, scholars, and commentators alike, disregards the broader cultural, historical, and political context of the Act. In focusing on organized crime as existing in a sort of vacuum — an unambiguous, apolitical “cancer” afflicting American society¹⁵⁵ — these narratives neglect the ongoing battles in courtrooms, statehouses, and workplaces throughout the United States over what place (if any) nonstate collective action should have in the nation’s economic system.

¹⁵³ Part III will address the applications of RICO and will attempt to complicate the way in which scholars have treated RICO’s application; however, it appears to be a matter of fact that the Act has been used in increasingly expansive ways since the 1970s. *See, e.g.*, *Boyle v. United States*, 129 S. Ct. 2237, 2246–47 (2009); *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 262 (1994); *Sedima*, 473 U.S. at 499; *United States v. Nascimento*, 491 F.3d 25, 30–31 (1st Cir. 2007).

¹⁵⁴ For an in-depth analysis of the legislative debates over RICO and its predecessor statutes, see Lynch, *supra* note 21, at 673–81.

¹⁵⁵ *See* Wendt, *supra* note 132, at B3.

This section seeks to resituate the dominant history of RICO's passage within a broader history of outlawed collective action and within a specific moment of market crisis in order to argue that RICO's assault on organized crime should be seen both as a sweeping assault on alternative social and economic orderings and as a force for the legitimation of hegemonic market actors and transaction models.

1. *Collective Action as Organized Crime Against the State.*

On April 23, 1969, President Nixon announced a "campaign on organized crime" to Congress,¹⁵⁶ a campaign that culminated in the passage of the Organized Crime Control Act. During the course of the following year, the Act, RICO, and the ensuing legislative debates attracted substantial media attention and editorial page treatments from advocates for an extensive "war" on organized crime, civil libertarians concerned about wire-tapping and lack of procedural safeguards, and many in between.¹⁵⁷ As discussed above, this political and ideological debate about how to combat organized crime continues in popular, scholarly, and legal discourse. But a closer look at the socio-political context (and even the front page of the *New York Times* the day after President Nixon's announcement) yields a more nuanced reading of RICO — a reading that shifts us out of the insular and morally unambivalent space of violence, oppression, and corruption that tended to

¹⁵⁶ *Text of Nixon's Message to Congress Proposing a Campaign on Organized Crime*, N.Y. TIMES, Apr. 24, 1969, at 30, available at ProQuest Historical Newspapers: New York Times (1851–2008).

¹⁵⁷ *Against the Law*, N.Y. TIMES, June 22, 1970, at 36, available at ProQuest Historical Newspapers: New York Times (1851–2008); *Anticrime Bill is Opposed by Texas Liberties Group*, N.Y. TIMES, Feb. 1, 1970, at 45, available at ProQuest Historical Newspapers: New York Times (1851–2008) (quoting Wayne Oakes, the executive director of the Texas Civil Liberties Union as saying that "[w]hile the stated purpose of the bill is to wipe out organized crime, a noble goal and one with which we agree, to accomplish this at the expense of civil liberties is an unacceptable price to pay."); Editorial, *Crime and Punishment*, WALL ST. J., Oct. 20, 1970, at 18, available at ProQuest Historical Newspapers: The Wall Street Journal (1889–1994) ("Before the organized crime bill passed, the evidence indicated that existing laws were not in fact strong enough to deal with racketeers and all their disgusting activities"); Glen Elsasser, *President Pledges Crime War*, CHI. TRIBUNE, Oct. 16, 1970, at 1, available at ProQuest Historical Newspapers: Chicago Tribune (1849–1988); Barry M. Goldwater, Editorial, *Liberals and Their Issues*, L.A. TIMES, Sept. 27, 1970, at F7, available at ProQuest Historical Newspapers: Los Angeles Times (1881–1988); Editorial, *How Not to Fight Crime*, BOS. GLOBE, June 12, 1970, at 14, available at ProQuest Historical Newspapers: Boston Globe (1872–1981); *On Crime Bill*, ATLANTA DAILY WORLD, Feb. 8, 1970, at 10, available at ProQuest Historical Newspapers: Atlanta Daily World (1931–2003); Spencer Rich, *Hill Action Expected on Crime Bills*, WASH. POST, Jan. 3, 1970, at 1, available at ProQuest Historical Newspapers: The Washington Post (1877–1995); Tom Wicker, Editorial, *The Crime-Fighters' Folly*, N.Y. TIMES, June 11, 1970, at 44, available at ProQuest Historical Newspapers: New York Times (1851–2008); Warren Weaver Jr., *Senate Opens Debate on Crime Bill*, N.Y. TIMES, Jan. 22, 1970, at 21, available at ProQuest Historical Newspapers: New York Times (1877–1995).

define mass cultural treatments of organized crime,¹⁵⁸ and into the realm of the conspiracy prosecutions discussed in Part I.

The content of President Nixon's address clearly focuses on organized crime, and the first headline on the story reads, "NIXON REQUESTS WIDE U.S. POWERS TO COMBAT MAFIA."¹⁵⁹ However, the front page of the *New York Times* issue containing these initial statements about the nascent legislative and executive efforts also suggests a much more complex cultural moment — a moment of general upheaval where collective threats to the United States and other hegemonic institutions were rampant.¹⁶⁰ The dominant headline on the front page introduces a story about armed black students' occupation of buildings at Cornell University.¹⁶¹ Four other articles on "student unrest" appear on the page, including one outlining a number of violent incidents.¹⁶² Two articles deal explicitly with the threat of international communism — one addressing the war in Vietnam¹⁶³ and the other involving tensions with the North Korean government.¹⁶⁴ Additionally — and ostensibly more attenuated from domestic political and social conditions — an article supplied by Reuters provided an account of the armed conflict between the post-colonial, secessionist state of Biafra and the U.S.-backed Nigerian government.¹⁶⁵

In line with much of what has been written about the revolutions of 1968,¹⁶⁶ a general sense of unrest permeates this collection of *Times* arti-

¹⁵⁸ See, e.g., ANGELS WITH DIRTY FACES (Warner Brothers 1938); BLAST OF SILENCE (Universal Studios 1961); G MEN (Warner Brothers 1935); LITTLE CAESAR (Warner Brothers 1931); THE PUBLIC ENEMY (Warner Brothers 1931); SCARFACE (United Artists 1932); see generally DAVID E. RUTH, INVENTING THE PUBLIC ENEMY: THE GANGSTER IN AMERICAN CULTURE, 1918–1934 (1996).

¹⁵⁹ Robert B. Semple, Jr., *Nixon Requests Wide U.S. Powers to Combat Mafia*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2008).

¹⁶⁰ N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2008).

¹⁶¹ Homer Bigart, *Cornell Faculty Reverses Itself on Negroes*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1877–1995).

¹⁶² M.A. Farber, *C.C.N.Y. To Close Again; Negroes Agree to Talks*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2008); Emanuel Perlmutter, *Student Violence Shuts 2 City Highs*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2008); Robert Reinhold, *Key Aide Scores Vote at Harvard*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2008); *Student Unrest in Brief*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2008).

¹⁶³ Hedrick Smith, *Paris Peace Talks Said to Be Stalled*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2005).

¹⁶⁴ Takashi Oka, *Korean Reds Warn U.S. Over Planes*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2005).

¹⁶⁵ *Biafra's Capital Reported Seized*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2005).

¹⁶⁶ See generally CHARLES KAISER, 1968 IN AMERICA: MUSIC, POLITICS, CHAOS, COUNTERCULTURE AND THE SHAPING OF A GENERATION (1988); JEREMI SURI, THE GLOBAL REVOLUTIONS OF 1968 (2007); JULES WITCOVER, THE YEAR THE DREAM DIED: REVISITING 1968 IN AMERICA (1997).

cles.¹⁶⁷ As is evident from the front page of this single *New York Times* issue, capitalism and state apparatuses of power were under attack from collective action.¹⁶⁸ In Biafra and Vietnam, insurgents sought to challenge the legitimacy of their respective state's efforts to impose order and economic and cultural values, and on American campuses, disaffected students sought to challenge the cultural hegemony of the official narratives presented in classrooms by advocating for changed curricula and institutional power dynamics.¹⁶⁹ This is not to say that these struggles were substantially analogous or that we can view them as theoretically unified or motivated by the same political or ideological strands. That being said, to varying degrees, each of the conflicts that appeared on the *New York Times* front page suggests a collective or organized threat to the dominant social, cultural, or economic structures and institutions of state dominance.¹⁷⁰ Thus, the nonstate (and antistate) collective action that had been the subject of well over a century of politically and economically inflected prosecutions under conspiracy

¹⁶⁷ Although largely unnecessary to the argument here, it is worth noting that the front page also featured another story involving violent challenges to the state and the dominant social order — the sentencing of Sirhan Sirhan for the assassination of Robert Kennedy. Douglas Robinson, *Sirhan Sentenced to Gas Chamber on 5th Jury Vote*, N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1923–Current file).

¹⁶⁸ See also Philip Hager, *Jury Gets Conspiracy Case of Oakland Seven Antiwar Group*, L.A. TIMES, Mar. 27, 1969, at A30, available at ProQuest Historical Newspapers: Los Angeles Times (1881–1986); Donald Janson, *16 Indicted by U.S. in Chicago Tumult*, N.Y. TIMES, Mar. 21, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2005); John P. MacKenzie, *U.S. Indicts 16 In Disorders at '68 Convention*, WASH. POST, Mar. 21, 1969, at A1, available at ProQuest Historical Newspapers: The Washington Post (1887–1992); *Was it a Conspiracy?*, CHI. DAILY DEFENDER, Mar. 25, 1969, at 13, available at ProQuest Historical Newspapers: Chicago Daily Defender (1910–1975).

¹⁶⁹ See N.Y. TIMES, Apr. 24, 1969, at 1, available at ProQuest Historical Newspapers: New York Times (1851–2008); cf. FOUCAULT, *supra* note 37, at 269–75; ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 418 (Quintin Hoare & Geoffrey Nowell Smith trans. and eds., 1971); Stuart Hall, *The Problem of Ideology — Marxism without Guarantees*, 10 J. COMM. INQUIRY 28, 28–44 (1986) (discussing the importance of cultural studies as an oppositional force in higher education). For negative public responses to these actions, see James J. Shannon et al., Letter to the Editor, *Voice of the People: Rebel Guns on Campus*, CHI. TRIBUNE, Apr. 24, 1969, at 28, available at ProQuest Historical Newspapers: Chicago Tribune (1963–Current file).

