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G. Robert Blakey
Notre Dame Law School, g.r.blakey.1@nd.edu

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SYMPOSIUM RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

FOREWORD: DEBUNKING RICO'S MYRIAD MYTHS

G. ROBERT BLAKEY*

> Various and discordant readings, glosses and commentaries [on statutes], will inevitably arise in the progress of time, and, perhaps, as often from the want of skill and talent in those who comment, as in those who make the law.[1]

In January of 1931, Warner Brothers-First National released a film entitled *Little Caesar*.[2] Based on a book by W. R. Burnett,[3]

* William J. and Dorothy O'Neill Professor of Law, Notre Dame Law School. A.B. 1957, J.D. 1960, University of Notre Dame. Professor Blakey is also a Vice-Chairperson of the RICO Cases Committee of the Criminal Justice Section of the American Bar Association. Professor Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970 when the Organized Crime Control Act of 1970, Title IX ("known as RICO"), was drafted and enacted.

[1] J. KENT, COMMENTARIES ON AMERICAN LAW 520-21 (9th ed. 1854).

[2] *Little Caesar* (Wisconsin/Warner Bros. Screenplay Series 1931). *See generally* Blakey & Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO, and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"* (pts. 1-3), 43 VAND. L. REV. 851, 982-87 (1990) [hereinafter *Myths*].

[3] W. BURNETT, LITTLE CAESAR (1929).

the movie, loosely portraying the life of Alphonse Capone,[4] starred Edward G. Robinson in its title role, Caesar Enrico Bandello, also known as "Little Caesar," or "Rico."[5] Robinson, as he lies dying, utters one of the most famous end lines in film history: "Mother of Mercy—Is this the end of Rico?"[6] Likewise, no one who looks at this Symposium—or others[7]—or the seemingly inevitable march of RICO reform (chloroform?) legislation through Congress[8]—or the endless efforts of the federal judiciary to narrow the statute[9]—can help but endlessly wonder, "Is this the end of RICO?"

This Symposium, with its wide-ranging lead articles and its craftsman-like student pieces, provides an excellent overview of the statute, and opinions for—and against—it.

I. BACKGROUND OF RICO[10]

In 1970, Congress enacted the Organized Crime Control Act,

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[4] *Myths*, *supra* note 2, at 983 n.437.

[5] *Id.* at 984 n.438.

[6] *Id.* at n.439.

[7] *See generally* Symposium, *Reforming RICO: If, Why, and How?*, 43 VAND. L. REV. 621 (1990); Symposium, *Law and the Continuing Enterprise: Perspectives on RICO*, 65 NOTRE DAME L. REV. 872 (1990).

[8] *See* S. REP. No. 269, 101st Cong., 2d Sess. 1 (1990) (reporting S. 430); 6 Civil RICO Rep. 1 (Sept. 25, 1990) (noting the reporting of H.R. 5111).

[9] *See, e.g.*, Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 952-56 (D.C. Cir.) (en banc) (adopting narrowest available rule for resolution of RICO issues), *petition for cert. filed*, No. 90-872 (Dec. 3, 1990). Although concurring in the judgment, Judge Mikva argued that the majority's interpretation of RICO "contravenes the very broad words of the statute and the apparent intent of its drafters," as well as precedent of the Supreme Court. *Id.* at 957 (Mikva, J., concurring). For a discussion and critique of the trend to limit the application of RICO, see *infra* notes 68-72 and accompanying text.

[10] "Background of RICO" reflects a suitably objective title appropriate for a foreword. Nevertheless, a caveat is in order: "[A]ny man who says he is impartial about any subject on which he speaks is either ignorant of the subject or a liar, and . . . the honest man is one who, aware of his partiality, guards against its abuse." Shaw, *Labor Law for the Average Lawyer's Practice*, LAB. L. J. 122, 122 (Nov. 1949) (paraphrasing Justice Holmes). For fuller discussions of the origins and underlying concepts of RICO, see generally Blakey, *The RICO Civil Fraud Action in Context: Reflection on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237 (1982) [hereinafter *Civil Fraud*]; Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO Be Effective Only Against White Collar Crime?*, 62 NOTRE DAME L. REV. 526 (1987) [hereinafter *Equitable Relief*]; Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); *see also* ORGANIZED CRIME AND RACKETEERING SEC., CRIM. DIV., U.S. DEPT OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS (3d rev. ed. 1990). For opposing views on the history, scope, and effectiveness of the RICO Act, compare Lynch, *RICO: The Crime of Being a Criminal* (pts. 1-4), 87 COLUM. L. REV. 661, 920 (1987),

Title IX of which is known as the Racketeer Influenced and Corrupt Organizations Act ("RICO").[11] Congress enacted the 1970 Act "to strengthen[] the legal tools in the evidence-gathering process, [to] establish[] new penal prohibitions, and [to] provide[e][] enhanced sanctions and new remedies. . . ."[12] RICO covers violence, the provision of illegal goods and services, corruption in labor or management relations, corruption in government, and criminal fraud.[13] Congress found that "the sanctions or remedies available" under the law as it existed in 1970 were "unnecessarily limited in scope and impact."[14] Congress then provided a wide range of new criminal and civil sanctions to control these offenses, including imprisonment, forfeiture, injunctions, and treble damage relief for "person[s] injured" in their "business or property" by violations of the statute.[15] At the time, these sanctions were called for by no less than the President,[16] the President's Commission on Law Enforcement and the Administration of Justice,[17] and the American Bar Association.[18]

The near-universal approval of the Act was evidenced by the overwhelming majorities in both houses that voted for it. The Senate passed the bill seventy-three to one.[19] The House passed an

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and Lynch, *A Reply to Michael Goldsmith*, 88 COLUM. L. REV. 802 (1988) with Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988).

