Protecting the Waterfront:

Prosecuting Mob-Tied Union Officials

Under the Hobbs Act and RICO after Scheidler[1]

Ehren Park Reynolds[2]

[Please cite as 10 BOALT J. CRIM. L. 2]

[Please pincite using paragraph numbers; e.g., 10 BOALT J. CRIM. L. 2, ¶ 11]

> [Genovese associate Stephen] Andretta: You know what the RICO Act is, right? We just came out of a civil RICO. It was the first case of its kind in the country. I'm under court order now. I can't be involved with no union people, I can't discuss no fuckin' union business.
>
> [Genovese member Matty "the Horse"] Ianniello: Yeah, but see we're legal...
>
> Andretta: It's a test case. They're gonna start using it all over the country ...[3]

INTRODUCTION

¶1. On March 13, 2003, Judge I. Leo Glasser of the Eastern District of New York granted a motion to strike two counts of a seven-count indictment in a federal RICO prosecution of the Genovese Crime Family, captioned as *United States v. Bellomo*. The stricken counts alleged the commission of labor racketeering, or mob-directed criminal activity involving the misuse of union assets, by Andrew Gigante, son of former Genovese boss Vincent "the Chin" Gigante. As a practical matter, the defense's successful motion did not seriously hinder the prosecution. The defendants pled guilty

within a month of Judge Glasser's ruling rather than contest federal prosecutors' overwhelming evidence of extortion and obstruction of justice.[4] The guilty pleas in *United States v. Bellomo* garnered little attention in the media or academia, not least because many of the same defendants had already been convicted on similar charges in a 1997 RICO prosecution in the Southern District of New York, and faced lengthy prison terms in any event.[5] The *Bellomo* prosecution gained a measure of notoriety only in relation to the theatrical efforts of Vincent "the Chin" Gigante, the so-called "Oddfather," to feign incompetence to stand trial.[6]

¶2. While procedurally unremarkable, Judge Glasser's *Bellomo* ruling in March 2003 was jurisprudentially significant.[7] In granting the motion, Judge Glasser held that a Supreme Court case decided three weeks earlier, *Scheidler v. National Organization for Women*, invalidated the principal legal theory undergirding the federal government's twenty-year campaign against labor racketeering in America, first successfully introduced in the early 1980's in *United States v. Local 560*. In keeping with what had become standard practice in litigation involving other mob-controlled unions since the *Local 560* case, the *Bellomo* prosecutors had charged Andrew Gigante with Hobbs Act extortion of union members' intangible rights to vote and speak freely in union elections, rights guaranteed by the federal Labor-Management Reporting and Disclosure Act (LMRDA). The victims were the rank-and-file of several locals of the International Longshoreman's Association (ILA) in New York, New Jersey, and Florida.[8] Hobbs Act extortion is a RICO predicate, and Gigante's actions thus provided the government with a basis to join Gigante in a larger RICO prosecution of the Genovese Crime Family. In a dramatic departure from the past, the *Bellomo* court granted the defense motion to strike the

counts, ruling that *Scheidler* precluded these charges as a matter of law. Judge Glasser held that the extortion of LMRDA union democracy rights was no longer sanctionable conduct under the Hobbs Act, thereby abandoning the doctrine of *Local 560*.

¶3. *Scheidler v. National Organization for Women*, decided during the pendency of the defense motion in *Bellomo*, pitted America's most prominent activist organizations on either side of the abortion debate against each other in the nation's highest court.[9] The pro-choice groups sought a nationwide injunction against the pro-life organizations, alleging a systematic campaign of violent intimidation against the staff and clientele of abortion clinics throughout the country over the previous two decades. The pro-choice coalition contended that the conduct of the pro-life side constituted Hobbs Act extortion and thereby served as the basis for a civil suit under RICO. Concluding a court battle that had commenced seventeen years earlier in 1986, the Supreme Court in *Scheidler* found for the pro-life groups, denying the injunction and categorically precluding future such litigation between the parties. Under the Supreme Court's interpretation of the Hobbs Act in *Scheidler*, blockades of abortion clinics could not constitute extortion because the pro-life activists did not endeavor to "obtain" "property" of the victims that could be "exercised, transferred, or sold," as the court construed the statute to require.[10] Though by its terms limited to the stylized and narrow field of abortion protest litigation, *Scheidler* sent a cloud over areas of otherwise settled law in other contexts, among them, federal prosecution of labor racketeers. Three weeks later, Judge Glasser held that after *Scheidler*, LMRDA rights could no longer be extorted under the Hobbs Act because they could not be "exercised, transferred, or sold," and struck the labor racketeering counts against Andrew Gigante.[11]

¶4. The *Bellomo* ruling is problematic, and warrants review. Judge Glasser's application of *Scheidler* has introduced uncertainty into settled labor racketeering jurisprudence. Further adoption of *Bellomo* could significantly undermine the federal government's campaign against labor racketeering, facilitating the resumption of mob influence over sectors of the labor movement traditionally susceptible to organized crime penetration. Though three other courts to have considered the issue since *Bellomo* have held *Scheidler* not to disturb *Local 560*, Judge Glasser recently reaffirmed the holding of *Bellomo* in *United States v. Coffey*. [12] The resulting split in the case law has left the validity of *Local 560* an open question, to be raised by defendants and adjudicated anew in future mob prosecutions. More immediately, some of the *Bellomo* defendants themselves have sought to benefit still further from Judge Glasser's ruling. Several have filed a petition to overturn nearly identical convictions based on the *Local 560* legal theory dating back to 1997 in light of the *Bellomo* judgment.[13] Though this gambit will probably fail, given that new jurisprudence is rarely applied retroactively, the petitions have nevertheless managed to mire the government in litigation for the past two years to preserve these convictions.[14]

¶5. *Bellomo* is wrongly decided. *Scheidler* does not overrule *Local 560*. The legal theory of *Local 560* has been an essential basis for legal action to liberate nearly two dozen locals in several major metropolitan areas from the clutches of organized crime over the past two decades. The future viability of such suits against labor racketeers may well hinge upon the recognition by other courts that the *Bellomo* court reached the wrong result.

¶6. This article will explain why *Scheidler* does not disturb the doctrine of *Local 560*. The first half traces the development of the jurisprudence of *Local 560* and discusses the role *Local 560* and progeny have played in labor racketeering suits since the early 1980's. This context permits an appraisal of the policy implications of overruling *Local 560*. The second half analyzes *Scheidler* itself, and explains how under any one of several interpretations of *Scheidler*, *Local 560* remains good law. This article concludes by assessing the likely repercussions of *Bellomo* on future federal labor racketeering litigation.

LOCAL 560* AND *SCHEIDLER

Local 560

The Problem

¶7. Labor racketeering, or the misappropriation of union assets by mob-tied union officials to enrich organized crime, has characterized the American labor movement since the early 20th century.[15] While the eradication of labor racketeering had been a law enforcement priority since the 1950's, Teamster President Jimmy Hoffa's disappearance, under circumstances suggesting mob involvement, brought about renewed attention to the infiltration of organized crime into American labor organizations. The initial salvo in the federal government's 20-year legal campaign to combat labor racketeering was the filing

of a civil complaint against a single Teamsters local in New Jersey in 1982. The precedent set by the government's victory in that case, *United States v. Local 560*, provided the legal basis underpinning successful civil litigation against nearly twenty other mob-controlled unions.[16] These suits resulted in the placement of the unions in trusteeships and the removal of mob associates from union office.

¶8. Local 560 of the International Brotherhood of Teamsters in New Jersey epitomized the type of mob-dominated union the government sought to liberate from the influence of organized crime. By 1982, Local 560 had been controlled for more than two decades by the so-called "Provenzano Group", which comprised of Genovese crime family member Anthony "Tony Pro" Provenzano and five of his cohorts.[17] Although the local held periodic elections for union offices as required by law, no race had been seriously contested since 1960. The most popular candidate then opposing the Provenzano Group was Anthony Castellito, who was murdered the following year at the behest of Provenzano[18] The last prominent dissident movement within the union had been spearheaded by Provenzano critic Walter Glockner and dissipated when Glockner was gunned down in front of his house in 1963.[19] In the ensuing years, the Provenzano Group and its allies occupied every union office, helping themselves to large salaries and misappropriating union assets.[20] In addition, the Provenzano Group orchestrated elaborate extortion schemes against employers for so-called "labor peace," a promise not to strike negotiated in bad faith, and illegally permitted unscrupulous employers to use non-union labor in exchange for bribes.[21] By 1982 the Provenzano Group's systematic and brazen theft of union pension funds and other assets and threats of violence against dissenters made Local 560 a suitable target for government intervention.

¶9. The extent of the entrenchment of organized criminal influence in Local 560 substantially complicated the task of liberating the local. While the behavior of the Provenzano Group was patently criminal, the precise structure of the legal challenge necessary to curtail this behavior was less obvious; successful purging of mob influence would require not only the punishment of individual mob-tied officials but also the prospective elimination of the practice of labor racketeering within the local. Labor racketeering was not a statutorily-proscribed offense as such; successful prosecutions of labor racketeers in the past had yielded convictions on charges of murder, bribery, or extortion. Indeed, by the early 1980's, the government's very success at prosecuting individual labor racketeers ironically served as a measure of its failure to combat the broader problem of labor racketeering itself. As one labor racketeer went to prison an associate would take his place, and the local would remain mob-controlled.

¶10. Local 560 was typical in this regard; the Provenzano Group continued to dominate the local through the early 1980's even with Provenzano serving a life sentence arising out of a 1978 conviction.[22] In fact, with the murder of Walter Glockner the notable exception, each of the most outrageous incidents of labor racketeering and attendant violence within Local 560 had resulted in convictions and prison terms for Provenzano and nearly all of his associates. As early as 1963, Provenzano was convicted for the extortion of "labor peace" payoffs from the Dorn Transportation Company and sentenced to seven years' imprisonment, of which he served four.[23] In 1976, Provenzano was sentenced to life imprisonment for the 1961 murder of Anthony Castellito, and was convicted in another "labor peace" scheme involving the Seatrain Lines company in 1979.[24] Most of Provenzano's relatives and business partners were

similarly punished for these and other offenses.[25] By the late 1970's, of the six original Provenzano Group members, Anthony Provenzano, Nunzio Provenzano, and Thomas Andretta were in prison. Stephen Andretta and Gabriel Briguglio were legally barred from holding union office and Salvatore Briguglio was dead.[26]

¶11. Incarceration notwithstanding, the Provenzano Group continued to draw exorbitant salaries and pensions, draining the union's finances. Provenzano retained this influence over the Local 560 Executive Board from prison by ensuring that the elected governing body of the union was made up of Provenzano loyalists not imprisoned at the time. As the *Local 560* court observed, "The evidence is highly persuasive that from the late 50's on into the 70's, Anthony "Tony Pro" Provenzano…ran this union with an iron hand whether in or out of prison or office. [Anthony Provenzano's brothers] Sam [Provenzano] and Nunzio [Provenzano] played musical chairs in minding the store for Tony to satisfy the technical requirements of the law."[27] Following Nunzio's conviction in 1980 for "labor peace" payoffs, other Provenzano loyalists who managed to avoid personal involvement in racketeering acts acceded to the Executive Board. By the early 1980's, the Local 560 Executive Board comprised President Salvatore "Sam" Provenzano, Anthony's brother, Secretary-Treasurer Josephine Provenzano, Anthony's daughter, Vice President Joseph Sheridan, Recording Secretary J. W. Dildine, and Board Trustees Thomas Reynolds, Stanley Jaronko, and Michael Sciarra.[28] These Executive Board loyalists secured generous salaries for the Provenzano Group, associated with members of the Group in jail, and lobbied the membership of Local 560 to pay Anthony Provenzano a sizable pension even after Provenzano's conviction for ordering the murder of Anthony Castellito.[29] The Provenzano Group's perpetration of labor racketeering

offenses through the process of musical chairs made a mockery of the government's prosecution of individual labor racketeers. The most potent symbol of the Provenzano Group's enduring control over Local 560 was a picture of Provenzano hung in the union hall.[30] With each successive prosecution by the government, the composition of the Executive Board changed, but Provenzano's picture remained, serving as a reminder to the entire union of who retained ultimate authority within Local 560.