¹⁷⁰ My claim is not that reading one page from one newspaper on one day provides proof of a causal relationship or clearly refutes dominant narratives of RICO's purpose and the War on Crime. I do not contend that the fact that RICO's introduction was covered alongside other stories involving nonstate collective action and unrest shows that drafters of the Act and its supporters were necessarily being disingenuous, that "organized crime" was meant to be metonymic for a broader class of political adversaries or opponents to formally structured and legally recognized markets, or that the bill's sponsors carefully avoided references to student radicals or to ongoing concerns about communism despite intending to target these areas. Rather, my argument focuses on the way in which the Act and its conception of organized crime should be seen as framed by this broader historical moment, and the *Times* page acts to reproduce and illustrate this cultural framing.

and other “generally applicable” legal regimes was once again rearing its head.¹⁷¹

In other words, at the moment of RICO’s introduction, the Mafia was hardly the only threat to dominant economic and political institutions.¹⁷² Yet this context has not even been a footnote in the dominant narratives of RICO’s development, its statutory purpose, or its influence on the structure of American society and the American market(s). The threat of organized crime has been treated as a threat in a vacuum.¹⁷³ Perhaps more important for this Article is the largely disregarded argument that the concept of organized crime, even as expressed in 1969 and 1970, could have encapsulated a cultural awareness of forms of organized crime outside of the Mafia paradigm.¹⁷⁴ Notably, in October 1970, just after President Nixon approved the Act’s passage, Senator Edward Brooke, a Republican from Massachusetts,

¹⁷¹ See *supra* Part I (discussing other generally applicable legal regimes used to prosecute dissidents and opponents of the dominant political economy).

¹⁷² It is clear that cultural awareness of the Mafia and the rise of organized crime in the United States is important to a contextualized or historicized account of RICO’s passage. However, the Mafia/prototypical organized crime frame is the only one that scholars of RICO have employed up until this point. The alternative frame suggested by this Article’s account of politically charged conspiracy prosecutions may not supplant the Mafia-centric narrative, but it should challenge the general understanding of the statute and also demonstrate that RICO — like other criminal statutes — is difficult to divorce from its political context and from systems of political and economic power.

¹⁷³ See *supra* Part II.A.

¹⁷⁴ Courts and commentators have struggled with what kind of internal structure is necessary for an entity to fall within the ambit of RICO and for an organization to satisfy the Act’s “enterprise” requirement:

We are asked in this case to decide whether an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* (2006), must have “an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.” Pet. for Cert. i. We hold that such an enterprise must have a “structure” but that an instruction framed in this precise language is not necessary.

Boyle v. United States, 129 S. Ct. 2237, 2241 (2009). Similarly, in *United States v. Cianci*, the First Circuit observed that:

Courts have divided over the legal standards that guide the drawing of this distinction. Some require proof that an alleged associated-in-fact enterprise have an “ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity . . . which might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes.” . . . Courts following the “ascertainable structure” approach do so out of concern that the factfinder not be misled into “collaps[ing] . . . the enterprise element with the separate pattern of racketeering activity element of a RICO offense.”

378 F.3d 71, 82 (1st Cir. 2004) (internal citations omitted); see also *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir. 1982); Randy D. Gordon, *Clarity and Confusion: RICO’s Recent Trips to the United States Supreme Court*, 85 TUL. L. REV. 677, 702–06 (2011); see generally Michael Morrissey, Note, *Structural Strength: Resolving a Circuit Split in Boyle v. United States with a Pragmatic Proof Requirement for RICO Associated-in-Fact Enterprises*, 77 FORDHAM L. REV. 1939 (2009).

publicly denounced radical political dissent as a form of organized crime.¹⁷⁵ Focusing on a spate of bombings that had destroyed federal property, Senator Brooke argued that the Act would “bring a number of these lawless acts under Federal jurisdiction with penalties appropriate to the seriousness of these offenses.”¹⁷⁶ While it may not necessarily speak to legislative intent, Senator Brooke’s comments illustrate that, for some lawmakers, RICO and the Organized Crime Control Act were in effect vehicles for subduing anti-state or nonstate collective action.¹⁷⁷

RICO, the Organized Crime Control Act, and the legislative debates about their passage should be understood as products of, and undivorceable from, their context.¹⁷⁸ The Act and the political interactions that spawned it should be understood not as the products of one determinist or functionalist narrative in a vacuum,¹⁷⁹ but as embedded in and contingent upon a broader set of economic and political conditions.¹⁸⁰ When viewed through this lens, RICO and the war on organized crime appear much less like unique legal developments and much more like parts of an ongoing war on (or at least an extended conflict with) collective actors whose alternative power structures

¹⁷⁵ *Brooke Bitterly Attacks Radicals*, Bos. GLOBE, Oct. 23, 1970, at 12, available at ProQuest Historical Newspapers: Boston Globe (1960–1981). In the fall of 1970, Senator Barry Goldwater also drew links between Democrats’ attitudes toward “the revolutionary action of today’s campus radicals, Black Panther activists and street-corner bomb-throwers” and the failure to sign the Organized Crime Control Act into law. Goldwater, *supra* note 135. Later in the fall, J. Edgar Hoover, the director of the Federal Bureau of Investigation, presented a report to the Senate stating that a group of anarchists had attempted to kidnap high-ranking government officials and, for at least the previous year, had been engaged in an ongoing, elaborate plot to infiltrate and overthrow the government. Ronald J. Ostrow, *Hoover Tells Anarchist Plot*, L.A. TIMES, Nov. 28, 1970, at 1, available at ProQuest Historical Newspapers: Los Angeles Times (1923–Current file). It appears clear, therefore, that around the time of RICO’s passage, legislators were well aware of the specter of organized radicalism *along with* the specter of organized crime.

¹⁷⁶ *Brooke Bitterly Attacks Radicals*, *supra* note 175.

¹⁷⁷ Cf. Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1254 (1931) (emphasizing the importance of viewing law in terms of its concrete effects as opposed to simply its drafters’ intent or theoretical underpinnings).

¹⁷⁸ Cf. DENNING, *supra* note 25; CATHERINE GALLAGHER & STEPHEN GREENBLATT, *PRACTICING NEW HISTORICISM* (2000); Gordon, *supra* note 6, at 71–116; Levin, *supra* note 32, at 567–72. As Christine Desan describes:

[A]n account should consider the way time creates, in the exchanges it makes possible, a coincidence of orders acted out by participants on unequal platforms; the way it reiterates, in the movement from moment to moment, the experience of authority; and the way it erases, in the disappearance of the past, its formative influence.

Christine Desan, *Out of the Past: Time and Movement in Making the Present*, 1 UNBOUND: HARV. J. LEGAL LEFT 39, 51 (2005).

¹⁷⁹ See Gordon, *supra* note 6, at 58–66 (discussing the importance of contingency as opposed to functionalism in historically rooted legal scholarship).

¹⁸⁰ See, e.g., J. S. FURNIVALL, *PROGRESS AND WELFARE IN SOUTHEAST ASIA: A COMPARISON OF COLONIAL POLICY AND PRACTICE* 44–45 (1941); MINDA, *supra* note 45, at 17–100, 165–222 (arguing generally that legal decision-making and doctrinal evolution cannot be divorced from imagination and cultural context); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 135 (1944) (describing the mutually embedded nature of social, economic, and political relationships); Gordon, *supra* note 6, at 125.

and internal governance exist as threats to the state and its institutions. Just as the courts in *Faulkner*¹⁸¹ and *Gitlow*¹⁸² had worried about the threat from labor and political organizations to the underlying state monopoly on (legal) violence, governmental treatments of organized crime focused on the threat of organized crime as exercising a sort of violent para-state or quasi-state authority that would threaten the functioning of the state and the economic and social institutions that it supported. In 1948, for instance, the Chicago Crime Commission concluded that “[l]egitimate business methods cannot survive under this type of competition” from organized crime.¹⁸³ “If not stopped . . . the syndicate might develop into another Nazi organization, [through] which its leader, like Hitler, Mussolini, or Stalin and others, could set himself up as the country’s dictator.”¹⁸⁴

Additionally, the rhetoric of infiltration and corruption of democratic society, which had resounded in prosecutorial arguments in the Chicago 7 trial, recurred not only in the title of RICO itself — Racketeer Influenced Corrupt Organization — but also in the framing of the war on organized crime. President Nixon’s address urged immediate action against organized crime and described a growing threat to the very structure of the American system writ large: the gangster “corrupts our governing institutions and subverts our democratic processes. For him, the moral and legal subversion of our society is a lifelong and lucrative profession.”¹⁸⁵ Similarly, Senator Brooke argued that “[t]he misguided radicals who glorify the noation [sic] of violent revolution in America in fact off [sic] every ideal of human progress. To nourish those ideals we must reject and bring to the bar of justice all those who would destroy the open society on which our welfare depends.”¹⁸⁶ Much like the prosecution’s argument against allowing Kidd to organize workers in 1898, these arguments characterize nonstate collective action — and in particular, action that is embedded in an alternative hierarchy and set of rules — as threatening to destabilize society and replace it with an antidemocratic, oppressive state or governing apparatus.¹⁸⁷

As a normative matter, we might ask whether this treatment is desirable and whether the state (or its electorate) should be criminalizing nonstate collective action that threatens its authority. In some sense, our answer necessarily depends on the way we imagine both the collective actors and the state

¹⁸¹ *People v. Faulkner* (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 315, 330–31.

¹⁸² *People v. Gitlow*, 195 A.D. 773, 777–82 (N.Y. App. Div. 1921); *see also* *Gitlow v. New York*, 268 U.S. 652, 655–56 (1925).

¹⁸³ James Doherty, *Crime Combine Threatens U.S., Says Peterson*, CHI. TRIBUNE, Sept. 19, 1948, at V27, available at ProQuest Historical Newspapers: Chicago Tribune (1849–1988).

¹⁸⁴ *Id.*

¹⁸⁵ *Text of Nixon’s Message to Congress Proposing a Campaign on Organized Crime*, *supra* note 156.

¹⁸⁶ *Brooke Bitterly Attacks Radicals*, *supra* note 175.