[11] Pub. L. No. 91-452, 84 Stat. 922 (1970).

[12] 84 Stat. 923 (1970).

[13] *Civil Fraud*, *supra* note 10, at 300-06.

[14] 84 Stat. 923 (1970).

[15] 18 U.S.C. §§ 1963, 1964(c) (1988). It is widely believed that the treble damage provisions were a "late addition, spot-welded to an already fully-structured criminal statute." P.M.F. Servs., Inc. v. Grady, 681 F. Supp. 549, 555 (N.D. Ill. 1988) (Shadur, J). Judge Shadur's views, first expressed in Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983), were followed by the Second Circuit in Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 488-90 (2d Cir. 1984), which was reversed by the Supreme Court, 473 U.S. 479 (1985). As such, their precedential value now is in considerable doubt. Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1081 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). They are also plainly wrong. *See generally Equitable Relief*, *supra* note 10, at 249-80; *Myths*, *supra* note 2, at 864 n.29.

[16] "Message on Organized Crime," *reprinted in Hearings Before the Subcomm. on Criminal Laws and Procedures, Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 449 (1969).

[17] PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 208 (1967).

[18] *Organized Crime Control: Hearings on S.30 Before the Subcomm. No. 5, House Committee on the Judiciary*, 91st Cong., 2d Sess. 537 (1970).

[19] 116 CONG. REC. 972 (1970).

amended bill 431 to 26.[20] The Senate then passed the House bill, after debate, but without objection,[21] and the President signed the legislation on October 15, 1970.[22]

The innovative approach to crime control embodied in RICO also is reflected in legislation adopted by a majority of state legislatures. Since 1970, twenty-nine states have enacted similar RICO legislation.[23]

A. Standards of Unlawful Conduct: Criminal and Civil

1. Standards

RICO sets out "standards" of "unlawful" conduct, which are enforced through "criminal" and "civil" sanctions. Section 1963 of Title 18 provides the criminal remedies. Section 1964 of Title 18 provides the civil remedies. Section 1962 explicitly states what is "*unlawful,*" as opposed to what is "*criminal.*" As such, RICO is not, as some believe, "primarily a criminal statute."[24] Accordingly, because the civil scope of RICO is *broader* than its criminal scope, RICO is *not* primarily criminal and punitive, but preventative and remedial.[25] RICO's civil remedies, based on a showing of a preponderance of the evidence, are available to the government and other parties.[26]

2. Liberal Construction

Congress directed that RICO "be liberally construed to effec-

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[20] *Id.* at 35,363.

[21] *Id.* at 36,296.

[22] *Id.* at 37,264.

[23] The first state to pass its own "little RICO" statute was Hawaii in May, 1972. The most recent was Minnesota in August, 1989. *See Myths, supra* note 2, at 988-1011 (1990) (chart in appendix analyzing laws of various states).

[24] *In re* Action Indus. Tender Offer, 572 F. Supp. 846, 849 (E.D. Va. 1983); *see* 116 CONG. REC. 602 (1970) (statement of Sen. Hruska) ("the principal value of this legislation may well be found to exist in its civil provisions"); 115 CONG. REC. 6993 (1969) (statement of Sen. Hruska) ("the criminal provisions are intended primarily as an adjunct to the civil provisions, which I consider as the more important feature of the bill").

[25] Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985) ("read broadly . . . to 'effectuate its remedial purposes' "); United States v. Turkette, 452 U.S. 576, 593 (1981) (RICO is "both preventive and remedial").

[26] *Sedima*, 473 U.S. at 492 ("no indication . . . depart from [preponderance]"); Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, 530-32 (9th Cir. 1987) (private suit); United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (government suit).

tuate its remedial purposes."[27] This liberal construction clause sets RICO apart from the bulk of federal criminal law. As the Supreme Court noted in *Russello v. United States*, "this is the only substantive federal criminal statute that contains such a directive."[28] The directive is a "mandate."[29] Accordingly, courts are required by the statute to read its language in the same fashion, whatever the character of the suit.[30]

3. No Supersession

While broad, RICO does not displace other bodies of law, federal or state. RICO was, of course, an innovation. As the Supreme Court noted in *United States v. Turkette*, "Congress was well aware that it was [with RICO] entering a new domain. . . ."[31] The issue was not whether RICO should apply to the conduct prohibited by its predicate offenses, but whether it should preempt other laws. Congress, however, expressly saved "provision[s] of Federal, State, or other law imposing criminal penalties or affording civil

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[27] 84 Stat. 947 (1970).

[28] 464 U.S. 16, 27 (1983). The liberal construction clause is not unique in state law. It had its origins in the codification movement of the 19th century. Judicial hostility to change through legislation was common at that time.

> [W]here [judges] were not ready boldly to declare [it] unconstitutional, [they were ready] to interpret it so restrictively as to narrow its effect.
>
> These factors found expression in the abstract canons of statutory interpretations . . . strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed "drastic" burdens, or of legislation that imposed special damages . . . .
>
> The effect was to put a primarily obstructive, if not destructive connotation on the process of statutory interpretation.

J. HURST, THE GROWTH OF AMERICAN LAW 186 (1950). Legislatures reacted. "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 174 (1974). In fact, a majority of states have abolished the common law rule. The statutes are collected in *Civil Fraud*, *supra* note 10, at 245 n.25. *See generally* Hall, *Strict or Liberal Construction of Criminal Statutes*, 48 HARV. L. REV. 748 (1935); Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

[29] Lou v. Belzberg, 834 F.2d 730, 737 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) (quoting *Sedima*, 473 U.S. at 492 n.10).