¶12. The Racketeer Influenced and Corrupt Organizations Act, or RICO, offered a means of addressing this "musical chairs" problem. In enacting RICO, Congress sought "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 providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[31] Among these new penal prohibitions was the proscription of a litany of predicate offenses. The predicate offenses include state and federal crimes including murder, bribery, and extortion.[32] Proof of these RICO predicates could establish a pattern of racketeering activity by an accused to acquire or maintain control over an "enterprise," such as a union, or to "conduct or participate" in the "conduct of such enterprise's affairs."[33] RICO empowered the government to prosecute organized criminal groups for their contribution to or participation in a pattern of racketeering activity rather than having to resort to separate prosecutions of individual perpetrators for each offense and carried stiff penalties.[34] In principle, the concept of a pattern of racketeering activity would enable the government to cast a much wider prosecutorial net than had hitherto been possible against the Provenzano Group's scheme.

¶13. The government first employed RICO against the Provenzano Group in a criminal prosecution in 1979, winning convictions but failing to diminish the Group's influence. The government indicted several members of the Group for predicate acts relating to the extortion of Seatrain Lines, a shipping company.[35] Provenzano and four associates were sentenced to terms of up to twenty years. While symbolically important, the successful verdict proved moot, given that Anthony Provenzano was already serving a life term for the murder of Anthony Castellito.[36] Anthony Provenzano continued to receive the pension that allies of his group arranged to pay him. Indeed, as the 3rd Circuit later noted, "incarceration, much less ineligibility to hold union office, does not prevent members of the Provenzano Group from committing acts of extortion."[37] By 1980, the ten-year-old RICO statute was still an unwieldy and largely untested legal weapon, unfamiliar to most federal prosecutors.[38] The *Provenzano* case demonstrated the limited utility of using RICO as a mere legal umbrella for the deployment of traditional prosecutorial doctrines in engendering fundamental reform within the union.

¶14. Though principally a criminal statute, RICO also contained civil provisions that enabled the government to sue in equity.[39] Civil litigation represented an alternative mechanism by which RICO could promote institutional reform within Local 560. The most significant advantage of a civil suit over a criminal prosecution was the remedy available. Injunctive relief allowed for the crafting of a specially-tailored remedy, such as a court-supervised trusteeship, directed towards reform of the union itself, rather than the prosecution of particular individuals. While the court's involvement in a prosecution might end upon conviction, compliance with a civil remedy could be monitored indefinitely. The other benefits of litigating civilly included the right to discovery, the

lesser burden of proof, and the government's ability to invite an adverse inference from the defense's silence. These reduced procedural and evidentiary burdens would make the case easier to win.

¶15. Yet while civil RICO provided a viable statutory framework, two related problems remained: whom to sue, and for commission of which "RICO predicates." Clearly, the government could not sue the Provenzano Group alone. Mere civil sanctions would be unlikely to deter the Group from labor racketeering if prison sentences had not. The government's conundrum was how to expand the suit to include the Executive Board of Local 560 in the pool of defendants. Unlike their relative Anthony, by 1982 neither Sam nor Josephine Provenzano had been convicted of any crime; yet by voting to pay Anthony Provenzano high salaries and consorting with known Provenzano Group associates, Sam and Josephine enabled Anthony Provenzano to maintain influence within Local 560.[40] The government's RICO suit would achieve little so long as Provenzano's picture remained on the wall. Of course, Sam and Josephine, not the jailed Provenzano Group, were responsible for hanging it there.

¶16. In addition, even with the Executive Board of Local 560 in the suit, the government was left with the question of which "predicate" offenses were available with which to charge the enlarged group of defendants. There was plenty of evidence to pin the Castellito murder and some of the biggest "labor peace" extortion schemes on various Provenzano Group members, and indeed, the government had already done so in successful criminal prosecutions.[41] Less clear was how to hold the current Executive Board liable for these crimes. Sam and Josephine Provenzano, along with Sheridan,

Dildine, and the other Executive Board members, carefully avoided direct involvement in criminal activity. Moreover, the most egregious labor racketeering offenses, including the two murders, occurred well before these individuals assumed their Executive Board positions.[42]

The Solution

¶17. The government resolved both issues by focusing on the consequences of Provenzano Group control for the union's rank-and-file, i.e., how the presence of Tony Pro's picture on the wall affected the way the local was run. That the Provenzano Group required a pliant Executive Board to maintain its influence was plain; more suspicious was how an Executive Board so closely associated with a cabal of convicted felons managed to get elected repeatedly by the union's rank-and-file. As the *Local 560* appeals court was later to remark, "it [was] beyond belief that 10,000 members would sit by and watch these things done and never utter a peep…unless a substantial number of the membership were fearful for their lives or their jobs."[43]

¶18. The government assembled evidence to show that the murders of Provenzano critics Anthony Castellito and Walter Glockner were widely believed to be perpetrated by the Provenzano Group, establishing a "climate of intimidation" in Local 560 by demonstrating that opposition to the Group invited violent retaliation.[44] As the government argued, the Provenzano Group maintained this climate of intimidation over the ensuing two decades. For its part, the Local 560 Executive Board aided and abetted the climate of intimidation, not by committing its own homicides, but by the persistent re-appointment to union offices of Provenzano associates rumored to have been associated

with these murders and other crimes,[45] and "the calculated refusal…to take such steps and measures as are reasonable and logically necessary to counter adverse perceptions."[46]

¶19. The government contended that the Provenzano Group cemented its power within the union, even while jailed, by exploiting union members' adverse perceptions to discourage opposition to the election of Provenzano loyalists to union offices and criticism of the Provenzanos at membership meetings. Under this reasoning, Provenzano supporters who thus benefited by securing union office on the Executive Board returned the favor by orchestrating large pension payments to incarcerated Provenzano Group members, associating themselves with the Group, and most prominently by hanging Anthony Provenzano's picture up in the union hall.

¶20. On the basis of these facts, the government presented a legal argument that union members' inability to participate meaningfully in the governance of Local 560 due to Provenzano Group bullying constituted a legally-cognizable injury. The Labor-Management Reporting and Disclosure Act (LMRDA), a federal statute passed in 1959, establishes a "Bill of Rights of Members of Labor Organizations."[47] This "Bill of Rights" guarantees union members the right to nominate and vote for candidates for union office of their own preference, attend and speak freely at membership meetings, and participate generally in the democratic governance of their union without fear of retribution.[48] The government argued that the climate of intimidation illegally interfered with union members' free exercise of their LMRDA rights.[49] The government presented additional evidence to show that union members' participation in

the democratic governance of Local 560 had indeed been sharply curtailed since the Castellito and Glockner murders, suggesting that "a significant number of Local 560 members are in fear of the Provenzano Group . . . through this fear the members were induced by the Provenzano Group, aided and abetted by [the Executive Board] to part with their LMRDA-created union democracy rights."[50]

¶21. The watershed jurisprudential development of the *Local 560* litigation was not the claim that the deprivation of LMRDA rights was illegal. This point was not new; indeed, the LMRDA itself criminalizes the "Deprivation of Rights by violence."[51] The penalty for violating this provision is modest, up to a year in jail and a $1,000 fine, and sorely inadequate to deter operators as sophisticated as the Provenzano Group.[52] The novel doctrine introduced by the government in *Local 560* was the characterization of the climate of intimidation as a form of the RICO predicate act of extortion. With this argument, for the first time, the government was able to construe the deprivation of LMRDA rights by the leadership of a union as the legal basis for a civil RICO suit.[53]

¶22. The government contended that union members' intangible LMRDA rights constituted property, and accordingly, the Provenzano Group's use of the threat of violence to induce the rank-and-file to part with its property fell within the ambit of the federal extortion statute, the Hobbs Act, a RICO predicate.[54] The Hobbs Act proscribes "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear."[55] Under this reasoning, by menacing the Local 560 membership into silence, the Provenzano Group obtained property of the membership, specifically, the LMRDA rights to participate in the

democratic governance of the union by voting and speaking at meetings. The government invoked a line of cases treating various types of intangible rights as property subject to extortion for purposes of the Hobbs Act.[56] Chief among these was *United States v. Tropiano*, which held that mobsters' intimidation of a waste-hauler into ceding lucrative carting contracts constituted Hobbs Act extortion.[57] The salient doctrinal contribution of *Tropiano* was the principle that intangible rights, such as the right to solicit carting contracts, represented Hobbs Act extortable property: "The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things…but includes, in a broad sense, any valuable right considered as a source or element of wealth…and does not depend upon a direct benefit being conferred on the person who obtains the property."[58]

¶23. By construing the deprivation of LMRDA rights as Hobbs Act extortion, for the first time, the government was able to tie not only the Provenzano Group, but also the Executive Board, to a RICO predicate. This legal underpinning permitted the government to argue that the Provenzano Group, aided and abetted by members of the Executive Board of Local 560, unlawfully acquired and maintained control of Local 560 through a pattern of racketeering activity in violation of RICO.[59] Filed in 1982, the government's complaint in *United States v. Local 560* alleged violations of a slew of RICO predicate offenses, including murder, fraud, conversion, and extortion of employers for "labor peace" payments, in addition to the Hobbs Act extortion of LMRDA rights.[60] Significantly, however, the Provenzano Group's extortion of the

LMRDA rights of union members was the only predicate act implicating the Local 560 Executive Board defendants.[61]

¶24. The government overcame a 12(b)(6) motion by the defense[62] and prevailed at trial.[63] The 3rd Circuit "affirmed in all respects" Judge Harold Ackerman's opinion from the District Court.[64] The government's argument that the failure of the Local 560 Executive Board to dispel the Provenzano Group's violent reputation constituted aiding and abetting extortion achieved what the prosecution of the Provenzano Group directly had not. Finally, Executive Board members loyal to Anthony Provenzano could be held liable for labor racketeering within Local 560. The Executive Board thus assumed indirect responsibility for the Castellito and Glockner murders by hanging Anthony Provenzano's picture up on the wall in Local 560; Sam and Josephine helped to destroy union democracy in Local 560 by disseminating the message that the murderers of dissenters would go unpunished, and indeed, retain ultimate authority in the union. The government succeeded in convincing the court that keeping Anthony Provenzano's picture on the wall constituted actionable behavior, and a RICO predicate at that.

¶25. The injunctive remedy sought by the government was a trusteeship, whereby the Executive Board was replaced with a cadre of court-appointed managers, mostly former prosecutors, to run the union indefinitely.[65] By suing the perpetrators of Hobbs Act extortion within a civil RICO framework, the government avoided the more rigorous proof standards of a criminal trial, and managed to achieve an enduring civil remedy to conduct proscribed by the Hobbs Act, a criminal statute.[66] Thus, without having ever faced criminal charges, Sam and Josephine Provenzano and the rest of the Executive

Board were barred from union office, and Anthony Provenzano's picture was finally taken down from the Local 560 union hall.[67] The trusteeship offered a more effective solution to the "musical chairs" problem that criminal prosecution had failed to remedy. The trustees could return to court to remove any union officer who continued to promote Provenzano Group influence within the union, and did so several times in the years following the imposition of the trusteeship.[68]

¶26. The proposition that LMRDA rights constituted Hobbs Act extortable property provided the jurisprudential foundation for civil RICO suits against nearly two dozen other unions. The 2nd Circuit adopted the reasoning of *Local 560*,[69] as did the 6th.[70] After the government prevailed in the first few trials, the remaining unions submitted to court-monitored trusteeships under consent decrees.[71] Many of these trusteeships are still in operation.[72] The holding of *Local 560* -- the construal of LMRDA rights as Hobbs Act extortable property -- proved to be the government's most effective jurisprudential weapon in combating labor racketeering over the subsequent two decades. It was this doctrine that Judge Glasser held *Scheidler* to have overruled.

Scheidler

The Hobbs Act Applied to Abortion Protesters

¶27. While the government litigated *Local 560* with the intention of eradicating labor racketeering, the courts that found for the government at both the trial and appellate levels did not place any such limitation on the scope of their holdings. At its most abstract level, *Local 560* simply established for the first time that proof to a mere civil

preponderance standard of the commission of an ill-defined inchoate act, the "extortion of intangible rights," could trigger RICO's extraordinary civil remedies. In addition, after *Local 560*, claims alleging commission of the otherwise criminal act of Hobbs Act extortion, of intangible rights or any other property, ceased to be the exclusive purview of government prosecutors, as the civil provisions of RICO granted standing to private plaintiffs in addition to the government.[73] The prospect of securing the dramatic remedies of civil RICO contributed significantly to the proliferation of civil RICO suits by private plaintiffs in the mid-1980's.[74] The abstract injury of "intangible rights" extortion represented a particularly vague, and thus conveniently adaptable, concept upon which to base a civil RICO suit.