¹⁸⁷ *Cf.* Auerbach, *supra* note 89, at 185–88 (focusing on the democratic or antidemocratic nature of political groups as important to the analysis of what kinds of political activity should be protected by the First Amendment).

itself. The answer may be indeterminate and may depend not only on the personal ideological commitments of those whose actions would be criminalized, but also on those advanced by the state. Using similar rhetoric about infiltration in the immediate aftermath of *Dennis*, for instance, Carl Auerbach emphasized the role of internal ideology:

So, in suppressing totalitarian movements a democratic society is not acting to protect the status quo, but the very same interests which freedom of speech itself seeks to secure — the possibility of peaceful progress under freedom. That suppression may sometimes have to be the means of securing and enlarging freedom is a paradox which is not unknown in other areas of the law of modern democratic states. The basic “postulate,” therefore, which should “limit and control” the First Amendment is that it is part of the framework for a constitutional democracy and should, therefore, not be used to curb the power of Congress to exclude from the political struggle those groups which, if victorious, would crush democracy and impose totalitarianism. Whether in any particular case and at any particular time, Congress should suppress a totalitarian movement should be regarded as a matter of wisdom for its sole determination. But a democracy should claim the moral and constitutional right to suppress these movements whenever it deems it advisable to do so.¹⁸⁸

According to this reasoning, if the internal workings and motivating ideology of a group is antithetical to democracy as expressed in the American system of governance, the group is a deserving target of state suppression.¹⁸⁹

Auerbach’s argument is worth noting here as a means of recognizing that nonstate collective action need not be imagined or framed as a potentially liberating or socially positive force (as it may at times appear in this Article, particularly given the initial focus on unions as a vehicle for empowering workers and those in lower socio-economic classes). Instead, such action may be the locus of hierarchies or rules more rigid, coercive, or abusive than those imposed by state actors. Indeed, one of the primary concerns about the infiltration of labor unions by organized crime was the way in which it undermined worker democracy and the accountability of union governance.¹⁹⁰ That being said, Auerbach’s argument, much like those critiqued generally throughout this Article, presupposes that the nonstate actors are wrong, that the State actually is a locus of democracy as opposed to hierarchy, and that those directly in control of state violence (the courts, legisla-

¹⁸⁸ *Id.* at 188–89.

¹⁸⁹ *See id.*

¹⁹⁰ *See* Michael J. Goldberg, *In the Cause of Union Democracy*, 41 *SUFFOLK U. L. REV.* 759, 760–64 (2008).

tors, high-ranking executive officers) do not have an interest in suppressing more democratic or egalitarian movements or modes of thought.

Further, Auerbach's argument, much like those advanced by Posner and by other RICO scholars,¹⁹¹ presupposes an apolitical, idealized definition of democracy — a pure, noninfiltrated or noncorrupted collective. But any such defining project is necessarily political and would require us to determine what democracy *means* or *looks like*. The project of prosecuting a conspiracy, then, brings with it a rejection and delegitimation by the dominant ideology of an alternative ideology.¹⁹² In other words, when we look at RICO in the context of the socio-political turmoil of 1969, can we divorce the attack on the Mafia from the cultural awareness of other counter-hegemonic movements that are potentially more morally ambivalent? As the next section suggests, do we err in viewing an assault on the Mafia as an apolitical move toward greater penalization of *malum in se* behavior, rather than as a broader move that discredits by association and, in turn, legitimates the state as democratic and formal markets as serving the interests of freedom?

2. *Collective Action as Organized Crime Against the Market.*

RICO's status as an inherently politically inflected statute owes largely to its grounding in a particular orientation to the market. That is, RICO was drafted specifically with an eye to protecting existing markets and market actors.¹⁹³ The statute was predicated on findings that "money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions."¹⁹⁴ But when read in conjunction with the larger narrative traced in this Article, this language takes on a striking tone of market supremacy, and seems to import an image of a naturalized market — a pure space for economic exchange that exists independent of external coercive or corrupting forces.¹⁹⁵ Indeed, this image of a conspiracy of private interests as perverting the public interest in a *legitimate* market seems to resonate with the

¹⁹¹ See *supra* note 41.

¹⁹² It is particularly important to this analysis that the statutory language of RICO provides an extensive and varied list of "predicate acts" that can lead to a criminal prosecution. 18 U.S.C. §§ 1961(1)(A), (B) (2006). That is, a defendant engaged in an enterprise that has violated federal gambling regulations on multiple occasions may be charged under the same statute and classified as the same sort of criminal as a defendant that runs a murder-for-hire organization or kills business competitors. See *infra* Part III. As a result, the opprobrium generally reserved for those who have committed some of the especially heinous crimes contained in § 1961 might also be imposed on those who have committed more morally ambivalent offenses.

¹⁹³ See, e.g., *United States v. Turkette*, 452 U.S. 576, 590 (1981); *Text of Nixon's Message to Congress Proposing a Campaign on Organized Crime*, *supra* note 156.

¹⁹⁴ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970).

¹⁹⁵ For scholarly attempts to denaturalize the market and the language of economic analysis, see, e.g., HARCOURT, *supra* note 10, at 240–45; Christine Desan, *The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History*, 30 *LAW & SOC. INQUIRY* 1, 5 (2005); Hale, *supra* note 54, at 474–75.

pre-realist period of the nineteenth-century labor conspiracy cases when worker collective action that “affect[ed] public trade or business” was treated as a conspiracy “against the public.”¹⁹⁶

Much as the discrediting of unions in the nineteenth century affirmed the legitimacy of abusive employment practices by employers and the criminalization of radical political organizations affirmed the legitimacy of the American state as a democratic apparatus, RICO can be seen as legitimating not only the structure of U.S. markets, but also the existing, non-“racketeer-influenced” collective actors in the market. By emphasizing the illegitimacy of certain market actors — those influenced or controlled by the extortionate or corrupt criminal syndicates — RICO serves as a legitimating tool and highlights the boundary between the criminal syndicate or corrupted organization and the (lawful) corporation or anodyne union.¹⁹⁷ Phrased in its most extreme form, then, the criminal law of the marketplace, by singling out certain forms of market violence and coercion for criminal punishment and social stigma, legitimates entrenched institutions of the marketplace and the violence and coercion inherent in them.¹⁹⁸

As in the discussion of RICO as legitimating the state and the system of American governance, the historical context of the statute’s passage is cru-

¹⁹⁶ *Commonwealth v. Grinder* (Pa. Rec’s Ct. 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 24, at 335–36.

¹⁹⁷ See DERRIDA, *supra* note 12, at 141–64. This Article does not deal with splits between more radical or more conservative unions, but it is worth noting that following the NLRA — at least in the middle part of the twentieth century — the union itself was not framed as being antithetical to American capitalism. See DENNING, *supra* note 25, at 430–31; WILLIAM M. LIESERSON, AMERICAN TRADE UNION DEMOCRACY 53 (1959) (“That labor unionism in the United States is an expression of the American democratic spirit working itself out in industry is hardly to be doubted.”); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 5–7 (1999). In part, this may be due to a laboring of American culture, see DENNING, *supra* note 25, at 430–31, but it may also be due to the de-radicalization of American unions and American labor law, see generally Klare, *supra* note 43. That is, the union had been legitimated, but only in a form that had been stripped of many of its political and economic weapons — primarily the secondary boycott and the general strike.

¹⁹⁸ This argument about the legitimating effect of the criminal law borrows from Carol and Jordan Steiker’s argument about legitimation in the context of capital punishment. See Steiker & Steiker, *supra* note 11, at 429–38. In their treatment of Supreme Court decisions on capital punishment, Steiker and Steiker argue that by making a series of minor improvements to the ways in which the death penalty is administered in the United States, the Court has effectively aided in a process of legitimating the institution of capital punishment. *Id.* at 437. They do not suggest that this was an intentional process by judicial actors. *Id.* at 438. Rather, Steiker and Steiker suggest that “the Supreme Court’s detailed attention to death penalty law has generated negligible improvements over the pre-*Furman* era, but has helped people to accept without second thoughts — much less ‘sober’ ones — our profoundly failed system of capital punishment.” *Id.* By focusing too much on minor reforms or on objectionable minutiae, we come to accept an institution as a given; the institution becomes a legitimate element of society or of the legal system that cannot be wholly jettisoned, but which rather must be incrementally adjusted. This process of legitimation then prevents us from confronting the more deeply troubling elements of the institution — that the state is killing human beings, or that workers are forced to endure meager wages and a low quality of life while others enjoy tremendous fortunes — and instead leaves us preoccupied and perhaps ultimately satisfied with nonsystemic changes.

cial. Recognizing that RICO was passed in an environment of instability for the state, the market, and the symbiotic power relationship between the two is vital to understanding how RICO came to advance private interests and legitimate a set of private actors on which the hegemonic ordering relies.

Just as the late 1960s saw a crisis of legitimacy for the state and American democracy, the period also saw corporate America and the structure of the market under great stress. The environmental movement and the consumer rights movement had actively assailed the publicly projected image of corporations as acting in the public interest and had urged regulations that would force market actors to internalize their own externalities.¹⁹⁹ For decades, corporate public relations experts had developed an industry devoted to promoting positive cultural images of the corporation as essential to an idealized concept of America and the free market as an essential component of freedom and democracy.²⁰⁰ Yet, during the 1960s, these narratives came under fire as publicized legislative action and products liability litigation suggested that the interests of most Americans (i.e., the public interest) might not be congruent with the private interests benefitting from the legal regimes that structured the market.²⁰¹ Indeed, it is worth noting that despite the rhetoric surrounding RICO about the pernicious, corrupting threat of organized crime, and despite the statute's allusion to cultural representations of gangsters from the 1930s (Rico was the protagonist in the classic gangster film *Little Caesar*),²⁰² the mass cultural representations of corrupt collective

¹⁹⁹ On the environmental movement, see, e.g., RACHEL CARSON, *SILENT SPRING* (1962). On the consumer rights movement, see, e.g., RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

²⁰⁰ See generally LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* (2003); ROLAND MARCHAND, *CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS* (1998); *THE CENTURY OF THE SELF* (BBC Four 2002) (discussing the use of psychological research in developing a hugely successful public relations sector in American corporate culture). The descriptions and arguments in this section relating to narratives of corporate accountability are explored in more depth in the context of the automotive industry's cultural identity in Benjamin Levin, *Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry*, 53 B.C. L. REV. 821 (2012).