[30] *Sedima*, 473 U.S. at 489; *cf.* Northern Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction"); United States v. MacAndrews & Forbes Co., 149 F. 823, 830 (Cir. Ct., S.D.N.Y. 1906) ("the same facts and acts which expose violators of [antitrust act] . . . to civil suit also render them subject to indictment").

[31] 452 U.S. 576, 586 (1981).

remedies in addition to those provided for" in RICO.[32] The Seventh Circuit succinctly captured RICO's aim when it held that "Congress enacted RICO in order to *supplement, not supplant,* the available remedies since it thought those remedies offered too little protection for the victims."[33] The Supreme Court itself acknowledged that such overlap between statutes "is neither unusual nor unfortunate."[34] The existence of cumulative remedies furthers remedial purposes.[35]

4. Elements of Section 1962 Violations

Section 1962(a). The standards of section 1962(a) embody four essential elements: (1) income derived from a "pattern" of racketeering (2) used or invested in the acquisition, establishment, or operation by a defendant (3) of an "enterprise" (4) engaged in or affecting interstate commerce.[36]

Section 1962(b). The standards of section 1962(b) embody three essential elements: (1) the acquisition or maintenance through a "pattern" of racketeering activity by a defendant (2) of an interest in or control of an "enterprise" (3) engaged in or affecting interstate commerce.[37]

Section 1962(c). The standards of section 1962(c) embody four essential elements: (1) employment by or association of a defendant with (2) an "enterprise" (3) engaged in or affecting interstate commerce (4) the affairs of which are conducted or participated in by a defendant through a "pattern" of racketeering activity.[38]

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[32] 84 Stat. 947 (1970).

[33] Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (emphasis added).

[34] *See* S.E.C. v. National Sec., Inc., 393 U.S. 453, 468 (1969).

[35] Herman & McLean v. Huddleston, 459 U.S. 375, 386 (1983).

[36] *See, e.g.*, Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1396-98 (9th Cir. 1986).

The Supreme Court provided its authoritative analysis of "pattern" in H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989). The best two pre-*Northwestern Bell* analyses of "pattern" appear in Goldsmith, *RICO and Pattern*, 73 CORNELL L. REV. 971 (1988) and Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83 (1986).

The best single analysis of "enterprise" is in Note, *Functions of RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989).

[37] *See, e.g.*, Medallion Television Enters., Inc. v. SelecTV of Cal., Inc., 833 F.2d 1360, 1362 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 3241 (1989).

[38] *See, e.g.*, Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987) ("Liability under § 1962(c) requires (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity") (citing *Sedima*, 473 U.S. at 496).

Section 1962(d). Section 1962(d) is the conspiracy provision of RICO. Section 1962(d) makes it "unlawful for any person to conspire to violate [subsections (a), (b), or (c)]."[39]

B. *The Criminal Enforcement Mechanism*

The criminal enforcement mechanism of RICO provides for imprisonment, fines, and criminal forfeiture. RICO authorizes imprisonment of up to twenty years, or life, where the predicate offense authorizes life.[40] In conjunction with other sections of United States Code, Title 18, RICO authorizes fines for RICO violations of up to $250,000 if an individual is convicted,[41] or up to $500,000 if an entity is convicted,[42] or alternatively, twice the gain or loss.[43] Sentencing courts can also order defendants to pay restitution to victims of an offense.[44] RICO itself mandates that forfeiture can be of illicit proceeds, related property, or any interest in an enterprise.[45]

C. *The Civil Enforcement Mechanism*

The civil enforcement mechanism of RICO provides for injunctions, treble damages, and counsel fees. The civil enforcement provisions were modeled on, but are not identical to, the antitrust laws.[46] The antitrust laws are termed "the Magna Carta of free enterprise."[47] The antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[48] A private "treble-damages remedy [is needed] . . . pre-

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[39] *See, e.g.*, United States v. Tille, 729 F.2d 615, 619-20 (9th Cir.), *cert. denied*, 469 U.S. 845 (1984). *See generally* Note, *Conspiracy to Violate RICO*, 58 NOTRE DAME L. REV. 1001 (1983).

[40] 18 U.S.C. § 1963(a) (1988).

[41] *Id.* § 1963(a) (violators "shall be fined under this title"). Section 3571(b) provides for fines that an individual may be sentenced to pay.

[42] *Id.* § 3571(c).

[43] *Id.* § 3571(d).

[44] *See id.* §§ 3556, 3663-64.

[45] *Id.* § 1963. *See generally* Blakey, *Asset Forfeiture Under Federal Criminal Law*, in H. ALEXANDER & G. CAIDEN, THE POLITICS AND ECONOMICS OF ORGANIZED CRIME 127 (1985); Note, *Bane of American Forfeiture Law*, 62 CORNELL L. REV. 708 (1977) (historical review of forfeiture law).

[46] S. REP. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. REP. No. 1549, 91st Cong., 2d Sess. 56-60 (1970).

[47] United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

[48] *Id.*

cisely for the purpose of encouraging *private* challenges to antitrust violations."[49] Such "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[50] Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the antitrust statutes.[51] Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators and provide[s] ample compensation to the victims."[52] In fact, RICO and the antitrust statutes are well integrated.[53]

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[49] Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (emphasis in original).

[50] Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965) (quoting Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965)).

[51] *Reiter*, 442 U.S. at 344. In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provision by the government or private parties, 84% were instituted by *private* plaintiffs. UNITED STATES DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). Professor (now Judge) Posner also forcefully argues on economic grounds for *private* enforcement of more than actual damages awards against all forms of deliberate antisocial conduct, particularly where the factor of concealment is present. R. POSNER, ECONOMIC ANALYSIS OF LAW 462 (private enforcement), 143, 272 (more than actual damage awards for deliberate conduct), 235 (concealment) (2d ed. 1977). *See generally Staff of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) (review of argument for and against and empirical studies of antitrust treble damage claims for relief); *Equitable Relief*, *supra* note 10, at 531 n.17 (history and rationale of treble damages); Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose[] a credible threat . . . [T]he deterrent effect [comes] . . . from . . . treble damages"); Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL 17, 17-18 (1983) ("treble damages remedy for private plaintiffs offers unique advantages in the scheme of antitrust enforcement").