¶28. Indeed, in 1987, shortly after the 3rd Circuit's *Local 560* decision, while the government negotiated a succession of court-supervised settlements with locals controlled by the mob, another class of plaintiffs filed a completely unrelated civil RICO suit alleging Hobbs Act extortion of intangible rights. The civil RICO complaint by the Northeast Women's Center in Philadelphia against a local group of thirty-one abortion protesters alleged injury arising out of the protesters' two-year campaign of blockades, harassment, and violence against the clinic.[75] The Center contended that as a result of the often violent and destructive protests, its right to operate as a business had been extorted in violation of the Hobbs Act, and prevailed at trial and on appeal.[76] Perhaps heartened by the result in *Northeast Women's Center v. McMonagle*, a national coalition of pro-choice groups filed a civil RICO suit two years later in the Northern District of Illinois against a broad array of abortion protest groups alleging extortion of intangible rights, including both the clinics' right to operate and the right of their clientele to receive

reproductive health services.[77] Appealed to the Supreme Court on an unrelated issue and remanded in 1994,[78] the high-profile litigation returned to the Supreme Court in 2003 in *Scheidler v. National Organization for Women* on the question of whether or not the pro-life protests could legally constitute Hobbs Act extortion of "intangible rights."

¶29. On February 26, 2003, the Supreme Court decided *Scheidler* in favor of the abortion protesters, ending more than 12 years of legal action between pro-choice and pro-life groups, and categorically precluding such litigation between the two sides in future.[79] The Supreme Court held that while the abortion protesters' conduct may have constituted trespass or battery, it did not violate the Hobbs Act.[80] The Supreme Court concluded that the defendants had not in fact extorted the "intangible rights" of either the clinics or their clientele, and the plaintiffs' suit thus failed for lack of proof of a RICO predicate.[81]

¶30. The Supreme Court in *Scheidler* based its holding upon the premise that the Hobbs Act proscribed only the "obtaining" of the property of another through the use of threats, rather than more general "interference" with another's property rights.[82] The *Scheidler* court stated that the "'obtaining' requirement of extortion . . . entail[s] both a deprivation and acquisition of property."[83] The court reasoned that the abortion protesters "may have deprived or sought to deprive [the clinics] of their alleged property right of exclusive control of their business assets, but they did not acquire any such property . . . [t]o conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is

sufficient to constitute extortion."[84] The majority stated that the pro-life groups could not be said to have obtained either the property represented by the clinics' right to operate as businesses, nor their patients' right to receive reproductive health services, given that the abortion protesters would not have been able to exercise, transfer, or sell this property.[85]

Scheidler Applied to Labor Racketeers

¶31. *Scheidler* was decided during the pendency of a motion in the Eastern District of New York to dismiss labor racketeering charges alleging Hobbs Act extortion of LMRDA rights by Andrew Gigante in *United States v. Bellomo*. Only fifteen days after the Supreme Court's ruling, Judge Glasser granted the *Bellomo* defendants' motion, invalidating the counts as a matter of law, and thereby holding *Scheidler* to have overruled both *Local 560* and its 2nd Circuit progeny.[86]

¶32. The defendants argued, and Judge Glasser agreed, that *Scheidler* introduced a new categorical rule that property may only be extorted under the Hobbs Act if it is obtained, which in turn requires that the property be subject to "exercise, transfer, or sale" by the alleged extortionist.[87] Judge Glasser held that the exercise, transfer, or sale of LMRDA rights is impossible in light of the LMRDA's own prohibition on proxy voting.[88] Judge Glasser reasoned that if union members could not legally permit others to vote on their behalf as proxies, LMRDA rights could not be said to be "exercised, transferred, or sold" by extortionists, and therefore could not be extorted within the meaning of the Hobbs Act.[89] Judge Glasser has since affirmed this position in *United States v. Coffey*, a related organized crime prosecution, in March of this year.[90]

¶33. Judge Glasser's ruling dealt the federal government one of the biggest defeats in its effort to prosecute labor racketeers. The principle of Hobbs Act extortion of LMRDA rights, used for twenty years to create RICO liability for mob-tied union officers who had not themselves been convicted of a crime, ceased to be settled law in the Eastern District of New York. *Bellomo* held that union officers aiding and abetting the imposition of a climate of intimidation by organized crime figures could no longer be targeted under the Hobbs Act, thereby potentially facilitating the resumption of musical chairs by the mob.

¶34. Three other courts to consider the extortion of LMRDA rights after *Scheidler* declined to follow *Bellomo* and preserved the *Local 560* doctrine. In *United States v. Peter Gotti*, Judge Frederick Block of the Eastern District of New York distinguished the labor racketeers before him from the *Scheidler* defendants insofar as the former sought to exercise the extorted intangible rights for their own benefit, while the latter did not: "what was missing in *Scheidler* [was] the acquisition or the opportunity to exercise, transfer, or sell something of value, which came about as a result of the criminal conduct [of] the defendants."[91] Affirming the government's charges of extortion of LMRDA rights in *United States v. Cacace*, Judge Sterling Johnson adopted the distinction of his Eastern District colleague grounded in the defendants' disparate motives.[92] In the Southern District of New York, Judge Naomi Reice Buchwald held "*Gotti's* and *Cacace's* reasoning more persuasive than" that of *Bellomo*, and denied the defendants' motion to dismiss extortion counts in light of *Scheidler*.[93]

¶35. While it is encouraging that three courts to have considered the impact of *Scheidler* on the *Local 560* doctrine have held the two compatible, it is nevertheless

problematic that the law is unsettled. The result in *Bellomo* implies that *Scheidler* has introduced uncertainty and unpredictability into this area of the law and casts doubt on the enduring viability of the *Local 560* doctrine. As noted above, it is also troubling that this decisional split within the 2nd Circuit has provided a foothold for Liborio Bellomo to tangle the government in nearly two years' worth of litigation to preserve Hobbs Act convictions for extortion of LMRDA rights dating back to 1997. The analysis that follows seeks to answer what is now an open question by demonstrating that *Scheidler* does not disturb the *Local 560* doctrine.

SCHEIDLER* DOES NOT OVERRULE *LOCAL 560

¶36. This remainder of this article is divided into three sections. The first two sections contest the proposition that *Scheidler* establishes the categorical test for Hobbs Act liability that property is "obtainable" under the Hobbs Act if and only if it is subject to "exercise, transfer, or sale" by the would-be extortionist. While every court to have tried labor racketeering cases after *Scheidler* has proceeded under this assumption, I argue that such a reading is inconsistent with both the language and policy rationales of *Scheidler* and that the "exercise, transfer, or sell" paradigm should not be read to govern the scope of liability under the Hobbs Act on a categorical basis.[94] In the first section the article demonstrates that *Scheidler* simply does not reach the conduct involved in *Local 560* and in the second it shows that even if it does, the "exercise, transfer, or sell" language does not govern the application of the holding. In the third section this article contends that even if the Supreme Court did establish a categorical test in *Scheidler* with this phrase, the extortion of LMRDA rights satisfies that test.

Scheidler Does Not Reach the Conduct Involved in *Local 560*

"Outer Boundaries"

¶37. *Scheidler* does not disturb *Local 560* because the Supreme Court did not intend its opinion to reach beyond an extremely narrow range of conduct. The text of *Scheidler*, as well as the Supreme Court's treatment of prior jurisprudence and the legislative history of the Hobbs Act, indicate that the holding of *Scheidler* is limited to the highly-stylized field of abortion protest litigation and should not be interpreted to apply to conduct implicating unions, labor law, or organized crime. Under this reasoning, the preservation of *Local 560* does not turn upon whether or not labor racketeers can exercise, transfer, or sell LMRDA rights because such analysis is inapposite to this context.

¶38. While *Scheidler* flatly bars abortion clinics from alleging Hobbs Act violations as predicates for RICO suits against abortion protesters, the opinion does not explicitly consider any other conduct. The court provides no guidance as to what types of RICO suits alleging Hobbs Act extortion of intangible property rights are to be precluded by its holding other than the specific litigation before the court. Indeed, the *Scheidler* court acknowledges the modesty of its ambitions: "We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act . . . Whatever the outer boundaries may be, the effort to characterize petitioners' [abortion protesters'] actions here as an 'obtaining of property from' respondents is well beyond them."[95] This limitation is one of the few express directives in the entire opinion. The focus on "petitioners' actions here" almost suggests that the opinion is to be limited to its facts.

¶39. Indeed, the court's disclaimer that it "need not now trace the outer boundaries" of "extortion liability under the Hobbs Act" suggests that *Scheidler* does not establish a categorical test governing such liability through the "exercise, transfer, or sell" language or any other section of the opinion. To hold that "property is obtained if and only if it may be "exercised, transferred, or sold" by the extortionist is precisely to trace an "outer boundary" of Hobbs Act liability, which the *Scheidler* court explicitly refuses to do. Were the opinion to set out a *per se* rule that extortionists cannot obtain property if they cannot exercise, transfer, or sell it, *Scheidler* would in fact have divided all property into that which can and cannot be obtained, creating a categorical formula to determine the scope of Hobbs Act liability rendering meaningless the court's caveat that its decision traces no such outer boundaries.

¶40. Furthermore, application of *Scheidler* to contexts beyond that of abortion protest litigation is frustrated by the vagueness of the language with which the court declares, within the discussion of outer boundaries, that "the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*." [96] Without tracing the outer boundaries of Hobbs Act liability, the court implies that *Tropiano* is among the constellation of decisions proximate to, and within, these "outer boundaries." At the same time, the court specifically notes that not only *Tropiano* itself, but "lower court decisions such as" *Tropiano*, are preserved by the holding in *Scheidler*.[97] Determining precisely which "lower court decisions" are thus left undisturbed by *Scheidler* by virtue of their similarity to *Tropiano*, or their placement on the still undefined outer boundaries of Hobbs Act liability is a matter of guesswork. The majority's identification of a perceived error by the dissent could imply that the

preserved "lower court decisions" include any one of dozens the dissent cites, all of them, or any number in between. Along similar lines, the court's allusion to *United States v. Green* in the sentence immediately following suggests that even *Local 560* itself could well be one such lower court decision *Scheidler* preserves, given that the defendants in both *Green* and *Local 560* were labor racketeers.[98] If *Scheidler* is to be applied with even the remotest consistency by lower courts, who must divine what of their jurisprudence counts among the lower court decisions *Scheidler* does not "reach[], much less reject[]," the *Scheidler* court's ambiguity suggests an intent only to implicate conduct that it specifically locates beyond the outer boundaries of Hobbs Act liability, i.e., abortion protest litigation.

Legislative History

¶41. The primacy of legislative history in guiding the *Scheidler* court also attests to the limited ambit of the opinion. The court relies heavily upon the legislative history of the Hobbs Act in *Scheidler*, observing that "Congress' decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision."[99] Notwithstanding the invocation of legislative history, the opinion omits any mention of unions, labor law, or organized crime in the holding. This omission is noteworthy given that the Congressional debate on the Hobbs Act revolved entirely around how the proposed legislation would combat labor racketeering without compromising existing labor law.[100] The Supreme Court concluded as much eleven years before *Scheidler* in *Evans v. United States*, a decision *Scheidler* cites; the *Evans* court observed that in passing the

Hobbs Act, Congress was primarily concerned with distinguishing between legitimate labor activity and labor racketeering, so as to prohibit the latter while permitting the former.[101] Similarly, while the *Scheidler* court cites *United States v. Culbert* for the proposition that "a 'paramount congressional concern' in drafting the Hobbs Act 'was to be clear about what conduct was prohibited,'"[102] in *Culbert* itself the Supreme Court noted that congressional debate over the Hobbs Act was devoted to the legislation's impact on organized labor.[103] As the Supreme Court notes in *Culbert* and *Evans*, a remedy to labor racketeering was plainly Congress' prime focus in passing the Hobbs Act; it is therefore significant that the *Scheidler* court relies upon the congressional debate over the Hobbs Act without mentioning this "paramount congressional concern."