²⁰¹ See, e.g., Frank Deale & Rita Cant, *Barack Obama and the Public Interest Law Movement: A Preliminary Assessment*, 10 CONN. PUB. INT. L.J. 233, 265–66 (2011) (discussing Ralph Nader's consumer activism and congressional hearings on automobile safety); Hetherington, *supra* note 108, at 289–90 (“Similarly, in the students' eyes university participation in government contracts, military recruiting on campuses, and recruiting by industrial firms engaged in military production connect the universities and these industrial firms with the military policy in Vietnam.” Further, “[o]ne commonly voiced criticism of student protests is that neither the industrial firms nor the universities were responsible for the policy at which protests are aimed. The protesters' answer to this is that these institutions are a part of the power structure that is responsible for the policies.”) (footnote omitted); Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 48–49 (2010) (“The origins of the modern debate on corporate social responsibility can be traced to the early 1950s. . . . In the 1960s, the argument was extended further with the assertion that ethical principles should govern a corporation's relationship with society.”) (footnote omitted). See generally Levin, *supra* note 200, at 848–56.

²⁰² For decades, there has been speculation that the acronym “RICO” was a nod to Rico, the gangster protagonist of *Little Caesar* played by Edward G. Robinson. See LITTLE CAESAR,

action at this moment tended to look more like assaults on the corporate structure, the military-industrial complex, or the state as a vehicle for capitalism than they did some sort of subversive criminal syndicate.²⁰³

The business community and the rising forces of neoliberalism reacted to these representations of dominant legitimate groups as threats and emphasized the importance of “free” markets to the maintenance of a free society.²⁰⁴ While it was drafted the summer after RICO’s passage, soon-to-be Supreme Court Justice Lewis Powell’s memorandum to the U.S. Chamber of Commerce on the “Attack of American Free Enterprise System is illustrative.”²⁰⁵ The memorandum, produced at the request of the Chamber of Commerce, “identif[ied] the problem” of the threat posed by “Commu-

supra note 158. For more on the relationship between the film and the statute, see *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God – Is This the End of RICO?”*, 43 VAND. L. REV. 851, 984–87 (1990).

²⁰³ Given the fierce language from sponsors and proponents of the war on organized crime, it is interesting that 1960s popular culture demonstrated relatively little engagement with “organized crime” or the Mafia. While the gangster and the criminal syndicate had been a staple of 1930s mass culture, it was relatively scarce in the cultural lexicon of this moment. Instead, the images of corruption and undesirable collective action in the nascent New Hollywood renaissance in countercultural filmmaking tended to focus much more on traditionally positive social forces — “legitimate business,” the state, and law enforcement. See, e.g., Phillip Novak, *The Chinatown Syndrome*, 49 CRITICISM 255, 276–77 (2007); Drehli Robnik, *Allegories of Post Fordism in 1970s New Hollywood: Countercultural Combat Films, Conspiracy Thrillers as Genre Recycling*, in *THE LAST GREAT AMERICAN PICTURE SHOW 347* (Thomas Elsaesser et al. eds., 2004); *THE WILD BUNCH* (Warner Brothers 1969); *EASY RIDER* (Columbia Pictures 1969); *MCCABE & MRS. MILLER* (Warner Brothers 1971); *BONNIE AND CLYDE* (Warner Brothers 1967).

In the period of genre subversion that characterized American New Hollywood cinema of the 1970s, the gangster and mob movie did return to prominence. See, e.g., *THE GODFATHER* (Paramount Pictures 1972); *THE GODFATHER PART II* (Paramount Pictures 1974); *THE LONG GOODBYE* (United Artists 1973); *MEAN STREETS* (Warner Brothers 1973). But unlike the earlier moment in gangster films, films of this era generally adopted a narrative of deep, systemic corruption or capitalist critique. In this sense, the gangster and the criminal syndicate in this cultural framing had been de-exceptionalized, much in the same way that I hope to de-exceptionalize RICO and organized labor in the narrative of RICO. The gang takes on an ambivalent quality — it was at once an oppositional force to the flawed realm of mainstream society, see, e.g., *BONNIE AND CLYDE*, *supra*; *PAT GARRETT & BILLY THE KID* (Metro-Goldwyn-Mayer 1973), and also a space potentially ridden with the same hierarchies, corruptness, and violence as those that defined the capitalist space, see, e.g., *THE GODFATHER PART II*, *supra*; *THE PARALLAX VIEW* (Paramount Pictures 1974); *POINT BLANK* (Metro-Goldwyn-Mayer 1967). Ultimately, my suggestion in this Article is that RICO, as a delegitimizing device, tends to eliminate this ambiguity and draw bright lines between the democratic and capitalist space of the formal and the hierarchy and corruption of the informal. Such a distinction, I argue, is inaccurate not only as a matter of political philosophy but also as a practical matter when we consider how RICO itself operates.

²⁰⁴ See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 9–10 (1962) (“Clearly, economic freedom, in and of itself, is an extremely important part of total freedom. . . . Political freedom in this instance clearly came along with the free market and the development of capitalist institutions.”); Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 122.

²⁰⁵ Memorandum from Lewis F. Powell to Mr. Eugene B. Sydnor, Jr., Director, U.S. Chamber of Commerce (Aug. 23, 1971) (on file with author), available at http://www.pbs.org/wnet/supremecourt/personality/sources_document13.html.

nists, New Leftists and other revolutionaries who would destroy the entire system, both political and economic.”²⁰⁶ Justice Powell argued that “[i]t is still Marxist doctrine that the ‘capitalist’ countries are controlled by big business. This doctrine, consistently a part of leftist propaganda all over the world, has a wide public following among Americans.”²⁰⁷ Despite anti-statist and anti-regulatory rhetoric in the memorandum, the challenges to the “enterprise system” were also framed as challenges to the state that should be opposed via the state apparatus.²⁰⁸ While Powell’s memorandum was submitted following RICO’s passage and, indeed, neither uses the phrase “organized crime” nor refers to President Nixon’s war on crime,²⁰⁹ it demonstrates a substantial, contemporary fear on the part of the business community about the corrosive effects of challenges to the dominant structures of political and economic governance.

In this context, the passage of a statute that defines “legitimate business” and suggests that it is in the public interest to protect these legitimate actors from external threats and “infiltration” becomes striking.²¹⁰ That is, in a moment when questions were emerging about whether legitimate business was in fact *legitimate*, RICO and the war on organized crime generally defined a set of actors and actions as violative and existing outside the morality of the marketplace, and in doing so suggested a sort of moral approbation of those actors who had been coming under fire from activists.²¹¹ Michael Denning has argued that in the 1930s, legal and cultural texts normalized organized labor and worker collective action, creating a “labored” culture that was more prone to solidaristic action and challenges to perceived political and economic inequalities.²¹² RICO presents a normalization of business organizations (and indeed also labor organizations) that did not challenge the primacy of the state in the capitalist market structure. By targeting groups that challenged the functioning of the marketplace, the Act might be viewed as a *delaboring* of the culture, a renaturalization of the market, and a discrediting of forces that might challenge the nascent neo-

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ The memorandum continues:

There should be no hesitation to attack the [Ralph] Naders, the [Herbert] Marcuses and others who openly seek destruction of the system. There should not be the slightest hesitation to press vigorously in all political arenas for support of the enterprise system. Nor should there be reluctance to penalize politically those who oppose it.

Id.

²⁰⁹ *Id.*

²¹⁰ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970).

²¹¹ See, e.g., Jackson, *supra* note 201, at 48–49; Levin, *supra* note 200, at 848–56.

²¹² See DENNING, *supra* note 25, at xvi–xvii. In his discussion of Depression-era mass culture and political consciousness, Denning describes a process of “laboring” of American culture to “refer[] to the pervasive use of ‘labor’ and its synonyms in the rhetoric of the period,” as well as to “the increased influence on and participation of working class Americans in the world of culture and the arts.” *Id.*

liberal orthodoxy. That is, where decades earlier organized labor had been treated as crucial to democracy and the American way of life,²¹³ the Act emphasized the antidemocratic and pernicious role that collective actors might have in the structure of American social and economic life.

While this section distinguished between the crisis of state legitimacy and the crisis of market legitimacy for the sake of organizational clarity, central to my argument is the fact that these two crises were largely interdependent. That is, this delaboring process largely resulted from the way in which the state and purportedly self-regulating market actors were framed as existing in symbiosis. An assault on the economic system was an assault on the system of governance and vice versa. RICO, then, should be seen as embedded within a broader discourse on the crisis of American capitalism and as existing within a period in which political actors sought to redefine the boundaries of the legitimate (or perhaps formal) market and of legitimate collective action. Located in this particular cultural context, the war on organized crime is not necessarily caused by a desire to *legitimate* the interdependent institutions of state and market, but certainly is *informed* by a political climate in which the line between legitimate and illegitimate was uncertain. The desire to draw this line — and to draw it via a statute that granted immense discretion to state actors²¹⁴ — was not a product of path dependency or a necessary step to solve a determinate problem.²¹⁵ Rather, it was a politically inflected decision — a decision that may have been geared towards one result, but given its context might reasonably have been expected to have broad-reaching implications for the structure of late-twentieth-century American capitalism.

²¹³ See, e.g., HARRY S. TRUMAN, LABOR-MANAGEMENT RELATIONS ACT VETO MESSAGE, H.R. 3020, 80th Cong. (1947), reprinted in 1947 U.S. CODE CONG. SERV. 1851, 1859 (stating that “[o]ne of the major lessons of recent world history is that free and vital trade unions are a strong bulwark against the growth of totalitarian movements” and emphasizing “the contribution which unions make to our democratic strength”); LEISERSON, *supra* note 197, at 53 (“That labor unionism in the United States is an expression of the American democratic spirit working itself out in industry is hardly to be doubted.”); Levin, *supra* note 32, at 587–603.

²¹⁴ In his dissent in *Sedima, S.P.R.L. v. Imrex Co.*, Justice Marshall describes:

The responsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions — which often rely on mail and wire fraud as predicate acts — given the extremely severe penalties authorized by RICO’s criminal provisions. Federal prosecutors are therefore instructed that “[u]tilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application.”