[52] Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982); *see also* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) ("'private attorneys general' [for] a serious national problem for which public prosecutorial resources are deemed inadequate"); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241 (1987) ("vigorous incentives for plaintiffs to pursue RICO claims"); Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985) ("private attorney general provision . . . designed to fill prosecutorial gaps") (citing *Reiter*, 442 U.S. at 344).

[53] "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." C. KAYSEN & D. TURNER, ANTITRUST POLICY 17 (1959). RICO focuses on the first two; antitrust focuses on the third. *See* American Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exerted through force or fraud or agreement"); Mosler v. S/P Enters., Inc., 888 F.2d 1138, 1143-44 (7th Cir. 1989) (RICO fraud).

> Because [such] frauds are concealable, trebling is important to produce proper incentives. . . . If perpetrators pay what they took when they get caught, and keep the proceeds the rest of the time, then fraud is profitable. If victims recoup only what they lost, and face the burdens and uncertainties of the legal process plus the costs of their own counsel, then victory will not make them whole, and the shortfall may mean that victims will not vigorously investigate and litigate. Trebling [under RICO] addresses both halves of this equation.

D. *Organized Crime and Beyond*

The drafting of RICO began, but did not end, with an effort to sanction organized crime's traditional activities. The "legislative history [of RICO] clearly demonstrates that . . .[it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[54] As the Supreme Court noted in *United States v. Turkette*, "the major purpose of Title IX. . .[was] to address the infiltration of legitimate business by organized crime," but the statute is not limited to infiltration: Congress wanted to reach both "legitimate" and "illegitimate" enterprises.[55] The Supreme Court put it well recently in *H. J. Inc. v. Northwestern Bell Telephone Co.*:

> [The notion that RICO is limited to organized crime] finds no support in the Act's text, and is at odds with the tenor of its legislative history. . . .Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.[56]

The legislative history of the 1970 statute is replete with statements by the bill's sponsors that fully demonstrate that they intended that it apply beyond organized crime. Representative Robert McClory, a floor manager of RICO, stated:

> [E]very effort . . .[was] made [in drafting RICO] to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with all who might be affected by . . .[the] legislation—whether part of the crime syndicate or not.[57]

Id. See generally Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 533-34 (1986). The purposes of the treble damages provision are to "(1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime." *Id.*

[54] *Russello*, 464 U.S. at 26.

[55] *Turkette*, 452 U.S. at 590-91. The Fourth Circuit similarly commented: "[R]ejected [also has been the] notion [that RICO] applies only to organized crime in the classic 'mobster' sense." United States v. Grande, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980).

[56] 109 S. Ct. 2893, 2903-05 (1989); *see also Sedima*, 473 U.S. at 495 ("not just mobsters"); Owl Constr. Co. v. Ronald Adams Contractor, Inc., 727 F.2d 540, 542 (5th Cir.), *cert. denied*, 469 U.S. 831 (1984) ("[C]ourts and . . . commentators have persuasively and exhaustively explained why . . . . RICO . . . [is not limited to] organized crime").

[57] 116 CONG. REC. 35,204 (1970) (remarks of Rep. Robert McClory).

As the Supreme Court observed in *Sedima, S.P.R.L. v. Imrex Co.*, "[Legitimate businesses] enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[58] Accordingly, RICO fits easily into a consistent pattern of federal legislation enacted as general reform over the past half century or more aimed at a specific target, but drafted without limiting it to the specific target.[59]

E. Implementation of Public Criminal and Civil RICO

At first, the Department of Justice moved slowly to use RICO in criminal prosecutions. Today, it is the prosecutor's tool of choice against sophisticated forms of crime.[60] The Department of Justice is also beginning to implement the civil provisions.[61] Since 1970, criminal RICO has been effectively used against:

1. organized crime groups;[62]
2. political corruption;[63]

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[58] 473 U.S. 479, 499 (1985). Finally, "the courts [are also] all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate organizations." United States v. Altomare, 625 F.2d 5, 7 (4th Cir. 1980).

[59] *See, e.g.*, 18 U.S.C. § 1951 (1988) (extortion), held not limited to racketeering in United States v. Culbert, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (1988) (Travel Act), held not limited to organized crime bribery in Perrin v. United States, 444 U.S. 37, 46 (1979); 18 U.S.C. § 1953 (1988) (lottery tickets), held not limited to organized crime in United States v. Fabrizio, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 2113(b) (1988) (bank robbery), held not limited to gangsters in Bell v. United States, 462 U.S. 356, 358-62 (1983); 18 U.S.C. § 2421 (1988) (white slave traffic), held not limited to commercial prostitution in Caminetti v. United States, 242 U.S. 470, 485-90 (1917). *See generally Equitable Relief, supra* note 10, at 529 n.13 (other cases collected); Blakey, *Definition of Organized Crime in Statutes and Law Enforcement Administration*, in PRESIDENT'S COMMISSION ON ORGANIZED CRIME: REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL—THE IMPACT: ORGANIZED CRIME TODAY 511-80 (April, 1986).

[60] *See Oversight on Civil RICO Suits: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott) [hereinafter Trott Testimony].

[61] *Id.* at 116-17 (litigation against mob-controlled unions reviewed).