¶42. At a minimum, the *Scheidler* court's deference to the legislative history of the Hobbs Act in tandem with its silence as to the impact of its holding upon unions, labor law, or organized crime counsels against reading *Scheidler* to affect these areas. It seems odd that a court so preoccupied with congressional intent would neglect to offer the slightest hint about the consequences of its holding for labor activity unless it did not anticipate that *Scheidler* would have any bearing on this area of the law. If the Supreme Court is indeed solicitous towards Congress' desire "to be clear about what conduct [is] prohibited," it is difficult to see how *Scheidler* could reinterpret the Hobbs Act for a broad swath of litigants without even a reference to labor racketeering, precisely what Congress sought to be prohibited by the statute. The absence of any provision for labor law in the holding makes *Scheidler* poor authority for overruling *Local 560*, or any other such jurisprudence implicating Hobbs Act litigation against labor racketeers. A judgment favoring such defendants would be difficult to square with the *Scheidler* court's fidelity

to the congressional intent behind the Hobbs Act. Accordingly, a narrow reading of *Scheidler* makes sense of the majority's concern that "petitioners' actions here" represent an "unwarranted expansion" of the Hobbs Act.[104] Whatever one's sympathies in the abortion debate, construing abortion protesters as extortionists may indeed represent a departure from the purpose for which Congress imagined it had passed a federal extortion statute. As a policy matter, *Scheidler* should thus be interpreted to punish labor racketeers, and to that end, *Scheidler* should not be read to disturb the doctrine of *Local 560.*

¶43. The text of the Hobbs Act itself further weighs against reading *Scheidler* to apply to labor law in any way absent any guidance to this effect in the opinion. In interpreting the Hobbs Act, *Scheidler* dwells entirely upon § 1951(b)(2), which defines "extortion," and contains the key words "obtaining" and "property." Significantly, though the *Scheidler* court does not mention it, the entire statute is governed by the often-overlooked final part, § 1951(c), which provides that "This section shall not be construed to repeal, modify or affect" a number of other statutes.[105] In light of the legislative history of the Hobbs Act, it is no coincidence that every single statute mentioned concerns labor law.[106] Representative Hobbs, among other supporters of the proposed legislation, affirmed that:

> Title III [codified as § 1951 (c)] of this bill exempts from the operation of this law any conduct under the anti-trust statutes [the Clayton Act], under the NLRB Act, under the Norris-LaGuardia statute, the Railway Labor Act, the Big Four that have been termed the Magna Carta of labor.[107]

The rationale for cross-referencing these statutes was to:

> exempt...from the Act every piece of labor legislation written on the statute books from the beginning, up to the present time which was intended to protect collective bargaining and the laboring man in his legitimate rights under the law.[108]

Of course, § 1951(c), passed in 1946, does not mention the LMRDA itself, which did not become part of "the Magna Carta of labor" until 1959. The requirement that the Hobbs Act "not be construed to repeal, modify or affect" any of these statutes is an explicit instruction to the judiciary. The absence of even the remotest allusion in the holding of *Scheidler* to any of these statutes, or labor law generally, is further evidence that the Supreme Court did not intend for the opinion to reach this area. It is difficult to see how the court could have ensured that the "exercise, transfer, or sell" language, left unexplained in *Scheidler*, would not in any way have affected these statutes, unless the scope of the opinion was intended to fall well short of the field of labor law. Absent any guidance from the Supreme Court, § 1951(c) discourages an application of *Scheidler* to labor law or related jurisprudence, including *Local 560*.[109]

¶44. *Scheidler* should thus be read to hold no more than that the protesters' harassment of the clinics did not violate the Hobbs Act because the clinics' property was not "obtained;" further abstraction departs from the terms of the opinion and the scope intended by the Supreme Court. Reconciliation of *Local 560* with *Scheidler* thus need not implicate the latter's "exercise, transfer, or sell" language, as this analysis is simply not applicable to the labor racketeering context. The court's observation that the would-be extortionists could not exercise, transfer, or sell the property is merely an illustration of why the protesters' conduct is beyond the outer boundaries of the statute, rather than a

categorical benchmark defining the scope of Hobbs Act liability for all classes of litigants. Though he ultimately rejected it, Judge Glasser himself was receptive to the proposition that the scope of *Scheidler* could be thus limited, observing that "in a determination of the parameters of *Scheidler* . . . another court [may] conclude that the reach of *Scheidler* does not extend [so] far" as to overrule the *Local 560* doctrine.[110] Such an interpretation is concordant with the intuitive result that a decision focusing entirely on abortion protests should not completely redefine labor racketeering jurisprudence, entirely by implication, through an overly-literal application of three words in an unrelated context.

¶45. It bears mention that a narrow interpretation would not unrealistically lessen the impact of *Scheidler* or diminish the opinion's significance. Abortion protest litigation had itself become a burgeoning field by the time the *Scheidler* litigants made their second appearance before the Supreme Court in 2003.[111] A decision for the clinics would likely have set off a flurry of similar suits throughout the country. The atmospherics of arbitrating between the two sides in arguably the nation's bitterest "culture war" could not have been lost on the court. The stakes were sufficiently high that the court's attention could plausibly have been consumed by the unusual character of the fact patterns involved in the litigation, yielding a judgment that resolved the high-profile suit without significantly altering the bounds of Hobbs Act liability for other classes of litigants, including labor racketeers.

Even if *Scheidler* Redefines the Hobbs Act for All Classes of Litigants, Liability Under the Statute is Not Governed by the Words "Exercise, Transfer, or Sell"

Tropiano

¶46. Closer analysis of the court's preservation of *Tropiano* demonstrates that as applied to all litigants, liability under the Hobbs Act cannot be predicated upon construal of the phrase "exercise, transfer, or sell." The defendants in *Tropiano* were the owners of a mob-tied waste-hauling company in Connecticut convicted under the Hobbs Act for employing threats to induce a rival hauler, Leonard Caron, to cede business to them.[112] The "property" extorted by the *Tropiano* defendants was "the intangible right to solicit refuse collection accounts," as noted by the *Scheidler* court.[113] Significantly, since the language of the Hobbs Act has not changed in a half-century, if *Scheidler* preserves *Tropiano*, it follows that the property extorted by the *Tropiano* defendants must have been, and must continue to be, obtainable. Thus, any purported redefinition of "obtain," with reference to "exercise, transfer, or sell," or any other language in *Scheidler*, must accommodate the intangible right to solicit refuse collection accounts.

¶47. The tortured semantics that result from reading the "exercise, transfer or sell" language in tandem with "the intangible right to solicit refuse collection accounts" indicate that the former phrase cannot govern the "obtaining" requirement on a categorical basis. It is linguistically incoherent to suggest that Ralph "Whitey" Tropiano could have "exercised, transferred, or sold" the "intangible right to solicit refuse collection accounts" that he "obtained" from Caron.[114] After all, as competing refuse haulers, both Tropiano and Caron each had their own such right. Once Tropiano had intimidated Caron into ceding business, surely it is only the accounts themselves, rather

than the right to solicit them, that could be said to be subject to "exercise, transfer, or sale."

¶48. By servicing the accounts taken from Caron, Tropiano may be said to have "exercised," for example, only his own right to solicit business, thereafter unhindered by competition from Caron, as it would be a bizarre formulation to have Tropiano "exercising" *Caron's* "right to solicit refuse collection accounts." This semantic problem suggests that obtaining cannot possibly turn solely upon the extortionists' purported ability to "exercise, transfer, or sell" the property. This phrase and the language that surrounds it must be reinterpreted to include the conduct of the *Tropiano* defendants within the scope of Hobbs Act liability while excluding that of their counterparts in *Scheidler*.

Pecuniary Motive

¶49. One feasible synthesis of *Tropiano and Scheidler* might be to read the latter to establish that a defendant must act with a pecuniary motive to be exposed to sanction under the Hobbs Act. Mercenary intent distinguishes the *Scheidler* and *Tropiano* defendants even though the fruits of the misconduct were not subject to "exercise, transfer, or sale" in either case; the mobsters in Tropiano extorted Caron to further their business interests, while *Scheidler* defendants acted out of a political conviction with no discernable monetary purpose. Indeed, the *Gotti*, *Cacace*, and *Muscarella* courts similarly consider pecuniary motive in upholding labor racketeering charges based upon the *Local 560* doctrine, but without reconciling *Scheidler* with *Tropiano* or accounting for whether the defendants before them "pursued or received something of value that they

could exercise, transfer, or sell."[115] The *Cacace* court comments that "[a]cknowledging the defendant's motive in the case at bar...is simply a means to distinguish this case from *Scheidler*."[116]

¶50. The words in the same sentence immediately preceding "exercise, transfer, or sell" provide textual support within the *Scheidler* opinion for the proposition that the extortionist's motive is a dispositive consideration; property cannot be obtained if the defendant "neither pursued nor received something of value.'"[117] The context indicates that the *Scheidler* court treats the term "something of value" as synonymous with "property:"

> Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. *Petitioners neither pursued nor received something of value from respondents that they could exercise, transfer, or sell* [emphasis supplied, internal quotations and citations omitted]. To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.[118]

In construing the Hobbs Act definition of obtain, the Supreme Court thus also refines the concept of property to require that it be of value; that this value takes on a pecuniary dimension follows as a logical consequence. The words "of value" would be redundant if it were to include non-monetary, purely psychic benefit. The simple fact that the something is sought by a putative extortionist imbues it with non-monetary value, at least to that person. The specification that the object be something of value requires that property under the Hobbs Act have more than a mere subjective, personal value; it must

have value in some measure reducible to monetary terms. This characterization of property for Hobbs Act purposes recalls the common law definition of extortion, relied upon by the *Scheidler* court to guide statutory interpretation of words absent direction from Congress, under which property included "money or any thing of value."[119] The juxtaposition of "thing of value" with "money" further affirms that unless "of value" is rendered superfluous, property under the Hobbs Act must be of some monetary consequence.

¶51. Other authority relied upon by *Scheidler* similarly assumes a pecuniary dimension to extortion.[120] This construal of property also accords with *Tropiano*, in which the Second Circuit construed "the concept of property under the Hobbs Act" to "include...in a broad sense, any valuable right considered as a source or element of wealth."[121] Though it is not the court's primary focus, it stands to reason that *Scheidler* should indirectly implicate the concept of pecuniary motive, given that *Scheidler* is the Supreme Court's first Hobbs Act case to involve litigants acting without one.[122]

¶52. Accordingly, after *Scheidler*, Hobbs Act extortion requires a pecuniary motive because the property will only remain something of value to an extortionist thus motivated by the "value." Caron's "right to solicit refuse collection accounts" was undoubtedly something of value to the *Tropiano* defendants once obtained; indeed, the 2nd Circuit valued the completed extortion at $15,000, and this substantial pecuniary gain plainly motivated the wrongdoing.[123] By contrast, exclusive control over the operation of an abortion clinic, the property at stake in *Scheidler*, is not something of value in the hands of an abortion opponent who, rather than operate the clinic, would only want it

shut down. The pro-life protesters could never obtain the right to operate the abortion clinic because once control over this right passed to them, this right would cease to be property in the Hobbs Act sense, because it would lose its value.

¶53. The utility of pecuniary motive as a distinguishing principle to reconcile *Scheidler* and *Tropiano* is further illustrated by a simple hypothetical example. Had Ralph "Whitey" Tropiano engaged in the same threatening behavior against an abortion clinic as he did against Caron, resulting in the closure of the clinic, the extent of Tropiano's Hobbs Act liability would turn upon the purpose for the intimidation. Had Tropiano acted out of philosophical opposition to abortion, his conduct would be indistinguishable from that of the *Scheidler* defendants. At the same time, had Tropiano operated a rival abortion clinic, and intended to secure the economic benefit that would redound to him upon the closure of a competitor, his actions could not logically be differentiated from that for which he was actually convicted in *Tropiano*. The value of the "right to exercise exclusive control over the use of [the clinic's] business assets" would depend on what Tropiano intended to do with it, which in turn would govern whether or not he could be sanctioned under the Hobbs Act.[124] To Tropiano the rival clinic operator, this right would certainly be something of value; by contrast, Tropiano the protester would not perceive this right as something of value, not least because the "business assets" of an abortion clinic are hardly "assets" if controlled by an abortion opponent.