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 503 (1985) (Marshall, J., dissenting). See also *United States v. Palumbo Bros.*, 145 F.3d 850, 871 (7th Cir. 1998) (finding that “there is no clear expression of congressional intent to alter or to limit the broad scope of the government’s prosecutorial discretion to seek indictments for violations of RICO in the general context of labor relations”).

²¹⁵ Such an explanation, which appears in one form or another in the opinions and commentary discussed in Part II.A, appears to resemble the sort of “evolutionary functionalist” legal history that predominated in legal scholarship prior to the 1970s. See Gordon, *supra* note 6, at 58–66. As a critical foray into the historical study of RICO, this Article rejects such a determinist account.

With this reading as a guide, the next Part will assess RICO's application over the forty years following its passage. By briefly examining some of its uses by federal prosecutors, I will explore the extent to which the statute's legitimating potential has been and might be applied.

III. THE LAW IN ACTION: RICO'S APPLICATION AND LEGITIMACY IN THE MARKET

The previous two Parts have attempted to challenge the straightforward narrative that treats RICO as a largely apolitical and necessary state response to the distinct and definable threat of organized crime by emphasizing the political economy of criminalization and suggesting that both the war on organized crime and the statute itself were products of a broader, ongoing struggle between state/capital and external, collective threats. Having situated RICO in this alternative narrative, this Part addresses RICO's actual statutory application²¹⁶ in an attempt to unpack broader arguments about criminalization and its relationship to the concept of legitimation advanced above.²¹⁷

Because of the discretion that it grants to prosecutors,²¹⁸ RICO serves as a compelling case study of the ways in which federal prosecutors and the Department of Justice can make policy decisions through criminal law. In his extensive dissent in the civil RICO case of *Sedima, S.P.R.L. v. Imrex Co.*,²¹⁹ Justice Thurgood Marshall emphasized the prosecutorial powers implicitly and explicitly written into the statute and the importance of moderation on the part of the state:

Congress was well aware of the restraining influence of prosecutorial discretion when it enacted the criminal RICO provisions. It chose to confer broad statutory authority on the Execu-

²¹⁶ I do not intend for this to be a comprehensive account of how the statute has been used or what political decisions are made within the Department of Justice or United States Attorneys' offices regarding potential prosecutions under RICO. While the study of RICO would presumably benefit from an updated account of how these processes and patterns have changed in recent years, such an extensive case-by-case analysis is largely outside of the scope of this project.

For an account of the mechanics of bringing a RICO prosecution by a former Deputy Chief of the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice, see Coffey, *supra* note 19, at 1038–49. For a detailed discussion of the particular uses of RICO in its first seventeen years in existence, see Lynch, *supra* note 21, at 734–64. This section owes a great deal to both articles for important details about the on-the-ground reality of federal RICO prosecution.

²¹⁷ Cf. Halley, *supra* note 123, at 3–4 (focusing on the practical consequences of theoretical and discursive arguments about the law); K.N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281 (1932) (focusing on law as its effects and applications); K.N. Llewellyn, *Behind the Law of Divorce: II*, 33 COLUM. L. REV. 249 (1933) (same); Llewellyn, *supra* note 177, at 1254 (emphasizing the importance of looking to the law in action as distinguishable from the law on the books).

²¹⁸ See *supra* note 214.

²¹⁹ 473 U.S. 479 (1985).

tive fully expecting that this authority would be used only in cases in which its use was warranted. . . . Moreover, in seeking a broad interpretation of RICO from this Court in *United States v. Turkette*, the Government stressed that no “extreme cases” would be brought because the Justice Department would exercise “sound discretion” through a centralized review process.²²⁰

The importance of appropriate prosecutorial discretion is likewise emphasized in publications by the U.S. Department of Justice.²²¹ Paul Coffey, while serving as the Deputy Chief of the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice, wrote that “[t]here are also at least a half-dozen . . . RICO manuals currently in publication, not to mention two ‘How-To’ RICO manuals issued by the Department of Justice. There are probably more RICO seminars conducted around the country at any time than for any other single federal statute.”²²²

Declarations of prosecutorial objectivity and restraint are ostensibly reassuring, but given the breadth of RICO and many of the offenses that constitute RICO’s predicate acts,²²³ the freedom entrusted to prosecutors remains considerable. According to Coffey, federal criminal prosecutions usually emerge out of wide-ranging investigations by the Federal Bureau of Investigation.²²⁴ Before a prosecution can be brought, the Department of Justice Criminal Division’s Organized Crime and Racketeering Section (OCRS) must perform a review of the case, focusing on a number of issues including “*Pinkerton*”²²⁵ issues arising from a RICO conspiracy count,” “language that violates established judicial interpretation of RICO or OCRS policy,” and “[a]nalysis of the ‘enterprise.’”²²⁶ Yet, despite this mechanism for review

²²⁰ *Id.* at 503–04 (Marshall, J., dissenting) (citations omitted).

²²¹ See EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2009 1 (2009), available at www.justice.gov/usao/reading_room/reports/asr2009/09statrpt.pdf. The cover page of the report cites to *Berger v. United States*, 295 U.S. 78 (1935), in emphasizing the impartiality of and public interest advanced by the United States Attorney: “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all” *Id.* (quoting *Berger*, 295 U.S. at 88).

²²² Coffey, *supra* note 19, at 1036.

²²³ For example, see Justice Marshall’s dissent in *Sedima*:

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

Sedima, 473 U.S. at 502 (Marshall, J., dissenting) (internal quotation marks omitted).

²²⁴ See Coffey, *supra* note 19, at 1038–39.

²²⁵ *Pinkerton* liability is derived from the Court’s holding in *Pinkerton v. United States*, 328 U.S. 640 (1946). In *Pinkerton*, the Court concluded that the overt acts of one member of a conspiracy may be attributable to all the members. *Id.* at 645.

²²⁶ Coffey, *supra* note 19, at 1045–46.

and supervision of criminal prosecutions under RICO, given the factors in question and the structure of the internal procedure, how exactly would objectivity and restraint be maintained?²²⁷ How does a series of checks that appear geared toward ensuring a successful RICO prosecution serve to prevent RICO from becoming the sort of “generally applicable law”²²⁸ that operated as the backbone of the political trials discussed earlier?

Since Coffey’s description of the prosecutorial procedure was published in 1990, RICO and state law analogues have been used to bring criminal suits against environmentalists as alleged ecoterrorists for stealing office furniture,²²⁹ to arrest animal rights groups for harassing pharmaceutical companies,²³⁰ and to reach or try to reach those suspected of involvement in urban rioting.²³¹ In 2004, John E. Lewis, the Deputy Assistant Director of the FBI, made a presentation to the Senate Judiciary Committee in which he described at length the risk posed by politically or “interest group”-motivated “domestic terrorist[s],” concluding that “the FBI has made the prevention and investigation of animal rights extremists/eco-terrorism matters a domestic terrorism investigative priority.”²³² Given this stated focus and given the favored status of RICO in federal prosecutors’ arsenal, RICO, like the statutes and offenses used historically to subdue dissenters, has the potential to serve as a vehicle for aggressive state intervention into potential political insurgency.²³³

This is neither meant to suggest that U.S. Attorneys are given free rein, nor that they have focused their power on regulatory offenses, on collective actors who compete directly with powerful business interests, or on political organizations that oppose a given administration.²³⁴ In the four decades since its passage, RICO has certainly been used to prosecute the prototypical

²²⁷ See *Berger v. United States*, 295 U.S. 78, 88 (1935).

²²⁸ Posner, *supra* note 35, at 76.

²²⁹ See, e.g., *Arrest Warrant, State of Indiana v. Farrell*, No. 63C01-0904-FC-00213 (Ind. Cir. Ct. Apr. 21, 2009) (outlining behavior leading to an arrest and charge under an Indiana state analog to RICO); see generally Xavier Beltran, *Applying RICO to Eco-Activism: Fanning the Radical Flames of Eco-Terror*, 29 B.C. ENVTL. AFF. L. REV. 281 (2002).

²³⁰ See Steven Best & Richard Kahn, *Trial By Fire: The SHAC7, Globalization, and the Future of Democracy*, 2 ANIMAL LIBERATION PHIL. & POL’Y J. 1, 2 (2004); Robert Hanley et al., *Seven Animal Rights Advocates Arrested*, N.Y. TIMES, May 27, 2004, at B9, available at <http://www.nytimes.com/2004/05/27/nyregion/27animal.html>.

²³¹ See *Uprising and Repression in L.A.: An Interview with Mike Davis by the Covert Action Information Bulletin*, in *READING RODNEY KING/READING URBAN UPRISING* 142, 151, 154 (Robert Gooding-Williams ed., 1993).

²³² *Animal Rights: Activism v. Criminality: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 70–76 (2004) (statement of John E. Lewis, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, Department of Justice).

²³³ See *Uprising and Repression in L.A.*, *supra* note 231, at 151.

²³⁴ Cf. Ilya Somin, *If You’re Reading This, You’re Probably a Federal Criminal*, THE VOLOKH CONSPIRACY (July 27, 2009, 12:21 AM), <http://www.volokh.com/posts/1248668478.html> (“[T]he amazing thing is not that federal prosecutors sometimes abuse their enormous powers, but that they don’t do so far more often. However, as federal criminal law continues to expand, it will be more and more dangerous to keep relying on their self-restraint or that of the Department of Justice.”).

“bad actor” and dangerously violent “racketeer” who were specifically targeted by the drafters and supporters of the Organized Crime Control Act. Indeed, many of the predicate acts upon which a RICO case can be based fall into the category of traditionally accepted *malum in se* violent crimes that have little in common with the generally applicable, broadly drawn statutes and common law doctrines discussed in Part I.²³⁵

In his seminal article on RICO in 1987, Judge Gerard Lynch presented a sample of 236 RICO cases, focusing on the predicate acts alleged in each.²³⁶ Of the cases sampled, ninety-four focused on criminal syndicates, with ten of them involving violent extortion, ten involving arson, and six involving political violence.²³⁷ The vast majority of the predicate offenses charged in Judge Lynch’s study, however, were nonviolent — including, *inter alia*, thirty-five cases of fraud, thirteen cases of “[t]ax/[r]egulatory” corruption, and sixteen cases of corruption involving government contracting.²³⁸ Based on the picture painted by Judge Lynch, RICO cases tended to materialize around regulatory offenses and property crimes that frequently involve governmental or labor union corruption.²³⁹

That is not to say that many of the other predicate acts charged in Judge Lynch’s sample do not also bring with them a risk of substantial physical harm and may not also be considered morally reprehensible (e.g., prostitution (four cases), loan-sharking (five cases), or theft (eight cases)).²⁴⁰ But it is crucial to recognize that the above-mentioned cases involved *market-based* offenses; they are the products of decisions that have been made over time about how society should structure its exchanges and what form a legitimate business should take.²⁴¹ A prosecution based on a particular loan ar-

²³⁵ See 18 U.S.C. § 1961 (2006) (including in its definitions of “racketeering activity,” *inter alia*: murder, kidnapping, arson, and sexual exploitation of children).