[62] *See, e.g.*, United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982) (RICO prosecution of "members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loan sharking"), *cert. denied*, 459 U.S. 1206 (1983).

[63] *See, e.g.*, United States v. Friedman, 854 F.2d 535, 541 (2d Cir. 1988) (conviction of public officials in N.Y.C. parking scandal); United States v. Mandel, 602 F.2d 653 (4th Cir. 1979) (en banc) (court equally divided) (conviction of governor of Maryland for RICO mail fraud and bribery), *cert. denied*, 445 U.S. 461 (1986), *conviction vacated*, 862 F.2d 1067 (4th Cir. 1988) (in light of United States v. McNally, 483 U.S. 350 (1988) and 18 U.S.C. § 1346 (1988) (*McNally* result set aside), *passed at*, 134 CONG. REC. H11207 (daily ed. Oct. 21, 1988)).

3. white-collar crime;[64] and
4. violent groups.[65]

Independent studies conclude that RICO is effective against sophisticated forms of crime. The President's Commission on Organized Crime praised RICO highly, and it recommended that states adopt similar legislation.[66] The General Accounting Office, too, in its study of federal organized crime prosecutions, concluded:

> Prior to the passage of [RICO], attacking an organized criminal group was an awkward affair. RICO facilitated the prosecution of a criminal group involved in superficially unrelated criminal ventures and enterprises connected only at the usually well-insulated upper levels of the organization's bureaucracy.
>
> . . . Before the act, the government's efforts were necessarily piecemeal, attacking isolated segments of the organization as they engaged in single criminal acts. The leaders, when caught, were only penalized for what seemed to be unimportant crimes. The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal prosecution. With the passage of RICO, the entire picture of the organization's criminal behavior and the involvement of its leaders in directing that behavior could be captured and presented.[67]

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[64] *See, e.g.*, United States v. Marubeni Am. Corp., 611 F.2d 763, 763-64 (9th Cir. 1980) (prosecution of Japanese corporation for RICO mail fraud and bribery).

[65] *See, e.g.*, United States v. Yarbrough, 852 F.2d 1522, 1526-28, 1540, 1546 (9th Cir. 1988) (prosecution of "Order" or "Bruders Schweigen" white-hate group for robbery and murder of Alan Berg), *cert. denied*, 488 U.S. 866 (1989). *See generally* S. SINGULAR, TALKED TO DEATH: THE MURDER OF ALAN BERG AND THE RISE OF THE NEO-NAZIS (1989).

[66] PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL—THE IMPACT: ORGANIZED CRIME TODAY (April 1986). The report concludes that RICO is one of the most powerful and effective weapons in existence for fighting organized crime. *Id.* at 133-34.

[67] GENERAL ACCOUNTING OFFICE, EFFECTIVENESS OF THE GOVERNMENT'S ATTACK ON LA COSA NOSTRA 14 (April 14, 1988) [hereinafter EFFECTIVENESS], *reprinted in, Organized Crime: 25 Years After Valachi: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 100th Cong., 2d Sess. 72, 505 (1988) [hereinafter *Organized Crime Hearings*]. The Senate's Permanent Subcommittee on Investigations recently concluded that federal law enforcement agencies "should continue, in appropriate and deserving cases, their innovative and effective use of the enterprise theory of investigation, the task force approach, and the provisions of the RICO statute." *Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, Federal Government's Use of the RICO Statute and Other Efforts Against Organized Crime*, S. REP. No. 407, 101st Cong., 2d Sess. 31-32 (1990); *see also Organized Crime Hearings, supra*, at 492, (testimony of David C. Williams, Director of Special Investigations, General Accounting Office, including reprint of EFFECTIVENESS); *The Mafia of 1980's: Divided and Under Siege*, N. Y. Times, Mar. 11, 1987, at 1, col 1; *Busting the Mob*, U.S. NEWS & WORLD REP., Feb. 3,

F. Implementation of Private Civil RICO

The private bar did not begin to bring civil RICO suits until about 1975. When it did, the district courts reacted with hostility; they judicially attempted to redraft the statute in an effort to dismiss civil RICO suits.[68] Indeed, before *Sedima*, sixty-one percent of the suits recorded in the reported decisions were dismissed on various grounds set forth in defendants' motions.[69]

The first attempt to redraft the statute sought to read an "organized crime" limitation into RICO. Because that limitation had no support in the text of the statute, and had been specifically rejected in the legislative debates, the Second, Fifth, Seventh, and Eighth Circuits were fast to reject it.[70] The next attempt involved reading a "competitive injury" requirement into the statute. The Seventh and Eighth Circuits discarded this limitation as well.[71] Finally, the district courts developed the "racketeering injury" and "criminal conviction" limitations. Both were repudiated by the Supreme Court.[72]

1986, at 24; *The Mob on Trial*, Newsday, Sept. 7, 1986, at 4, col. 1; *see also A Battered and Ailing Malice Is Losing its Grip on America: The Mob in Decline*, N.Y. Times, Oct. 22, 1990, at A12, col. 1. "Law enforcement officials generally credit a long-term strategy adopted by the Justice Department and the Federal Bureau of Investigation in the early 1980's: developing cases against the top leader of organized-crime families and relying largely on the Racketeer Influenced and Corrupt Organizations Act, or RICO, as a courtroom tool." *Id.*

[68] *See* Horn, *Judicial Plague Sweeps United States—"Result Orientis" Infects Civil RICO Decisions*, 5 Nat'l L.J., May 23, 1983, at 31, col. 1.

[69] *See* Trott Testimony, *supra* note 60, at 127.

[70] Alcorn County, Miss. v. U.S. Interstate Supplies, 731 F.2d 1160, 1167 (5th Cir. 1984) (cases cited).