¶54. Consideration of pecuniary motive thus permits a coherent synthesis of *Scheidler* and *Tropiano* derived from the *Scheidler* court's requirement that obtaining entail the pursuit or receipt of something of value. In this rendering, the capacious phrase

"exercise, transfer, or sell" can be understood merely to represent an illustrative, but non-exhaustive, list of ways to describe "something of value." Many types of fungible property sought by extortionists, including money, may well be subject to "exercise, transfer, or sale;" other types of Hobbs Act extortable property, including Caron's right to solicit refuse collection accounts, are not. Characterizing the phrase "exercise, transfer, or sell" as illustrative is not to ignore it; on the contrary, letting this language govern all Hobbs Act analysis renders meaningless the *Scheidler* court's explicit proviso that its decision does not "reach, much less reject" *Tropiano*. In the absence of guidance from the *Scheidler* opinion, the focus on pecuniary motive avoids the awkward semantics that result from shoehorning abstract concepts such as "the intangible right to solicit refuse collection accounts" to accommodate the words "exercise, transfer, or sell."[125] Treating "exercise, transfer, or sell" as merely illustrative accords with the intuitive result that the Supreme Court would not employ a single nebulous phrase, susceptible to myriad interpretations and without explanation or additional textual support anywhere else in the opinion or any prior case law, as a touchstone for a fundamental redefinition of the Hobbs Act. This conclusion is also bolstered by the similarly intuitive proposition that the perpetrators of a crime like extortion are going to be profit-minded mobsters like Ralph "Whitey" Tropiano and Anthony "Tony Pro" Provenzano, rather than politically-motivated protesters, though the latter may break other laws.

¶55. Rejection of the premise that *Scheidler* conditions the Hobbs Act liability upon a semantically-contorted invocation of the phrase "exercise, transfer, or sell" helps to preserve the doctrine of *Local 560*. Labor racketeers from the Provenzanos to the Gigantes who extort LMRDA rights unquestionably act out of a pecuniary motive, as

evidenced by the diversion of pension fund monies and other union assets by which they line their pockets. Under this rendering, the extortion of LMRDA rights remains sanctionable conduct under the Hobbs Act after *Scheidler*, and *Local 560* remains good law.

Even if *Scheidler* Now Limits the Scope of Hobbs Act Liability to Encompass Only the Extortion of Property Subject to "Exercise, Transfer, or Sale," LMRDA Rights Satisfy This Test

¶56. Positing, however improbably, that *Scheidler* now conditions Hobbs Act liability upon a showing of the "obtaining" of "property" that can be "exercised, transferred, or sold," the conduct implicated by the *Local 560* doctrine patently satisfies this test. *Gotti*, *Cacace*, and *Muscarella* more or less reach this result. LMRDA rights can in fact be "exercised, transferred, and sold," and their extortion thus creates liability under the Hobbs Act. Accordingly, *Scheidler* does not overrule *Local 560*.

"Exercise"

¶57. The basis of mob control over a union, be it Local 560 or any other, is influence over the union's leadership. In turn, mob-tied union officers owe their positions to the votes of the union's rank and file, which is itself empowered to select union officers through an election pursuant to the LMRDA. It was precisely in recognition of the vital role played by union officers, such as Sam and Josephine Provenzano, that the *Local 560* jurisprudence was first developed. As Judge Ackerman observed back in 1982, the "climate of intimidation" extends the influence of organized crime beyond the echelon of union officials down to the entire rank-and-file of the union. Mindful of the fate of union

dissidents such as Anthony Castellito and Walter Glockner, union members exclusively support mob-approved candidates, such as Anthony Provenzano, and later Sam and Josephine Provenzano, for union offices. In one representative episode, "at the time of his nomination and appointment as a Business Agent for Local 560, Anthony Provenzano directed Salvatore Sinno and Earl Coluccio to attend the membership meeting in question in order to intimidate and if necessary discipline any 'rambunctious people' –those members who might voice opposition to his appointment."[126] The dynamic of fear wrought by the Provenzano Group is no less characteristic of other mob-controlled unions, including the ILA locals controlled by the *Bellomo* defendants, as it is of Local 560. Whether or not the rank-and-file literally pulls the voting lever or fills out the election ballot, in the throes of a "climate of intimidation" the winning Executive Board candidates are not chosen by the membership. They are chosen by organized crime.

¶58. Once the threat of violence has intimidated rank-and-file into voting for the mob-tied candidate, union members' LMRDA voting rights are no longer theirs to exercise. By selecting mob-friendly union candidates and employing violence or the threat of violence to get them elected, organized crime, rather than the union membership, usurps the right to participate in union democracy under the LMRDA. The alternative conception of "exercise," as propounded by the *Bellomo* defendants, is incoherent as it suggests that the union membership somehow continues to exercise the right to vote without exercising the accompanying right to choose for whom to vote.

¶59. If this right can be exercised, it is property that can be obtained, and the Hobbs Act criminalizes its extortion. Extortion of LMRDA voting rights remains a Hobbs Act violation, and by extension a RICO predicate.

"Transfer or Sell"

¶60. Organized crime may similarly transfer or sell LMRDA voting rights. These latter two concepts, transfer and sell, demand a similar analysis to one another, given that both connote a change in ownership, differing only in the type of consideration given in exchange. Organized criminal entities routinely transfer or sell LMRDA rights between them when they arrange for one to gain control over a given union in place of another by assuming the duty of intimidating the membership.

¶61. An example is illustrative. In 1999, the 2nd Circuit upheld the conviction of Genovese capo James Ida for "conspiracy to control a union election by violence."[127] Judge Noonan described the facts meriting the affirmation of the conviction:

> Local 46 of the Mason Tenders Union...was dominated by the Lucchese Family, which used it as a vehicle for extortion from construction contractors. At an earlier period it had been dominated by the Genovese Family. As a union election approached, the Lucchese Family candidate to be Local 46's president was Joe Luciano. The Genovese Family sought to regain control with their own candidate, Ed Diovisalvo. James Messera, a Genovese capo, informed the Lucchese Family that Luciano was a rat, i.e., a government informer. Ida, then a capo, repeated this accusation in negotiations with D'Arco for control of Local 46. At the end of the Ida-D'Arco discussions, the accusation was withdrawn, and Luciano was elected president of Local 46.[128]

As with Local 560, at different times, each crime family controlled Local 46 through its influence over loyal union officers. By competing to control Local 46, the Lucchese and

Genovese organizations each sought to exercise the LMRDA rights of the union membership to pick the local's officers. Before they could they had to settle the differences between them, and one would have to yield control over the union to the other. Such a transaction would encompass a change in ownership of the "claim" to maintenance of the "climate of intimidation" within the union and thereby the ability to install the crime family's own candidates in union offices.

¶62. The change in ownership thus constituted a transfer or sale from one crime family to another of the rank-and-file's LMRDA rights to select union officers. The interaction between the Lucchese and Genovese families did indeed resemble a business transaction:

> The negotiations between the two crime families made no pretense of democratic methods; the negotiators assumed that control could be passed from one criminal organization to the other. Ida and Messera were rationally found guilty of conspiracy to commit extortion because they sought to replace control of the union by the Lucchese Family with control by the Genovese Family--a control that necessarily rested not on democratic election but on at least the threat of violence in violation of 18 U.S.C. § 1951. The right of the members of a union to democratic participation in a union election is property; that the right is intangible does not divest it of protection under the Hobbs Act. *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir.1986).[129]

As Judge Noonan recognized, the basis for control of the union was control over the election of the officers, "control that rested not on democratic election but on at least the threat of violence in violation of [the Hobbs Act]," and it was this authority over which the two crime families negotiated.[130] The LMRDA vests the authority to elect union officers solely in the membership of the union, not in organized crime. For control of the union to pass from one group to another, the LMRDA rights to select officers must be

transferred or sold.[131] As in the previous discussion, if LMRDA rights can be transferred or sold, under *Scheidler*, they can be obtained, and are therefore Hobbs Act extortable property.

Proxy Argument

¶63. The *Bellomo* defendants' argument grounded in the LMRDA's prohibition on proxy voting is unhelpful. In tandem, 29 U.S.C. § 402(k) and 29 U.S.C. § 481(b) do direct labor organizations to conduct elections "in no event by proxy."[132] The proxy argument reduces to the proposition that LMRDA voting rights cannot *legally* be exercised, transferred, or sold.[133] Such reasoning is beset by internal inconsistencies. On the one hand, the argument would permit a defense that certain conduct is legal, not extortionate under the Hobbs Act, precisely because it is illegal (entails the prohibited exercise, transfer, or sale of the property obtained). At the same time, any otherwise legal exercise, transfer, or sale of extorted property would itself be rendered illegal precisely because of the illegal means by which it was obtained. The theoretical legality of some future counter-factual exercise, transfer, or sale of property once already in the hands of the extortionist is an odd benchmark for determining whether or not the property has been extorted in the first place.

¶64. Moreover, notwithstanding the illegality of their actions, the *Local 560* defendants did actually employ the threat of violence to exercise the votes of union members as a factual matter. The prohibition on proxy voting did not make the haggling between the Genovese and Lucchese crime families over control of Local 46 any less of an attempt to transfer or sell LMRDA voting rights from one group to the other, as the 2nd Circuit

concluded in the 1999 *Bellomo* judgment. Judge Glasser's conclusion that LMRDA rights cannot be exercised, transferred, or sold as a matter of law thus conflates illegality with impossibility.[134] The proxy voting argument demonstrates unsurprisingly that LMRDA is simply yet another federal statute, along with the Hobbs Act and RICO, brazenly violated by labor racketeers such as Anthony Provenzano and Andrew Gigante. The *Muscarella* court characterizes the invocation of 29 U.S.C. § 402(k) and § 481(b) as "the crux of defendants' argument."[135] Indeed, without it, the case for reading *Scheidler* to disturb *Local 560* is fatally weakened.

CONCLUSION

¶65. In 1991, Judge Dickenson Debevoise, successor to Judge Ackerman as supervisor of the Local 560 trusteeship from the federal bench, underscored the importance of reforming Local 560 and purging it of mob influence:

> As long as [Genovese member Michael] Sciarra holds any position within Local 560 [and] assumes power within the Union it is highly likely that upon termination of the court appointed trustee's oversight the Genovese Family would reassert control over Local 560, undoing all the efforts of the past eight years. Great strides towards the establishment of union democracy have been made during the period of the trusteeship. The return of Sciarra and, through him, Genovese Family influence, would crush the movement towards membership control and bring back the dark night of the strong arm and repression.[136]

The proposition that *Scheidler* overrules *Local 560* could do much to vindicate the concerns of Judge Debevoise. Though Michael Sciarra himself has since been barred from holding union office, further rulings in accord with *Bellomo* could encourage substitutes for Sciarra among the associates of the Genovese Crime Family to assume positions on the Executive Boards of locals in the Eastern District of New York with diminished fear of exposure under RICO. So long as the likes of Sam and Josephine Provenzano avoid direct involvement in overtly criminal activity, the demise of the *Local 560* doctrine could facilitate the reestablishment of "climates of intimidation" by such individuals in the Eastern District. Sam and Josephine may be able again to aid and abet the extortion of the union democracy rights of rank-and-file by hanging pictures of notorious mob figures on the wall in the head offices of these locals, and by consorting with mobsters and orchestrating lavish pay packages for them out of union funds. The resumption of "musical chairs" by organized crime could indeed lead back to "the dark night of the strong arm and repression."[137]

¶66. One consequence of the *Bellomo* judgment may be increased reliance by the government upon the theory of "deprivation of honest services," under the mail and wire fraud statutes, as applied to the labor racketeering context. In an amendment to these statutes, Congress specifically included the deprivation of honest services among the classes of sanctionable conduct constituting mail or wire fraud.[138] A number of courts, Judge Glasser's among them, have upheld mail or wire fraud counts alleging the deprivation of honest services of union officials.[139] The government could argue that union officials who facilitate the perpetuation of a climate of intimidation within a union defraud, rather than extort, the LMRDA right to democratic participation in the union's

affairs from the rank-and-file. Mail and wire fraud are RICO predicates, and could therefore stand in for the Hobbs Act in supporting a RICO suit. Presiding over a breakdown in union democracy resulting from a climate of intimidation would appear to constitute a blatant deprivation of honest services.[140] Such reasoning could potentially avoid *Scheidler* and eliminate the need to invoke the Hobbs Act, whose scope may now be uncertain after *Bellomo*, in order to charge mob-tied union officials.