²³⁶ Lynch, *supra* note 21, at 735.

²³⁷ *Id.* I highlight violent extortion, arson, and political violence here because they involve force or violence with the attendant risk of injury, as opposed to damage to property, making such acts more concrete and less politically inflected *malum in se* offenses. That is, such crimes fit neatly within a traditional, apolitical view of criminal law and of RICO as a vehicle for weeding out unambiguously bad, violent, and dangerous actors.

²³⁸ *Id.*

²³⁹ *Id.* (“Labor corruption” accounts for twenty-nine of the cases and “government corruption” — of one sort or another — accounts for seventy-one of the cases in the 1987 sample).

²⁴⁰ See *id.*

²⁴¹ That is, original distributions or allocations of property rights matter. See generally R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 5–8 (1960) (arguing that in a world without “transaction costs,” original allocations of rights would not matter; as a corollary, because transaction costs are ubiquitous, initial allocations of rights must have a substantial impact on social and economic structuring); Hale, *supra* note 54 (describing the way that background property rules can have coercive effects on labor contracts). Trespassing, for instance, cannot be disassociated from the creation of a right to exclude. Similarly, many of the RICO predicate offenses result from affirmative decisions about who should be granted rights and what sorts of rights from the Hohfeldian bundle of sticks may be exchanged. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 710, 746 (1917). Protections against copyright infringement result from decisions to grant enforceable and alienable rights in creative works and to recognize transfers in these

rangement, just like one based on copyright infringement,²⁴² is the product of a set of background market structures.

Perhaps more than any other area of legal discourse and policymaking, criminal law has served as a space for morality and moralizing. Legions of scholars apply moral philosophy to questions of criminalization and to challenging issues of punishment and culpability.²⁴³ In the legislative and judicial arenas, declarations of moral opprobrium are vital components of imposing criminal sanctions and increasing the severity of punishment.²⁴⁴ When we view RICO as a response to organized crime — a statute that conjures up images of vulnerable members of society being exploited (e.g., sex trafficking,²⁴⁵ protection rackets²⁴⁶) or unrestrained violence²⁴⁷ — it is

goods, whereas laws barring prostitution result from decisions to prohibit transactions for sexual services. Literally, there is no right of alienability in one's body. Yet, the decision to recognize marriage and marriage contracts (or indeed many labor contracts) demonstrates that this latter statement may not be true across the board. Rather than a purely moral distinction between the appropriate form of exchanged intimacy (marriage) and the inappropriate form (prostitution), a judgment has been made about what sort of market relationships should be recognized. The labor contract and the marriage contract (at least traditionally) have both been deemed legitimate markets in the body. Cf. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1520–25 (1983) (situating the marriage contract and the family within a broader analysis of labor contracts and state enforcement).

All of this is to say that it would be a mistake to treat the property crime, regulatory offense, or other sort of crime lacking explicit violence under a quasi-natural rights or pure morality framework. While the rhetoric of absolutes may appear in certain debates about the deprivation of rights (human, property, or otherwise), it is essential to recognize that the perceived absoluteness of these rights is inextricable from the vehemence and absoluteness with which the state intercedes to protect them. As in the case of the private law rights critique, this does not necessarily yield the conclusion that rights are per se “bad” and cannot be important or mobilized for good causes. Rather, the critique is instead meant to denaturalize the market structures written into RICO and draw our attention to both the inescapable political economy of the criminal law, and to the fact that “organized crime” is no more a natural or unambiguous concept than is the property right in a given piece of land or chattel. Within the decision to designate collective action as organized crime (and also within the decision to prosecute it), state actors inherently invoke these background rules and inherently take part in a project of normalizing social interactions with the “morality” of the market. Cf. POLANYI, *supra* note 180, at 135 (discussing the relationship between the social and the market).

²⁴² See Lynch, *supra* note 21, at 735 (three of the sample cases involved copyright infringement); Julie L. Ross, *A Generation of Racketeers? Eliminating Civil RICO Liability for Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 55, 66 (2010).

²⁴³ See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 855–59 (1978); DOUGLAS N. HUSAK, *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* (2010); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871 (1976).

²⁴⁴ See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (discussing the moral culpability of a juvenile defendant); *Nunez v. Holder*, 594 F.3d 1124, 1130–32 (9th Cir. 2010) (discussing the classification of certain crimes as involving “moral turpitude”); J. Harry Jones, *Child Molester is Given 32 Years*, SAN DIEGO UNION-TRIBUNE, Apr. 6, 2005 (Local), at B, available at 2005 WLNR 5501934 (quoting the judge as stating that “some crimes are so ‘morally reprehensible’ that they deserve the strongest punishment,” and noting that “[h]e imposed the longest prison term possible”).

²⁴⁵ See, e.g., *United States v. Pipkins*, 412 F.3d 1251, 1253 (11th Cir. 2005) (reinstating an opinion affirming the RICO conviction of pimps involved in the trafficking of minors for prostitution); *United States v. Truglio*, 731 F.2d 1123 (4th Cir. 1984) (RICO prosecution for prostitution ring); *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) (RICO prosecu-

tempting to engage with the statute on this realm and to argue that RICO successfully targets and reaches bad actions and bad actors. However, RICO should also be viewed as part of a tradition of broad criminal prohibitions that operate in a more tenuous moral realm and that encompass behavior that might more easily be classified as *malum prohibitum*. In addition, if we allow ourselves to focus on those charged under RICO with taking part in enterprises revolving around murder or other violent crimes, we miss a deeper, more realistic reading.²⁴⁸ To the extent we imagine the statute only as a method of defense for society against the stereotypical gangster suggested by the statute's traditional framing (and even its name²⁴⁹), it may be difficult to appreciate and perhaps critique the series of political choices inherent in the decision to criminalize a set of actors and markets.²⁵⁰

That is, if RICO and other criminal law doctrines are imagined only in the abstract, treated as necessary responses to unambiguously bad or immoral actors, it might make it easier to impose harsher punishments or to advocate for a more draconian criminal justice system.²⁵¹ Moral certainty, in

tion for interstate prostitution ring); The White-Slave Traffic Act, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421-24 (1998)). On the federal government's history of elevating sex trafficking and sex-related crimes above other state offenses, see Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 788 (2006).

²⁴⁶ See, e.g., *United States v. DiDomenico*, 78 F.3d 294, 298 (7th Cir. 1996) (RICO prosecution against a mafia "[c]rew engaged in the usual 'Mob' activities, in particular the protection racket (the collection of 'street tax' from brothels, gambling enterprises, and other illegal businesses)"); *United States v. Rainone*, 32 F.3d 1203, 1205 (7th Cir. 1994) (RICO prosecution with predicate acts involving extortionate offenses related to a protection racket); *United States v. Romano*, 684 F.2d 1057, 1059 (2d Cir. 1982) (RICO prosecution against individuals who had used their position in a union to run a protection racket).

²⁴⁷ See, e.g., *United States v. Bergrin*, 650 F.3d 257 (3d Cir. 2011) (RICO prosecution based on a number of predicate acts including conspiring to murder witnesses); *United States v. Chong*, 240 F. App'x 748, 748 (9th Cir. 2007) (RICO prosecution based on an alleged murder-for-hire ring); *United States v. Davidson*, 122 F.3d 531, 533 (8th Cir. 1997) (RICO prosecution of a gang alleged to have run an interstate murder-for-hire operation).

²⁴⁸ In addressing the dangerously expansive scope of federal criminal law, Ilya Somin has raised a similar set of concerns:

The vast scope of federal criminal law is a very serious problem. Because of it, most Americans are effectively at the mercy of federal officials whenever they might choose to come after us. We are used to thinking of "criminals" as a small subset of the population. In that happy state of affairs, criminal law threatens only a small number of people, most of whom have committed genuinely heinous acts. But when we are all federal criminals, perfectly ordinary citizens can easily get swept up in the net simply by being unlucky or because they ran afoul of federal prosecutors or other influential officials.

Somin, *supra* note 234.

²⁴⁹ See *supra* note 202.

²⁵⁰ Further, the causal relationship between the decision to criminalize a given market and that market becoming a locus for violence is unclear. "Violence is the norm in illicit gambling markets but not in legal ones." Jeffrey Miron, *Legalize Drugs to Stop the Violence in Mexico*, CNN, Mar. 24, 2009, <http://www.cnn.com/2009/POLITICS/03/24/miron.legalization.drugs/index.html>. "Violence results from policies that create black markets, not from the characteristics of the good or activity in question." *Id.*

²⁵¹ See Alex Kozinski & Misha Tseytlin, *You're (Probably) A Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF THE

this way, can lead to moral condemnation and result in a system rooted in a belief that criminal defendants are clearly different from other, law-abiding members of the polity.²⁵² If, on the other hand, we view RICO — emblematic of other criminal statutes — as born out of political decision-making and susceptible to personal politics and electoral gamesmanship, we might be more hesitant to approve of harsh punishments rooted in moral condemnation or embrace uncompromised policing methods.²⁵³

By emphasizing that the term “organized crime” in the RICO context can encompass concerted action aimed at advancing an ideology or set of interests — as in the era of the labor conspiracy, the time of the Red Scare, and at the moment of RICO’s passage — I mean to suggest that RICO itself should be viewed as troublingly ambivalent. In other words, beyond the procedural or moral objections voiced by criminal law scholars, RICO should be viewed critically — not so much as a unique statute, but as emblematic of a broad legal regime based on a set of assumptions about society, and one that should be analyzed in light of its potential to legitimate certain collective actors and reformist or reimaginative projects, while delegitimizing and outlawing others.