[71] *See* Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.) (competitive injury barrier to recovery supported by neither language nor central goal of statute), *cert. denied*, 464 U.S. 1002 (1983); Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir.) (allegation of commercial . . . injury not required by RICO), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).

[72] *See Sedima*, 473 U.S. at 488-500. The Second Circuit had suggested in its opinion that civil RICO suits against "respected and legitimate 'enterprises,' were extraordinary, if not outrageous." *Sedima*, 741 F.2d 482, 487 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). Included among the so-called "legitimate" enterprises was E. F. Hutton. *See id. But see* BUS. WEEK, Feb. 24, 1986, at 98, col. 1 (Hutton pleads guilty to 2,000 counts of mail fraud in multi-million dollar bank scam); *see also* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 395 n.14 (7th Cir. 1984) (white collar crime alleged in RICO complaints against " 'legitimate' businesses is in some ways at least as disturbing"), *aff'd*, 473 U.S. 606 (1985).

Those who consider RICO claims against "legitimate" businesses outrageous are apparently unaware of the substantial body of literature on white-collar crime committed by "respectable" businesses. *See, e.g.*, Ross, *How Lawless Are Big Companies?*, FORTUNE, Dec. 1, 1980, at 57. The 1043 major corporate violations between 1970 and 1980 included: 117 con-

II. Overview and Critique

Discussions about RICO often are marred by a series of myths that are not supported by a careful analysis of the statute, its legislative history, or the facts.[73] The pieces that make up this Symposium are no exception. The most persuasive myth is that RICO was designed to combat only organized crime.[74] Closely following the "Organized Crime Myth" is the "Legitimate Business Myth," which sees *one* purpose of the statute as its *only* purpose.[75] Underlying each of these mistaken beliefs is the "Litigation Floodgate Myth," which asserts, but does not document, the proposition that civil RICO disputes are inundating the federal courts with an overwhelming burden of new filings—or, in other words—every litigated business dispute today includes a RICO count.[76] This myth may be restated as the "Garden Variety Fraud Myth."[77] When these myths are recognized and appropriately discounted, the opinions offered in a number of the pieces that make up this Symposium can themselves be appropriately discounted.[78] Indeed, a major portion of their value may be in illustrating how thoroughly these myths falsely color proposals for reform. Nevertheless, it remains true, as Justice Holmes noted: "The first call of a theory of law is that it should fit the facts."[79] Unfortunately, as this Symposium illustrates, too many do not.

The most significant of the six principal essays is that written

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victions or consent decrees for 98 antitrust violations; 18 kickbacks, briberies or illegal rebates; 21 illegal political contributions; 11 frauds; and five tax evasions. *See id.* Such white-collar crime has been called " 'the most serious . . . crime problem in America today.' " Braswell v. United States, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980)).

[73] *See generally Myths*, *supra* note 2, at 860-923.

[74] *Id.* at 860; *see supra* note 55 and accompanying text.

[75] *Myths*, *supra* note 2, at 868; *see supra* note 56 and accompanying text.

[76] *Myths*, *supra* note 2, at 869. In fact, RICO criminal prosecutions, out of approximately 44,000 general criminal filings, account for only 110 cases per year; 48% are in the political corruption and white-collar crime area, 39% are in the organized crime and labor racketeering area, and 13% are in other areas, chiefly violent crime. *Id.* at 878, 1020. From December, 1979 to January, 1988, civil RICO suits represented 0.156% of the total civil filings. *Id.* at 878-79; *see also id.* at 870-73 (analysis of data and dispute on number of hidden civil filings). Approximately 60% of the civil filings have an independent basis for federal jurisdiction. *See Equitable Relief*, *supra* note 10, at 619.

[77] *See Myths*, *supra* note 2, at 881.

[78] *See* Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 35, 170 N.E. 479, 483 (Cardozo, J.) ("opinion has a significance proportioned to the sources that sustain it"), *cert. denied*, 282 U.S. 878 (1930).

[79] O. Holmes, The Common Law 167 (Howe ed. 1963).

by Philip A. Lacovara and David P. Nicoli.[80] Building on positions

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[80] Lacovara & Nicoli, *Vicarious Criminal Liability of Organizations: RICO as an Example of a Flawed Principle in Practice*, 64 ST. JOHN'S L. REV. 725 (1990).

In 1965, Justice Douglas suggested the adoption of an editorial policy requiring each author of a law review essay to indicate his special interest in the subject matter of his article. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 229 (1965). Readers of this Symposium ought to be aware that Mr. Lacovara is the principal spokesman for the Business/Labor Coalition for Civil RICO Reform and was senior counsel for litigation and legal policy of General Electric ("G.E."). *See Myths*, *supra* note 2, at 870 n.47. One of the biggest beneficiaries of RICO reform legislation, if it were made retroactive, as initially proposed, but subsequently dropped after public outcry, would be G.E., which is being sued under civil RICO for $1 billion by the Washington Public Power Supply System over the construction of a nuclear containment unit. *See* Dwyer, *Business May Have Found a Way to Delay RICO*, BUS. WEEK, Aug. 28, 1989, at 26. The Lacovara and Nicoli proposals recall the remarks of Justice Brandeis in 1905, who was then in private practice: "We hear much of the 'corporate lawyer' and far too little of the 'people's lawyer.' The great opportunity of the American bar is and will be to stand again, as it has in the past, ready to protect also the interests of the people." A. MASON, BRANDEIS AND THE MODERN STATE 30 (1933) (quoting speech before Harvard Ethical Society); *see also* N.Y. Times, Nov. 29, 1990, at A 12, col. 1. (elderly investor, accountant, who spent life savings on worthless junk bonds from Charles H. Keating's Lincoln Savings and Loan Ass'n and who was plaintiff in civil RICO suit, commented in suicide note: "There's nothing left for me of things that used to be. Government is supposed to serve and protect, but who? Those who can gather the most savings from retired people.").