¶67. On the other hand, a deprivation of honest services theory would be an imperfect substitute for the *Local 560* doctrine. The latter addresses relatively subtle conduct, such as "the calculated refusal…to take such steps and measures as are reasonable and logically necessary to counter adverse perceptions."[141] The government declined to allege a mail or wire fraud theory in *Local 560* out of a concern that these statutes might not reach mere acts of omission by an entire Executive Board; courts that have applied the "deprivation of honest services" language to the labor context have focused on affirmative misconduct by individual union officers.[142] No court has yet found that subverting union democracy by means of a "calculated refusal...to counter adverse perceptions," or hanging up a mobster's picture on the local's premises, would rise to the level of "deprivation of honest services" by a union officer. One court has suggested the opposite.[143] Moreover, even if the concept of "deprivation of honest services" could be thus expanded, it might be counter-intuitive to allege that mob-tied officers can maintain a "climate of intimidation" through fraud, which requires a material misrepresentation, in place of extortion, which involves the threat of violence. Indeed, the Provenzano Group and their allies were brutally honest in ruling Local 560, one wrong they did not commit was to misrepresent the extent of their authority. Without the

"climate of intimidation," it could be much more difficult to admit evidence of the violence that accompanies mob rule over unions, thereby weakening a case for the imposition of institutional injunctive relief as long-term and as drastic as a trusteeship. As noted by Bob Stewart, the federal prosecutor who developed and argued *Local 560*, "make no mistake about it, murders are what get judges' attention."[144] While encouraging, the utility of a "deprivation of honest services" theory in this area thus remains speculative at present.

¶68. It is true that labor racketeering is less of a law enforcement priority than it was in the early 1980's as the principal protagonists, labor unions and La Cosa Nostra, have declined in influence and membership since then. Fewer than 13% of today's workforce belongs to a union, as compared to over 20% two decades ago.[145] More importantly, La Cosa Nostra has been crippled by major prosecutions since the late 1980's, and other criminal groups, including those based upon Russian, Jamaican, and East Asian ethnicity, have not ventured into labor racketeering. Law enforcement resources have been further diverted to other areas since the events of September 11th. It is therefore possible that the relationship between *Scheidler* and *Local 560* will never be decisively resolved. The fewer labor racketeering suits filed, the less jurisprudence created addressing the continued viability of *Local 560*, and the less inclined the government will be to appeal adverse judgments like *Bellomo* to the 2nd Circuit for a resolution of the Eastern District split.

¶69. The introduction of uncertainty and confusion into an area of otherwise settled and productive case law after *Scheidler* nevertheless jeopardizes the future of labor

racketeering litigation. Though decided differently, *Bellomo, Gotti, Cacace*, *Muscarella*, and *Coffey* all demonstrate that labor racketeering persists, albeit on a smaller scale than in the past. In response, the government continues to pursue injunctive remedies, including trusteeships, to purge locals of mob influence.[146] *Bellomo* will invariably complicate the evaluation by future courts of the impact of *Scheidler* on the legal theory of *Local 560*, and it has already imperiled the *Bellomo* defendants' previously settled convictions dating back to 1997. It is disturbing that a latter-day Sam or Josephine Provenzano from the Eastern District of New York could rely upon *Bellomo* to avoid civil RICO liability arising out of the creation of a "climate of intimidation." For this reason, it is imperative that the case for reading *Scheidler* not to disturb *Local 560* be made out in legal scholarship. Light shed in this subject will discourage the adoption of *Bellomo*, encourage the preservation of *Local 560*, and contribute to the eradication of labor racketeering and the protection of the LMRDA rights of union members in the United States.

[1] This note is adapted from a thesis paper I submitted to the seminar "Labor Racketeering and Union Democracy," taught by Professor James B. Jacobs at New York University School of Law, Fall 2003. The author is extremely grateful to Professor Jacobs for his assistance and counsel throughout the writing process.

[2] J.D., New York University School of Law, May 2005. E-mail: ehren.reynolds@gmail.com. The author is currently an Assistant District Attorney in New York County.

[3] U.S. v. Local 560, 694 F.Supp. 1158, 1172 (D.N.J. 1988) (intercepted conversation).

[4] *See, e.g.*, Anthony DeStephano, *Taking One on the "Chin,"* NEWSDAY, April 8, 2003, at A26.

[5] U.S. v. Bellomo, 954 F.Supp. 630 (S.D.N.Y. 1997).

[6] In April 2003, Gigante pleaded guilty to obstruction of justice charges arising out of a thirty-year ruse to fake insanity. *See, e.g.,* Associated Press, *Legal System Finally Gets Wise to "Oddfather's" Mind Game*, CHI. TRIB., April 10, 2003, at 7A.

[7] For purposes of clarity, unless otherwise indicated, "*Bellomo*" refers to this ruling, U.S. v. Bellomo, 263 F.Supp.2d 561 (E.D.N.Y. 2003), throughout the paper.

[8] *See, e.g.*, Kati Cornell Smith, *Mob Son Follows "Chin" to Prison*, NEW YORK POST, July 26, 2003, at 14; *Bellomo*, 263 F.Supp.2d at 569.

[9] *See generally* Scheidler v. Nat'l Org. for Women, 537 U.S. 393, 397-400 (2003).

[10] *Id.* at 402.

[11] Bellomo, 263 F.Supp.2d at 576. Ironically, Bellomo reversed more than just the jurisprudence of Local 560; some of the very same individuals initially targeted back in 1982 benefited directly from Judge Glasser's ruling. The principal defendant in Local 560, Anthony Provenzano, was a capo in the Genovese Crime Family. While he exercised ultimate authority within Local 560, the acting boss within the Genovese Family at the time was none other than Vincent "the Chin" Gigante, one of the principal defendants in Bellomo. Gigante himself became a civil defendant in a 1989 RICO suit arising out of labor racketeering offenses against Local 560. During the 1989 suit, the President of Local 560 was Michael Sciarra. After being barred from the Local 560 Presidency at the instigation of the government, Sciarra was inducted into the Genovese Crime Family by James Ida, another *Bellomo* defendant. Thus, for Gigante and Ida, among others, defending against the Local 560 litigation could be seen as less a matter of contesting the government directly so much as biding time to find a federal judge who would rule in their favor, as Judge Glasser did. *See, e.g.,* U.S. v. Local 560, 581 F.Supp. 279, 316 (D.N.J. 1984); Local 560, 694 F.Supp. at 1170 ("In 1984, Anthony ('Fat Tony' or 'Tony') Salerno was the boss of the Genovese Family. His headquarters was in Harlem. In November 1984, Vincent ('The Chin' or 'Chin') Gigante was acting boss."); U.S. v. Gigante, 737 F.Supp. 292, 296 (D.N.J. 1990) ("The Amended Complaint generally alleges that defendant Gigante is the leader of the 'Genovese Crime Family;' that the 'Provenzano Crime Group' is a faction of the 'Genovese Crime Family' and that Gigante conspired with members of these groups to commit various predicate acts in order to, inter alia, maintain an interest in and control over Local 560 of the International Brotherhood of Teamsters, ('Local 560'), which is a labor organization."); U.S. v. Local 560, 736 F.Supp. 601, 602 (D.N.J. 1990); Robert C. Stewart, "*A Perspective on Organized Crime in America*," Presentation to Labor Racketeering Course, New York University, October 13, 2003, at 7.

[12] *See infra* notes 87-89.

[13] See Bellomo v. U.S., 297 F.Supp.2d 494 (E.D.N.Y. 2003). In the previous RICO case in 1997, Liborio "Barney" Bellomo, the nominal defendant in the 2003 RICO prosecution before Judge Glasser, and Vincent "the Chin" Gigante's successor as acting boss of the Genovese family, was sentenced with several other defendants to 120 months' imprisonment by Judge Lewis Kaplan for labor racketeering offenses against Local 46 of the Mason Tenders Union, among other crimes. See U.S. v. Bellomo, 176 F.3d 580, 592 (2nd Cir. 1999). The only distinction between the facts before Kaplan and those before Judge Glasser was the identity of the union victimized by the defendants; the government charged many of the same defendants with identical labor racketeering crimes based upon the jurisprudence of Local 560. Bellomo, 954 F.Supp. at 642. On October 8, 2003, seven months after Judge Glasser's Bellomo decision, Bellomo and several confederates sentenced by Kaplan in 1997 filed a habeas petition pursuant to 28 U.S.C. § 2241, seeking to have Judge Glasser overturn Kaplan's sentence, now purportedly invalid in light of the Supreme Court's Scheidler judgment. Bellomo, 297 F.Supp.2d at 496-97. Judge Glasser did not disturb Kaplan's sentence, but deemed the petition viable, and required the Bellomo defendants to submit it to Judge Kaplan's court. *Id.* at 503.

[14] Liborio "Barney" Bellomo and other defendants have argued before Judge Kaplan that if extortion of LMRDA rights is no longer a crime under the Hobbs Act after Scheidler, their previous guilty pleas for this same conduct were not knowing and intelligent, and that they are innocent of any actual criminal activity. Judge Kaplan's most recent decision in November 2004 did not adjudicate the merits of the petition, but focused on a jurisdictional question. See Bellomo v. U.S., 344 F.Supp.2d 429, 433 (S.D.N.Y.).

[15] *See, e.g.*, James B. Jacobs & Kristin Stohner, *Labor Racketeering: The Mafia and the Unions,* 30 CRIME & JUST. 229 (2003). The authors' caveat merits repeating here: "It need hardly be added that focusing on labor racketeering as a crime problem is no more an indictment of the vast majority of union officials and members than focusing on corporate crime is an indictment of the vast majority of businessmen." *Id.* at 230.

[16] Though initially developed in a civil context, the legal theory of *Local 560* has also been employed in criminal prosecutions, such as Bellomo. *See infra* note 62. Accordingly, if adopted by other courts, Judge Glasser's reasoning invalidating the theory in a criminal prosecution would likely preclude its application in civil litigation as well.

[17] Local 560, 581 F.Supp. at 304.

[18] *Id.* at 307.

[19] *Id.* at 308.

[20] *Id.* at 307-310.

[21] *Id.* at 306.

[22] *Id. at 290.*

[23] *Id.* at 289.

[24] *Id.* at 290.

[25] *See generally id.* at 288-291.

[26] *See* Local 560, 780 F.2d 267, 293 (3rd Cir.1985).

[27] *Id.* at 293.

[28] *Id.* at 288-89.

[29] *Id.* at 311.

[30] *See* JAMES B. JACOBS, ET AL., BUSTING THE MOB 36 (1994).

[31] Organized Crime Control Act, Pub. L. 91-452, 84 Stat. 922, 923 (1970).

[32] 18 U.S.C. § 1961 (1) (1970).

[33] 18 U.S.C. § 1962 (b), (c) (1970).

[34] RICO authorizes sentences of up to life imprisonment for "racketeering" if the criminal statute proscribing the underlying RICO predicate acts permits a life sentence. If not, the maximum penalty is 20 years' incarceration. 18 U.S.C. 1963 (a) (1970).

[35] *See* U.S. v. Provenzano, 620 F.2d 985 (3rd Cir.1980).

[36] *See* Local 560, 581 F.Supp. at 290.

[37] Local 560, 780 F.2d at 293.

[38] JACOBS, BUSTING THE MOB 10.

[39] 18 U.S.C. § 1964 (a), (b) (1970).

[40] Sam Provenzano had maintained clean hands through the initial filing of the complaint in Local 560; during the pendency of the Local 560 litigation, he was convicted of fraud involving the union's dental plan. JACOBS, BUSTING THE MOB 42.

[41] *See generally id.* at 288-291.

[42] *Id.*

[43] Local 560, 780 F.2d at 278 (internal quotations omitted).

[44] Local 560, 581 F.Supp. at 313.

[45] *Id.* at 313.

[46] *Id.* at 315-6.

[47] 29 U.S.C. § 411 *et seq.* (1959).