By stigmatizing all those who fall on the wrong side of a RICO charge — whether alleged members of a murder-for-hire operation or environmental activists — as “racketeers,”²⁵⁴ the statute emphasizes bad actors as opposed to broader systemic flaws.²⁵⁵ Much as a pretextual prosecution for a lesser offense may obscure the severity of a defendant’s action and fail to advance societal interests in criminalizing undesirable conduct,²⁵⁶ a prosecution under RICO emphasizes societal disapprobation by evoking the image of malevolent organized crime in a wide range of cases. As a statutory and cultural mechanism born out of a moment of systemic crisis, as discussed in Part II, RICO encourages a nonsystemic reading of societal problems and encourages the scapegoating of individual actors (or collectives). It is not that RICO is somehow unique in the realm of criminal law because of its

CRIMINAL LAW” 43, 44 (Timothy Lynch ed., 2009) (“While Americans vote for politicians who pass laws that make most people criminals, they also support harshly punishing and socially ostracizing those convicted of crimes. In sum, most people think of criminals as bad people, who deserve punishment, while not realizing that they are criminals themselves.”).

²⁵² *Id.*

²⁵³ For a broader discussion of the ways in which decisions about criminal procedure and criminal justice policy have shaped the contemporary culture of mass incarceration, see generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

²⁵⁴ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) (“The defendant, fac[es] a tremendous financial exposure in addition to the threat of being labeled a ‘racketeer’ . . .”).

²⁵⁵ Cf. Steiker & Steiker, *supra* note 11, at 429–38 (arguing that procedural reforms relating to the imposition and administration of capital punishment may have actually served to legitimate capital punishment; by focusing on the glaring misapplications of capital punishment as opposed to the problems with the institution, judges and capital punishment opponents may have inadvertently normalized the practice).

²⁵⁶ See generally Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

role in directing public attention and condemnation and in encouraging a cultural discourse rooted in easily crafted moral binaries. Rather, because of its sweeping scope and the way in which it incorporates *malum in se* and *malum prohibitum* offenses under the same banner, RICO is particularly illustrative of the way in which the criminal law can conceal assumptions about political and economic structuring with the language of moral clarity.²⁵⁷

This sort of cultural and legal misdirection may be most evident in the context of business fraud. In Judge Lynch's sample, business fraud accounted for thirty-eight of the 236 cases (approximately 16%);²⁵⁸ the effort to identify as criminal those whose business dealings have attracted negative attention has found voice in the public condemnations of Enron,²⁵⁹ Michael Milken,²⁶⁰ Bernard Madoff,²⁶¹ and the AIG executive board.²⁶² The problem with a legal regime that centers on the criminal prosecution of these individuals is not that they are somehow innocent or undeserving of retributive punishment, but rather that such an approach encourages a superficial fix both in the political and legal arenas — a fix that will punish individuals and possibly provide some checks on the freedom of potential bad actors to do harm, but which also inhibits broader systemic criticism.²⁶³ Even though there may be reason to believe that Milken and the other defendants mentioned above were not acting outside of accepted practices in their line of work,²⁶⁴ by highlighting their criminality and exceptionalism, we come to

²⁵⁷ Cf. Kozinski & Tseytlin, *supra* note 251; Somin, *supra* note 234.

²⁵⁸ Lynch, *supra* note 21, at 748.

²⁵⁹ See generally BETHANY MCLEAN & PETER ELKIND, *SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (Portfolio Hardcover 2003).

²⁶⁰ See generally *United States v. Milken*, 759 F. Supp. 109 (S.D.N.Y. 1990).

²⁶¹ See generally Robert Frank et al., *Madoff Jailed After Admitting Epic Scam*, WALL ST. JOURNAL, Mar. 13, 2009, <http://online.wsj.com/article/SB123685693449906551.html?mod=djemalertNEWS>.

²⁶² See generally Juliet Lapidus, *Can Paulson Fire Naughty Executives?*, SLATE, Oct. 8, 2008, <http://www.slate.com/id/2201853/>.

²⁶³ See, e.g., Levin, *supra* note 200, at 851–53 (arguing that focusing on those charged with white collar crimes as opposed to focusing on the systems and institutions that allowed them to prosper has prevented broader calls for financial regulation, changes in corporate governance, and reexamination of financial markets); Tom R. Tyler, *Psychological Perspective on Legitimacy and Legitimation*, 575 ANN. REV. PSYCHOL. 375, 384 (2006) (“People are found to accept a variety of types of legitimating myths about markets. They uncritically accept meritocratic explanations for economic inequality, they focus blame for failure on individuals, not the system”) (internal citations omitted).

²⁶⁴ See, e.g., MCLEAN & ELKIND, *supra* note 259, at 143; JAMES B. STEWART, *DEN OF THIEVES* 20–21 (1992). As Stewart contends:

Nor were these isolated incidents. Only in its scale and potential impact did the Milken-led conspiracy dwarf others. Financial crime was commonplace on Wall Street in the eighties. A common refrain among nearly every defendant charged in the scandal was that it was unfair to single out one individual for prosecution when so many others were guilty of the same offenses, yet weren't charged. The code of silence that allowed crime to take root and flourish on Wall Street, even within some of the richest and most respected institutions, continues to protect many of the guilty.

Id.

accept as legitimate the potentially questionable behavior of market actors who are not prosecuted.

Similarly, the increasing use of RICO as a tool to fight governmental corruption can be seen as operating to legitimate state structures and practices of governance — institutions that had been sharply criticized as corrupt and unrepresentative in the years leading up to RICO's passage.²⁶⁵ In 1987, at the time of Judge Lynch's study, governmental corruption cases made up 30% of the U.S. Attorneys' Offices' RICO dockets.²⁶⁶ And in subsequent years, cases against government officials have continued to be a substantial component of the federal prosecutorial repertoire²⁶⁷:

The Justice Department's breakdown of prosecutions based upon each predicate act, expressed as a percentage of total RICO prosecutions, as of January 1, 1989, is the following: 28% involved corruption of government officials, 27% narcotics, 13% fraud in the private sector, 7% labor racketeering, 6% government procurement fraud, 5% gambling, 1% securities fraud, 13% other activities.²⁶⁸

What is striking, however, as with the business fraud cases, is the disjuncture between the criminal activities alleged and the actual trends in society. Many of the governmental corruption cases involve some sort of exchange of political favors for money or campaign contributions,²⁶⁹ but over the past few decades, there has been a marked increase in the amount of

²⁶⁵ See D.J.R. Bruckner, *King, Daley Clash Over Rights Aims in Chicago*, L.A. TIMES, July 12, 1966, at 5 (quoting the Reverend Martin Luther King, Jr., as declaring, after an unsuccessful meeting with the mayor of Chicago, "the beginning of the nonviolent assault on the government and power structure of this city"); Roberts, *supra* note 120 (quoting a student anti-war activist describing her organization's view of mainstream politics by saying that "[m]ost of [the students] think Senator Robert F. Kennedy is completely corrupt"); *supra* sections I.B and II.B.2.

²⁶⁶ Lynch, *supra* note 21, at 734–35 (finding that governmental corruption cases made up seventy-one of the 236 reported cases).

²⁶⁷ See, e.g., *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007); *United States v. Campbell*, 491 F.3d 1306 (11th Cir. 2007); *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001).

²⁶⁸ Andrew J. Melnick, Note, *A "Peep" at RICO: Fort Wayne Books, Inc. v. Indiana and the Application of Anti-Racketeering Legislation to Obscenity Violations*, 69 B.U. L. REV. 389, 389–90 n.5 (1989).

²⁶⁹ See, e.g., *United States v. Jannotti*, 729 F.2d 213, 217 (3d Cir. 1984) (RICO prosecution of corrupt legislators who had taken bribes in exchange for political favors); *United States v. Walsh*, 700 F.2d 846, 851 (2d Cir. 1983) (RICO prosecution involving corrupt public officials who had taken bribes in exchange for political favors); *United States v. Thompson*, 685 F.2d 993, 995 (6th Cir. 1982) (RICO prosecution involving official bribes in exchange for pardons); *United States v. Long*, 651 F.2d 239 (4th Cir. 1981), *cert. denied*, 454 U.S. 896 (1981) (prosecuting a congressman for violation of and conspiracy to violate RICO with bribery as the predicate offense); *United States v. Forsythe*, 560 F.2d 1127, 1131 (3d Cir. 1977) (addressing bribery of magistrate judges by bail bondsmen); *United States v. Dimora*, 843 F. Supp. 2d 799, 815 (N.D. Ohio 2012) (dealing with allegations of bribery and major governmental corruption); Goldsmith, *supra* note 20, at 288 n.37; Lynch, *supra* note 21, at 735 (cataloguing predicate acts that fall under the ambit of governmental corruption); Melnick, *supra* note 268, at 389–90 n.5.

money in political campaigns, and courts have recognized political contributions to be an essential part of American democracy.²⁷⁰ As in so many of the RICO applications discussed in this Part, there are, no doubt, ways to distinguish between the facts of a given prosecution and the run-of-the-mill give-and-take between politician and constituent or interest group — to distinguish between the mundane exchange of earmarks for future votes and campaign contributions, on the one hand, and the unlawful quid pro quo bribe, on the other. But are these distinctions without a difference? Does RICO really weed out corrupting influences from “legitimate” political and economic arenas, or does it simply legitimate these inherently imperfect arenas and modes of exchange by drawing our attention to those careless enough or politically unpopular enough to get caught?²⁷¹

As a way of examining how this critique applies to RICO in action, it is useful to return to a version of the argument advanced by Auerbach about the importance of preventing infiltration of democratic institutions by nondemocratic organizations and ideologies.²⁷² In advocating for the expansive use of (generally civil) RICO in union-related cases, for instance, James Jacobs has recently suggested that one of the reasons for American organized labor’s failure has been its domination by corrupt racketeers.²⁷³ Had it not been for these corrupt mobsters, his argument goes, unions would have instead been dominated by leftists — communists, socialists, and others — who would have created a more successful, egalitarian movement.²⁷⁴ Jacobs does acknowledge that one of the reasons for the rise of organized crime as a corrupting force in unions was the government’s war on communism.²⁷⁵ But he concludes that if somehow organized crime had not taken control of many of the unions, these leftist forces would have risen to power, yielding more vital unions, a labor political party, and a much different twentieth century. I do not mean to focus too much on a counterfactual history or

²⁷⁰ See, e.g., *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

²⁷¹

In addition, the ability to convict almost anyone of a federal crime means that federal officials have wide discretion to punish people who are unpopular, politically weak, run afoul of the current administration, or otherwise become tempting targets. Tellingly, the people who get imprisoned for nonviolent drug offenses are mostly poor and lacking in political influence, while middle class people who do similar things are less likely to be singled out by federal prosecutors.