Lacovara's and Nicoli's proposed restrictions on entity liability might also redound to G.E.'s financial benefit in the future. *See* Dwyer, *Business May Have Found a Way to Delay RICO*, BUS. WEEK, Aug. 28, 1989, at 26. An examination of a past incident might demonstrate how. In 1961, G.E. and 29 other electrical equipment manufacturers, together controlling 95% of the market, were convicted of conspiracy to fix prices. Middle-level executives were also convicted, but company presidents, denying all knowledge of the conspiracy and claiming that it violated company policy, were neither convicted nor indicted. Watkins, *Electrical Equipment Antitrust Cases: Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97, 106-10 (1961). Although the conspiracy inflicted an estimated $2 billion in damages on equipment purchasers, the subsequent civil suits for treble damages under the antitrust laws recovered only $600 million. Moreover, most of the offending officers retained their positions or moved to equivalent positions elsewhere. *See* C. WALTON & F. CLEVELAND, CORPORATIONS ON TRIAL: THE ELECTRIC CASES (1964). Derivative suits against the corporate directors for negligent supervision were generally unsuccessful. *See, e.g.*, Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 86, 188 A.2d 125, 131 (1963) (defendant directors without duty to look for wrongdoing when unaware of employees' violations of antitrust laws).

The companies, G.E. in particular, were then managed by the so-called "rule of anticipated reaction," which permits superiors to command only by correcting subordinates. *See* SIMON, ADMINISTRATIVE BEHAVIOR 129-30 (2d ed. 1957). "[M]anagers [were] required to show a profit or be dismissed." N.Y. Times, Feb. 28, 1961, at 26 (describing "Cordiner Plan," named after Ralph W. Cordiner, G.E.'s Chairman of the Board). It is doubtful that the outcome of the 1961 scandal—hardly fully satisfactory from society's perspective—would be improved under Lacovara's and Nicoli's new regime of even more limited corporate civil and criminal responsibility. For further discussion on the G.E. litigation, see generally C. WALTON & F. CLEVELAND, *supra*.

Lacovara's and Nicoli's proposals would be more credible if actually tested by their

taken by the American Law Institute in its influential Model Penal Code,[81] and the National Commission on Reform of Federal Criminal Law,[82] Lacovara and Nicoli persuasively argue that some modification of the current doctrine of entity criminal responsibility may be in order. In particular, in the context of RICO, they argue that limits should be adopted on the parallel doctrine of entity civil responsibility. For them, courts should not find entity respon-

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comprehensive application to major corporate scandals, such as the recent E.F. Hutton bank-fraud caper. *See* J. STERNGAD, BURNING THE HOUSE DOWN: HOW GREED, CONCEIT, AND BITTER REVENGE DESTROYED E.F. HUTTON *passim* (1990); M. STEVENS, SUDDEN DEATH: THE RISE AND FALL OF E.F. HUTTON *passim* (1989). If the proposals produced defensible and desirable outcomes, Congress might want to consider adopting them. If not, Congress should either modify them appropriately or reject them completely. Nonetheless, presented only as conventional legal reasoning (as here), the authors do not supply sufficient information to allow an assessment of their wisdom or folly. In any event, the courts should not adopt the proposals, in light of Article III's limitations on legislative activity by courts. See *infra* note 93 and accompanying text.

[81] MODEL PENAL CODE § 2.07 (Official Draft 1962).

[82] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW § 402 (1971). The Commission, however, was not of one mind. Some members of the Commission believed that "criminal liability of corporations poses issues quite different from ordinary accomplice liability of individuals." *Id.* at 35. "The diffusion of responsibilities necessitates more flexible attribution of criminality to artificial entities not subject to grave penalties like imprisonment." *Id.* The Senate Judiciary Committee, which reported comprehensive criminal code reform legislation in 1979, rejected the approaches of the Model Penal Code and the Commission, opting to retain present law. S. REP. No. 553, 96th Cong., 2d Sess. 79-83 (1980). Restricting corporate criminal liability, in short, failed to command political support when tested in comprehensive legislative hearings. The arguments have also failed to convince the judiciary. *See, e.g.*, Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 233-61, 275 N.E.2d 33, 78-106 (1971) (criminal liability of corporation based on acts of officers, directors, and employees to bribe or conspiracy to bribe public official), *cert. denied*, 407 U.S. 914 (1972). If anything, the law needs to be strengthened. *See* J. CONKLIN, ILLEGAL BUT NOT CRIMINAL: BUSINESS CRIME IN AMERICA 129 (1977).

> [T]he criminal justice system treats business offenders with leniency. Prosecution is uncommon, conviction is rare, and harsh sentences almost nonexistent. At most, a businessman or corporation is fined; few individuals are imprisoned and those who are serve very short sentences. Many reasons exist for this leniency. The wealth and prestige of businessmen, their influence over the media, the trend toward more lenient punishment for all offenders, the complexity and invisibility of many business crimes, the existence of regulatory agencies and inspectors who seek compliance with the law rather than punishment of violators all help explain why the criminal justice system rarely deals harshly with businessmen. This failure to punish business offenders may encourage "feelings of mistrust, lower community morality, and general social disorganization" in the general population. Discriminatory justice may also provide lower-class and working-class individuals with justifications for their own violation of the law, and it may provide political radicals with a desire to replace a corrupt system in which equal justice is little more than a spoken ideal.