[48] 29 U.S.C. § 411 (1959) provides:

> (a) (1) Equal rights
>
> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> (2) Freedom of speech and assembly
>
> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

[49] U.S. v. Local 560, 550 F.Supp. 511, 515 (D.N.J 1982).

[50] Local 560, 581 F.Supp. at 317.

[51] 29 U.S.C. § 530 (1959).

[52] On a motion to dismiss, the defense contended that this provision preempted claims of deprivation of LMRDA rights pursuant to any other statute, including the Hobbs Act, on the reasoning that other such claims would render § 530 surplusage. See Local 560, 550 F.Supp. at 521. Judge Ackerman concluded that § 530 did not preclude the government's theory of Hobbs Act extortion of LMRDA rights because there was not a complete overlap of elements between the two statutes, and the defense's argument implicated the

disfavored principle of implied repealer. *Id.* at 523 (internal quotations and citations omitted).

[53] At the time of the Local 560 suit, the deprivation of LMRDA rights had been deemed a RICO predicate in one other case, U.S. v. Boffa, 688 F.2d 919 (3rd Cir.1982) (construing the federal mail fraud statute to encompass the deprivation of the LMRDA right to the honest and faithful services of union officials). However, it is unclear how many defendants could have been joined to the Local 560 suit under a mail fraud theory; every defendant in Boffa, a criminal prosecution, was an active participant. With the Hobbs Act as the RICO predicate instead of the mail fraud statute, the government was able to name the entire Executive Board along with the Provenzano Group in the suit, on the grounds that every Provenzano ally could be said to contribute to the "climate of intimidation," either as a principal or an aider and abettor, including those whose conduct was limited to acts of omission. In addition, using the "climate of intimidation" theory, the government could put the two murders into the record, and as noted by Robert Stewart, the federal prosecutor who argued and won Local 560, "make no mistake about it, murders are what get judges' attention." E-mail from Robert C. Stewart, Retired Chief of the Strike Force Division, U.S. Attorney's Office, District of New Jersey, to the author (October 1, 2004, 10:02 EST) (on file with author).

[54] Local 560, 550 F.Supp. at 513.

[55] 18 U.S.C. § 1951 (1948).

[56] Local 560, 550 F.Supp. at 518-519.

[57] U.S. v. Tropiano, 418 F.2d 1069 (2nd Cir. 1969).

[58] *Id.* at 1076 (internal quotations and citations omitted). Other decisions in which intangible rights has been held to be Hobbs Act extortable property include Bianchi v. U.S., 219 F.2d 182, 189 (8th Cir. 1955) (rights under construction contract) (cited by Tropiano, 418 F.2d at 1075); U.S. v. Nadaline, 471 F.2d 340, 344 (5th Cir. 1973) (right to solicit business accounts and hire business representatives); U.S. v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978) (right to make business decision free from outside pressure); and U.S. v. Stofsky, 409 F.Supp. 609, 615 (S.D.N.Y.1973) (right to solicit business).

[59] Local 560, 581 F.Supp. at 283-84.

[60] Throughout the complaint, the government referred to Local 560 together with its Welfare and Pension Funds as the "enterprise," pursuant to § 1961 (4) of RICO. Local 560, 581 F.Supp. at 283. Confusingly, in relation to certain predicate acts, unrelated to the extortion of LMRDA rights, the government also characterized the Provenzano Group itself as the "enterprise." *Id.* at 303. Rejecting arguments by the defense that RICO did not authorize an internally inconsistent charging scheme, Judge Ackerman of the District Court found "no incongruity or inconsistency with the statute in the government's characterization of the Provenzano Group (and its associates) as a 'person' in some

instances, particularly as to § 1962 (b), while also characterizing it as an 'enterprise' in others, particularly as to § 1962 (c)." *Id* at 329-30. Three years earlier, the Supreme Court had interpreted the "enterprise" concept to include wholly illegal entities, such as the Provenzano Group, in addition to legal organizations, such as Local 560. U.S. v. Turkette, 452 U.S. 576 (1981).

[61] Local 560, 780 F.2d at 274.

[62] Local 560, 550 F.Supp. 511.

[63] Local 560, 581 F.Supp. 279.

[64] Local 560, 780 F.2d at 296.

[65] For more detail on the subsequent history of the trusteeship, *see, e.g.*, Local 560, 736 F.Supp. at 602-03.

[66] In 1985, with the defense appeal in Local 560 still pending, the Supreme Court simplified further such litigation against other mob-run unions by holding that RICO predicates defined by criminal statutes, including the Hobbs Act, need only be proven by a preponderance of the evidence in civil cases. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985). The Local 560 litigation had proceeded under this assumption, see Local 560, 780 F.2d at 280, but contrary authority had existed in other circuits. The portion of the Supreme Court's holding implicating proof standards is somewhat obliquely put. In one section, the court declares: "We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under [18 U.S.C.] §1964 (c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. *See e.g.*, [citing cases]. There is no indication that Congress sought to depart from this general principle here." Sedima, 473 U.S. at 491. However, later in the same opinion, the court appears to indicate that the foregoing may be dictum: "But we need not decide the standard of proof issue today." *Id.* at 491. The court then states: "The court below also feared that any other construction would raise severe constitutional questions, as it 'would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law.' [Internal quotations and citations omitted.] We do not view the statute as being so close to the constitutional edge." *Id.* at 492. Even if construed as dictum, the Supreme Court's discussion in Sedima of proof standards intended by Congress for civil RICO suits represents the court's most recent, and indeed only, jurisprudence on the matter. Every court to have considered the issue has construed Sedima to hold that civil RICO predicates require proof only by a preponderance. *See, e.g.*, U.S. v. Local 359, Seafood Workers 705 F.Supp. 894, 897 (S.D.N.Y. 1989), *aff'd in part, remanded in part*, 889 F.2d 1232 (2nd Cir. 1989); U.S. v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F.Supp. 1303, 1309 (S.D.N.Y. 1993).

[67] JACOBS, BUSTING THE MOB 36.

[68] *See, e.g.,* Local 560, 694 F.Supp. 1158 (D.N.J. 1988) (enjoining Michael Sciarra and Joseph Sheridan from seeking elective office within the union). In 1999, Judge Ackerman terminated the trusteeship. U.S. v. Local 560, 1999 WL 125447 (D.N.J.).

[69] *See, e.g.*, U.S. v. Int'l Bhd. of Teamsters, 765 F.Supp. 1206, 1210 (S.D.N.Y 1991), appeal dismissed, U.S. v. Int'l Bhd. of Teamsters, 1991 WL 346072 (2nd Cir.).

[70] U.S. v. Debs, 949 F.2d 199, 201-02 (6th Cir. 1991).

[71] *See, e.g.*, U.S. v. Local 6A, Cement Workers, 86 Cv. 4819 (S.D.N.Y.); U.S. v. Local 359, Seafood Workers, 87 Cv. 7351 (S.D.N.Y.); U.S. v. Int'l Bhd. of Teamsters, 88 Cv. 7351 (S.D.N.Y.); U.S. v. Local 54, HEREIU, Cv. 90-5017 (D.N.J.); U.S. v. Dist. Council of Carpenters, 90 Cv. 5722 (S.D.N.Y.).

[72] For an appraisal of the progress of these trusteeships, see James B. Jacobs, et al., *The RICO Trusteeships After Twenty Years: A Progress Report,* 19 LAB. LAW. 419 (2004).

[73] 18 U.S.C. § 1964 (1970). It is undisputed that private plaintiffs may sue for treble damages; at present, there is a circuit split over whether or not private plaintiffs may also sue for equitable relief. The 1st, 7th, and 8th Circuits have resolved this question in the affirmative, while the 2nd, 4th, 5th, and 9th Circuits have held the opposite. Compare Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990); Nat'l Org. for Women v. Scheidler, 267 F.3d 687, 695 (7th Cir. 2001); and Bennett v. Berg, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief is available); with Trane Co. v. O'Connor Sec., 718 F.2d 26, 28-29 (2d Cir. 1983); Johnson v. Collins Ent'mt. Co., 199 F.3d 710, 726 (4th Cir. 1999); In re Fredeman Litig., 843 F.2d 821, 828-30 (5th Cir. 1988); and Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1084 (9th Cir. 1986) (expressing doubt about the availability of injunctive relief for private plaintiffs). See also Northeast Women's Ctr. v. McMonagle, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion on resolution). The Supreme Court granted certiorari to the 7th Circuit in Scheidler in 2003 not only to construe the Hobbs Act, to be discussed below, but also to resolve the circuit split over the availability of injunctive relief to private plaintiffs under RICO. Reaching the merits of the Hobbs Act question, the Supreme Court declined to address the circuit split, which remains unresolved at present. Scheidler, 537 U.S. at 411.

[74] The Supreme Court in Sedima observed that of "270 District Court [civil] RICO decisions prior to this year [1985], only 3% (nine cases) were decided throughout the 1970's, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984." Sedima, 473 U.S. at 479 (citing Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 55 (1985)).

[75] Northeast Women's Ctr. v. McMonagle, 670 F.Supp. 1300 (E.D. Pa. 1987). Litigation between the parties actually commenced in 1985, but the subject-matter of the previous

suit is not directly relevant here. Northeast Women's Ctr. v. McMonagle, 624 F.Supp. 736 (E.D. Pa. 1985).

[76] Northeast Women's Ctr. v. McMonagle, 868 F.2d 1342, 1350 (3rd Cir.1989). McMonagle was modeled upon Local 560, the governing authority in the 3rd Circuit. In finding for the plaintiff, the district court relied explicitly, and solely, upon Local 560: "The court previously addressed defendants' argument as to the applicability of extortion under the Hobbs Act of intangible property rights…For Hobbs Act purposes, the term "property" includes intangible property interests such as the right to make decisions free from wrongfully imposed outside pressures. The court based this finding on the Third Circuit opinion of U.S. v. Local 560 of the International Brotherhood of Teamsters, 780 F.2d 267, 290 (3rd Cir. 1985)." Northeast Women's Ctr. v. McMonagle, 689 F.Supp. 465, 474 (E.D. Pa. 1988). The 3rd Circuit affirmed, noting that "the 'right' on which the Center's case was predicated was the right to continue to operate its business. The Center's extortion claim was the Defendants used force, threats of force, fear and violence in their efforts to force the Center out of business." Northeast Women's Ctr. v. McMonagle, 868 F.2d 1342, 1350 (3rd Cir.1989).

[77] Nat'l Org. for Women v. Scheidler, 765 F.Supp. 937 (N.D. Ill. 1991). As with McMonagle, the parties had actually been litigating since 1986, but the injuries alleged had not involved the Hobbs Act. *See* Scheidler, 537 U.S. at 398.

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

[79] Scheidler, 537 U.S. 393.

[80] *See generally id.*

[81] *Id.* at 411.

[82] *Id.* at 401.

[83] *Id.* at 404.

[84] *Id.* at 405.

[85] *Id*.

[86] Ironically, the most recent 2nd Circuit precedent on point was an affirmation of the 1997 RICO sentences of many of the exact same defendants for nearly indistinguishable offenses in Judge Kaplan's court in the Southern District of New York. Bellomo, 176 F.3d 580.

[87] Bellomo, 263 F.Supp.2d at 575- 76.

[88] *Id.* at 576.

[89] *Id.* at 576.

[90] U.S. v. Coffey, 361 F.Supp.2d 102, 108-09 (E.D.N.Y 2005).

[91] U.S. v. Peter Gotti, et *al.*, 02 Cr. 606, quoted in U.S. v. Cacace, 2004 WL 1646760, 3 (E.D.N.Y.).

[92] Judge Johnson resolved that since "The Government contends that Defendant's ultimate goal was to make money from the ability to exercise, transfer, or sell [LMRDA rights,] Defendant's charged conduct in this case is far different from the protestors' conduct in *Scheidler*, whose objective was not profit but rather the promulgation of a political message." Cacace, 2004 WL 1646760 at 3 (internal quotations and citations omitted).

[93] U.S. v. Muscarella, 2004 U.S. Dist. LEXIS 19476, 25 (S.D.N.Y.).