Somin, *supra* note 234, at 1–2.

²⁷² See *supra* notes 188–91 and accompanying text.

²⁷³ JACOBS, *supra* note 20, at 257–61. Much of Jacobs’s discussion of RICO focuses on its civil uses by the Department of Justice. However, given the substantial doctrinal similarities between civil and criminal RICO (e.g., similarities in the structure of the offense and in the sorts of behaviors and organizations that both the criminal and civil sections of the statute proscribe) and the ways in which courts tend to elide their analyses of both, Jacobs’s argument is still pertinent to this Article’s exploration of criminal RICO.

²⁷⁴ *Id.* at 259–61.

²⁷⁵ *Id.* at 257–58 (arguing that individuals with organized crime ties were able to take advantage of the power vacuum created by the departure of those suspected of being communists and obtain positions in union leadership).

spend too much time trying to refute it, especially given that it occupies only a few pages of Jacobs's extensive history of labor racketeering and that he concedes that it is "wild speculation."²⁷⁶ But his easy distinction between communists and organized crime, and his assumption that a union purged of organized crime would look more egalitarian and democratic, belie the same attitude implicit or explicit in almost all of the scholarly accounts of criminal prosecution addressed in this Article: state intervention and expurgation of corrupting and subverting influences would yield a positive or pure space, a space devoid of coercion or manipulation. Indeed, one of the successes of RICO in Jacobs's narrative has been the replacement of union officials who have alleged organized crime ties with state-imposed trusteeships.²⁷⁷ In other words, a system that deposes union leadership and replaces it with a state-sanctioned alternative (usually an unelected federal prosecutor) is meant to reassure us that workers' interests are being advanced.²⁷⁸

The state in his narrative is one essentially devoid of politics or ideology; RICO is a vehicle to free good individuals from the domination of bad actors. And indeed, such an alternative may prove an effective means of reducing organized crime and may indeed serve the interests of worker democracy in unions overrun by oppressive and violent syndicates. But when we consider the fact that more radical, leftist union leaders had been deposed decades earlier during the *Dennis*-era moment of anticommunism based on similar claims that they were antidemocratic or failed to represent worker interests, there seems to be good reason to think that RICO might weed out politically disfavored or marginalized union leaders and unionization regimes, in addition to those that actually failed to represent worker interests.²⁷⁹ It may, in fact, be that both groups were antidemocratic or failed to represent sufficiently worker interests, but as in the other areas of RICO application, the "legitimate" entity has its flaws — any system of union hierarchy necessarily runs the risk of failing to represent some constituents and of becoming too distant from the rank and file.²⁸⁰ Perhaps, then, RICO is reflective of a belief that the private interests represented by state and federal prosecutors are more desirable than the private interests represented

²⁷⁶ *Id.* at 260.

²⁷⁷ *Id.* at 138–60.

²⁷⁸ *Id.* at 143, 146.

²⁷⁹ See *id.* at 257–58; cf. *supra* note 271; *supra* notes 229–31 and accompanying text (raising the possibility that RICO and its state law analogues have been used to prosecute marginal and radical political groups).

²⁸⁰ See, e.g., *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975) (involving union members following a more radical course of action than their ostensibly representative union leaders); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cnty.*, 431 F.3d 277 (7th Cir. 2005) (dealing with "labor peace agreements" struck between union leadership and employers); *Dana Corp. ("Dana II")*, Cases 7-CA-46965, 2005 NLRB LEXIS 174, at *1 (2005) (alleging that union leaders and employer had reached an agreement in which the union conceded workers' rights without the consent of workers).

by this set of nonstate collective actors.²⁸¹ It may be that the Mafia has ruined many unions, destroyed many lives, and should be purged by any means necessary, but it is essential to recognize that Jacobs's project, much like other anti-infiltration narratives, is ultimately imperialist in nature.²⁸² By granting free rein to state agents to subdue nonstate collective action, RICO replaces one set of actors (perhaps capitalistic, perhaps syndicalistic) with the hegemon of state-sanctioned capitalism. That is, there may not be a legitimate business, only a legitimated one.

This critique of the naturalization of criminal law and the distinction between legitimate and illegitimate markets and market actors has deeper normative significance. As Bernard Harcourt argues in the context of his examination of the interrelated naturalization of the market and the penal system:

[F]aith in natural order . . . forecloses a full normative assessment of market outcomes. It closes the door on the very condition of possibility. It effectively depoliticizes the market itself and its outcomes. It is only when the illusion of natural order is lifted that a real problem arises: that of the justice of the organizational rules and their distributional consequences.²⁸³

By uncritically embracing the role of the state as protecting freedom and free markets through criminal sanctions, the traditional account of RICO, much criminal law scholarship, and much of the cultural discourse on criminal law prevents the sort of honest normative and distributional assessment that Harcourt invokes.²⁸⁴ Viewing RICO through the historical lens of politically inflicted conspiracy prosecutions should invite such future assessments — inquiries into the interests advanced and hindered by prosecutions and nor-

²⁸¹ As one critical account of the free rein of federal criminal prosecutors argues, “[u]nder the best circumstances, most targets [of federal criminal prosecutions] will be unlucky schmoe who happen to catch the authorities’ attention or people the prosecutors or the public think are especially ‘bad.’ At worst, a ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant.” Kozinski & Tseytlin, *supra* note 251, at 44.

²⁸² Cf. Gustavo Esteva, *Regenerating People's Space*, in *TOWARDS A JUST WORLD PEACE* 271 (Saul H. Mendlovitz & R.B.J. Walker eds., 1987) (critiquing international development projects that focus on disturbing informal spaces and imposing a formal market order or formal, hierarchical state model); Mark Tushnet, “*I Couldn't See It Until I Believed It*”: *Some Notes on Motivated Reasoning in Constitutional Adjudication*, 125 *HARV. L. REV. F.* 1, 6 (2011) (“Progressivism in law collapsed for intellectual reasons as well: the Progressive view of science was imperialist and utopian. Technical specialists would replace political decisionmakers across the entire range of public policy, from ratemaking in economic regulation to rehabilitation in the criminal justice system and beyond.”).

²⁸³ *HARCOURT, supra* note 10, at 32.

²⁸⁴ Harcourt describes “the price we pay for believing that the economy is the realm of natural orderliness and that the legitimate and competent sphere of government administration lies elsewhere, in policing and punishing” as “shielding the massive wealth distributions that occur daily” and “massively expanding the carceral sphere.” *Id.* at 191.

mative reexaminations of what sorts of market action should actually be treated as “legitimate” and “corrupt.”

CONCLUSION

The arguments advanced in this Article are not unique to the context of RICO and might be applied more broadly to the criminal law. That is, RICO, like other criminal laws, is ultimately a line-drawing exercise between the legitimate on the one hand, and the illegitimate on the other. By invoking state violence and the attendant social stigma of criminality, criminal law generally and RICO specifically act not only to separate legitimate from illegitimate but to create both categories — to legitimate and to delegitimate. What makes RICO such a powerful example of the political economy of criminal law is the uncertainty of the line that it draws and the difficulty inherent in a legal institution that purports to distinguish between market actors based on some apolitical or nonideological moral metric. Embedded in a history of prosecutions enforcing a particular conception of state and market, RICO serves as a reminder of the criminal law’s politicization and role in creating and structuring American society.

In closing, then, perhaps the myth of RICO and the culturally constructed image of organized crime and the gangster cannot be separated from the similarly culturally constructed bipolarity of the U.S. economy.²⁸⁵ Loosely based on Al Capone and long held to be the namesake of the statute, Rico was the protagonist of *Little Caesar*, the story of a violent, small-time hood who rises to power in the underworld, only to fall victim to his own immoral ways and meet his demise in a shootout with police.²⁸⁶ While *Little Caesar* has remained linked to RICO, perhaps the better representation of law in this narrative is the contemporary genre piece, *Angels with Dirty Faces*, which tells the story of two childhood friends, Rocky and Jerry, from poor backgrounds who grow apart and wind up on opposite sides of the law (Rocky, a gangster, and Jerry, a priest).²⁸⁷ Throughout the film, Jerry tries with little success to keep the neighborhood boys from idolizing his old friend. Like *Little Caesar*, the film plays out as a morality tale, but unlike Rico, Rocky is tried and sentenced to death. In an attempt to discourage troubled youth from following a life of crime and to crush the image of the romantic, rebellious gangster, Jerry urges Rocky to cry and show fear when he goes to the electric chair. Rocky cries, and we are left with the image of

²⁸⁵ That is, the ostensibly clear divide that exists between the legitimate American business or businessmen and the criminal or sociopathic market actors. See HARCOURT, *supra* note 10, at 147 (describing “neoliberal penalty” as embracing a view whereby “[t]he relationship between the market and the penal system is binary: there is a market option, which is the space of ordered exchange, and it is marked off from the fraud and coercion option, which is the space of market bypassing, the space outside the market”).

²⁸⁶ LITTLE CAESAR, *supra* note 158.

²⁸⁷ ANGELS WITH DIRTY FACES, *supra* note 158.

the boys disillusioned and saddened at the loss of the mythic underclass hero.

Angels with Dirty Faces, then, serves as a cultural marker of the same theme that has recurred throughout this exploration of RICO — the false clarity of law as a legitimating project. The parable is straightforward, and the world portrayed is black and white: the gangster dies in ignominy, his way of life is discredited, and the boys return to the sanctified space of the priest. But outside of the diegesis, what life awaits the boys? How will they support themselves and find places in society? Rocky's answers might have been violent, immoral, and unsatisfactory, but outside of some vague, institutionalized morality, what is offered in their place to the young tenement dwellers? Ultimately, then, the film, like the traditional scholarly and political treatment of "organized crime," leaves the hardest questions unanswered by offering false clarity. In an imagined space of good and evil, legitimate markets and nefarious interlopers, it is all too easy to draw the line and to invoke state violence to protect the public from the private. In a more complicated world, however, where there may be no good market and no pure, altruistic state, the legitimization project may have saved the boys or it may have doomed them to an alternate form of dehumanization. There may be a law, but there may not be a line.