[94] Bellomo, 263 F.Supp.2d at 575-76; Cacace, 2004 WL 1646760, *3 (addressing both the court's own conclusions and those expressed by the Gotti court at sentencing); and Muscarella, 2004 U.S. Dist. LEXIS at 19-20 ("we find that, in the context of LMRDA rights, it is necessary to determine on a case-by-case basis whether, under Scheidler, a defendant received 'something of value' that he could 'exercise, transfer, or sell.'"). *See also, e.g.*, Advance Relocation & Storage Co. v. Local 814, I.B.T., 2005 U.S. Dist. LEXIS 6835, *16 (E.D.N.Y.).

[95] Scheidler, 537 U.S. at 402.

[96] *Id*.

[97] *Id*.

[98] *Id.*

[99] *Id.* at 406.

[100] See Culbert, 435 U.S. at 377 ("The primary focus in the Hobbs Act debates was on whether the bill was designed as an attack on organized labor. Opponents of the bill argued that it would be used to prosecute strikers and interfere with labor unions...The proponents of the bill steadfastly maintained that the purpose of the bill was to prohibit robbery and extortion perpetrated by anyone.") (internal citations omitted). 91 Cong. Rec. 11899-11922 (1945) (House debate). The Senate passed the Hobbs Act without debate. 92 Cong. Rec. 7308 (1946). *Compare, e.g.*, 91 Cong. Rec. 11900 (1945) (remarks of Rep. Hobbs) ("Title III [codified as 18 U.S.C. § 1951 (c)] exempts from the operation of this law any conduct under the anti-trust statutes, under the NLRB Act, under the Norris-LaGuardia statute, the Railway Labor Act, the Big Four that have been termed the Magna Carta of labor."); *id.* at 11906 (remarks of Rep. Robison) ("Title III...preserves expressly the so-called big four – the magna carta of American labor.

These are: The Clayton Antitrust Act of 1914; the Norris LaGuardia Anti-Injunction Act; the Railway Labor Act; and the National Labor Relations Board. This bill does not disturb these four acts."); *id.* at 11909 (remarks of Rep. Vursell) ("This act is intended to apply only to a citizen who is guilty of robbery or extortion...It exempts from the Act every piece of labor legislation written on the statute books from the beginning up to the present time which was intended to protect collective bargaining and the laboring man in his legitimate rights under the law."); *id.* at 11912 (remarks of Rep. Jennings) ("This bill by express terms leaves in full force and effect every law upon the statute books passed for the protection of the legitimate rights of labor.") with *id.* at 11901 (1945) (remarks of Rep. Celler) ("Mr. Chairman, this bill does strike and strikes hard at organized labor."); *id.* at 11906 (remarks of Rep. Gallagher) ("[M]y friends, this bill is a declaration of war on organized labor or lack of trust in them and a declaration of the class struggle as vicious as any red advocate ever conceived."); *id.* at 11916 (remarks of Rep. Biemiller) ("Those of us who are opposed to the bill in its present form are genuinely fearful that the bill as it now stands can be used, as previous speakers have intimated, to infringe upon the legitimate rights of labor unions.").

[101] Evans v. U.S., 504 U.S. 255, 262-63 (1992).

[102] Scheidler, 537 U.S. at 407.

[103] U.S. v. Culbert, 435 U.S. 374, 377 (1978).

[104] Scheidler, 537 U.S. at 402. In concurrence, Justice Ginsburg similarly characterizes the respondents' argument as "an expansive definition of 'extortion.'" *Id.* at 412. The concurrence also recites a quotation from Sedima, supra note 62, indicating that Ginsburg did not perceive the holding to extend to labor racketeering. In reference to RICO, but in terms equally applicable to the Hobbs Act, the concurrence notes that the statute "has already evolved into something quite different from the original conception of its enactors...warranting concerns over the consequences of an unbridled reading of the statute." Id. at 412 (quoting Sedima) (internal quotations omitted). These concerns may be "warranted" as relates to abortion protesters, but not as to labor racketeers; the "original conception of [the] enactors" of both RICO and the Hobbs Act was precisely to combat labor racketeering and related unlawful conduct by organized crime. *See supra* notes 31, 95.

[105] 18 U.S.C. § 1951 (c) (1994).

[106] The full text of § 1951 (c) reads: "This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29, or sections 151-188 of Title 45." 15 U.S.C. § 17 and 29 U.S.C. § 52 are part of a body of statutes passed as the Clayton Act, 29 U.S.C. §§ 101 *et seq.* refers to the Norris-LaGuardia Act, 29 U.S.C. §§ 151 *et seq.* is popularly known as the National Labor Relations Act, and 45 U.S.C. §§ 151 *et seq.* represents the Railway Labor Act.

[107] 91 Cong. Rec. 11900.

[108] *Id.* at 11909 (remarks of Rep. Vursell).

[109] It bears mention that as of this writing, Congress is considering an amendment to the Hobbs Act that would rename the statute "The Freedom from Union Violence Act" (FUVA). The amendment repudiates the holding of U.S. v. Enmons, 410 U.S. 396 (1973), in which the Supreme Court held that Hobbs Act liability did not extend to wrongdoing committed in pursuit of a legitimate labor objective. Under FUVA, the perpetrators of anything beyond "minor property damage" would be subject to prosecution. 2005 Cong. US HR 239. Whether or not FUVA becomes law, the fact remains that the absence of any mention of labor law in Scheidler indicates that the Supreme Court did not anticipate that the opinion would be extended to the labor area.

[110] Bellomo, 297 F.Supp.2d at 502.

[111] *See, e.g.*, Libertad v. Welch, 53 F.3d 428 (1st Cir. 1st Cir. 1995); W. Hartford v. Operation Rescue, 915 F.2d 92 (2nd Cir. 1990); U.S. v. Arena, 180 F.3d 380 2nd Cir. 1999); Northeast Women's Ctr. v. McMonagle, 868 F.2d 1342 (3rd Cir.1989); Volunteer Med. Clinic v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991); Planned Parenthood v. Am. Coalition of Life Activists 945 F.Supp. 1355 (D. Or. 1996); Women's Health Care Servs. v. Operation Rescue-Nat'l, 773 F.Supp. 258 (D. Kan. 1991).

[112] *See generally* Tropiano, 418 F.2d at 1072-74.

[113] Scheidler, 537 U.S. at 402.

[114] Cf. Coffey, 361 F.Supp.2d at 108-09.

[115] Scheidler, 537 U.S. at 405 (internal quotations and citations omitted).

[116] Cacace, 2004 WL 1646760 at *3. *See also* Muscarella, 2004 U.S. Dist. LEXIS 19476 at *22 ("This is a markedly different case from *Scheidler*.")

[117] Scheidler, 537 U.S. at 405 (internal quotations omitted).

[118] *Id.* (internal quotations and citations omitted).

[119] *Id.* at 402.

[120] *See, e.g.*, Enmons, 410 U.S. at 406 ("An accused...could not be convicted without sufficient evidence that he was actuated by the purpose of obtaining a financial benefit for himself") (internal citations and quotations omitted); Scheidler, 537 U.S. at 403 (using "money" interchangeably with "property" in characterizing the holdings of two New York cases, People v. Ryan and People v. Weinseimer); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 405 (1995) ("accepting the assumption, because the argument was waived, that the Hobbs Act is a federal payment for official action statute") (internal citations and quotations omitted). The Scheidler court relies upon both Enmons,

Ryan and Weinseimer for its central proposition that extortion under the Hobbs Act requires "not only the deprivation but also the acquisition of property." Scheidler, 537 U.S. at 404. The property at stake in Nardello, the source of the phrase "something of value" in Scheidler, was money. Nardello, 393 U.S. 286, 290 (1969).

[121] Tropiano, 418 F.2d at 1075.

[122] In addition to litigation involving the Scheidler defendants, the Supreme Court has treated the Hobbs Act in Carter v. U.S., 530 U.S. 255 (2000); Lebron v. Nat'l R.R. Passenger Corp. 513 U.S. 374 (1995); Evans v. U.S., 504 U.S. 255 (1992); McCormick v. U.S., 500 U.S. 257 (1991); U.S. v. Miller, 471 U.S. 130 (1985); Snell v. U.S., 450 U.S. 957 (1981); Blackburn v. Thomas, 450 U.S. 953 (1981); U.S. v. Gillock, 445 U.S. 360 (1980); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Dalia v. U.S., 441 U.S. 238 (1979); U.S. v. Culbert, 435 U.S. 371 (1978); Abney v. U.S., 431 U.S. 651 (1977); U.S. v. Enmons, 410 U.S. 396 (1973); Callanan v. U.S., 364 U.S. 587 (1961); Stirone v. U.S.; 361 U.S. 212 (1960); Curcio v. U.S.; 354 U.S. 118 (1957); and U.S. v. Green; 350 U.S. 415 (1956). Omitted from this list are cases in which the Hobbs Act is so tangential to the discussion that the opinions make no reference to what motivated the conduct violative of the statute.

[123] Tropiano, 418 F.2d at 1076.

[124] Scheidler, 537 U.S. at 405.

[125] *Id*. at 402.

[126] Local 560, 581 F.Supp. at 306.

[127] Bellomo, 176 F.3d at 592.

[128] *Id.* at 592.

[129] *Id.* at 592-93.

[130] *Id.* at 592.

[131] *See* Robin K. Luce & Nancy G. Itnyre, *Don't Write Off the Hobbs Act Yet: Scheidler v. NOW and its Applicability in the Labor Context*, AMERICAN BAR ASSOCIATION, LABOR AND EMPLOYMENT LAW SECTION, 13, *available at* http://www.bnabooks.com/ababna/nlra/2004/luce2.doc (implying a similar conclusion).

[132] 29 U.S.C. § 402 (k) (1959). 29 U.S.C. § 481 (b) (1959), reads, in relevant part: "Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing." 29 U.S.C. § 402 (k) defines "secret ballot" to mean "the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter,

which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed."

[133] *See* Coffey, 361 F.Supp.2d at 108-09.

[134] *Id. See also*, U.S. v. DeFries, 129 F.3d 1293, 1306 (D.C. Cir. 1997) (finding that defendants, former union officers, engaged in proxy voting as a factual matter, even though such a practice violated the LMRDA).

[135] Muscarella, 2004 U.S.Dist. LEXIS 19476 at *22.

[136] U.S. v. Local 560, 754 F.Supp. 395, 407 (D.N.J. 1991).

[137] *Id.*

[138] 18 U.S.C. § 1346 (1988). Congress passed § 1346 specifically to overrule the Supreme Court's judgment the previous year in U.S. v. McNally, which rejected the characterization of the "right to honest services" as "property" for purposes of the mail and wire fraud statutes. U.S. v. McNally, 483 U.S. 350 (1987).

[139] Courts have applied § 1346 to the labor context in U.S. v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997), U.S. v. Boyd, 309 F.Supp.2d 908 (S.D.Tex 2004), and U.S. v. Coffey, 361 F.Supp.2d 102 (E.D.N.Y. 2005) (Judge Glasser, J.), among others. Prior to the passage of § 1346, courts that had validated theories alleging the "deprivation of honest services" of union officers as the basis for mail or wire fraud charges had relied upon 29 U.S.C. § 501, an LMRDA provision, which itself sets out a right to the honest services of union officers. *See supra* note 50.

[140] Significantly, the Second Circuit has declined to extend Scheidler to the mail and wire fraud statutes. Porcelli v. U.S., 404 F.3d 157, 161-62 (2nd Cir. 2005).

[141] Local 560, 581 F.Supp. at 315-16.

[142] *See supra* note 133.

[143] DeFries, 129 F.3d at 1306 (holding that interference with the exercise of LMRDA voting and free speech rights did not constitute "interference with honest services").

[144] *See supra* note 50.

[145] "In 2003, 12.9 percent of wage and salary workers were union members, down from 13.3 percent in 2002, the U.S. Department of Labor's Bureau of Labor Statistics reported today. The number of persons belonging to a union fell by 369,000 over the year to 15.8 million in 2003. The union membership rate has steadily declined from a high of 20.1 percent in 1983, the first year for which comparable union data are available." Bureau of

Labor Statistics, *Union Members in 2003,* UNION MEMBERS SUMMARY, January 21, 2004, *available at* http://www.bls.gov/news.release/union2.nr0.htm.

[146] The most recent such suit was filed in April 2002 against Local 69 of the Hotel Employees and Restaurant Employees International Union (HEREIU). *See* James B. Jacobs, *The RICO Trusteeships After Twenty Years: A Progress Report,* 19 LAB. LAW. 419, 420 (2004).