Id.

sibility, criminally or civilly, unless high managerial involvement can be demonstrated by the prosecutor or the plaintiff.[83]

They further argue for the extension of the "person-enterprise" rule in RICO actions, which, as they note,[84] is the majority position under 18 United States Code section 1962(c).[85] While in a "minority of one,"[86] the Eleventh Circuit's position, however, is correct, and in good, although unexpected, company.[87]

Ostensibly, the "person-enterprise" rule stems from two principal considerations, neither of which justify it. First, it is said to be rooted in a belief that an enterprise cannot, under the language of the statute, be "employed or associated with" itself.[88] To be "self-associated" may be a strain on the normal use of words, but to be "self-employed" hardly departs from standard usage. Second, the rule is said to reflect unease at the prospect of holding an enterprise liable, when it is the victim of the racketeering.[89] "[T]his hardly seems a reason to fashion a general rule that applies even when the enterprise is not the victim, but is instead the perpetra-

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[83] *See* Lacovara & Nicoli, *supra* note 80, at 745-50; *see also Myths*, *supra* note 2, at 942 (restricting multiple damages and authorizing counsel fees in context of affirmative defense might make sense), 223 (suggested statutory text); *compare* Elkins, *Corporations and Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 119-21 (1976) (criticism of due diligence defense) *with* Miller, *Corporate Criminal Liability: A Principle Extended to Its Limits*, 38 FED. B.J. 49 (1979) (support of due diligence defense).

[84] For a comprehensive examination of the development and rationale of the "person-enterprise" rule, see Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179, 189-98 (1988).

[85] *See* Lacovara & Nicoli, *supra* note 80, at 752-59; *see also* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 951 (D.C. Cir.), *petition for cert. filed*, No. 90-872 (Dec. 3, 1990).

[86] *Yellow Bus Lines*, 913 F.2d at 951; *see* United States v. Hartley, 678 F.2d 961, 988-89 (11th Cir. 1982), *cert. denied*, 459 U.S. 1183 (1983). In *Hartley*, the Court of Appeals for the Eleventh Circuit reasoned that to read "person" separate from "enterprise" would permit a corporation to evade punishment. *Id.*

[87] *Report of the Ad Hoc Civil RICO Task Force*, A.B.A. SEC. ON CORP., BANKING AND BUS. LAW 366-77 (1985) [hereinafter *A.B.A. Report*] (noting six substantial reasons supporting the Eleventh Circuit's position).

[88] *See, e.g.*, *Yellow Bus Lines*, 913 F.2d at 951 ("Logic alone dictates that one person may not serve as the enterprise and the person associated with it because . . . 'you cannot associate with yourself'") (quoting district court opinion, 839 F.2d at 790); Schofield v. First Commodity Corp., 793 F.2d 28, 29-34 (1st Cir. 1986) ("person" engaging in pattern of racketeering activity must be "distinct" from enterprise).

[89] *See, e.g.*, B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628, 633-34 (3d Cir. 1984) (RICO meant to punish infiltrating criminals rather than legitimate businesses). *But cf.* United States v. Local 30, United Slate, Tile & Composition Roofers, 871 F.2d 401, 405-06 (3d Cir. 1989) (person-enterprise rule limited to § 1964(c) claims for damages; inapplicable to § 1964(a) suits for equitable relief).

tor."[90] Moreover, the victim exclusion rule, not considered by Lacovara and Nicoli, would work, independent of any special RICO rule, to preclude secondary liability for enterprises when they are victims or merely passive instruments.[91] As such, the "person-enterprise" rule is neither necessary nor wise, and it unjustifiably circumscribes RICO's proper scope in holding a perpetrator responsible—criminally and civilly—for his conduct.

More generally, Lacovara's and Nicoli's proposal that the courts adopt a high managerial agent theory of criminal and civil responsibility runs into Article III limitations. In 1948, Congress codified entity liability.[92] Only Congress, therefore, can change it. "RICO may be a poorly drafted statute, but rewriting it [or enacting a new general theory of entity liability under Title 18] is a job for Congress, if it is so inclined and not for the courts."[93]

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[90] *ABA Report, supra* note 87, at 374 n.607. The offender and the enterprise need not necessarily be separate—they may be identical. *Id.*; *see also* Busby v. Crown Supply, Inc., 896 F.2d 833, 840-42 (4th Cir. 1990) (en banc) (person-enterprise rule under § 1962(a) abandoned in light of "universal" rejection based on "compelling" reasoning).

[91] *See* Gebardi v. United States, 287 U.S. 112, 119, 120-21 n.5 (1932) (woman's acquiescence to transportation in violation of Mann Act not crime of conspiracy to transport, of which man alone can be guilty); United States v. Tillem, 906 F.2d 814, 822-24 (2d Cir. 1990) (evidence that restaurant consultant was conduit of extorted money does not demonstrate active participation in extortion scheme); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 594-96 (2d ed. 1986).

[92] 1 U.S.C. § 1, *enacted at* 62 Stat. 859-60 (1948); *see* United States v. A&P Trucking Co., 358 U.S. 121, 123 n.2 (1958). "It is significant that the definition of 'whoever' in 1 U.S.C § 1 [to include entities] was first enacted into law as part of the very same statute which enacted into positive law the revised Criminal Code [in Title 18] (citation omitted). The connection between . . . [it and Title 18] is thus more than a token one . . . ." *Id.*; *see also* United States v. Polizzi, 500 F.2d 856, 906-09 (9th Cir. 1974) (context makes entity theory of liability applicable), *cert. denied*, 419 U.S. 1120 (1975). *See generally* S. REP. No. 1620, 80th Cong., 2d Sess. 5 (1948); H.R. REP. No. 304, 80th Cong., 1st Sess. 8 (use of "whoever"), 9 ("preserve the original meaning"), app. 454 ("whoever" and "person" "synonymous," "phrased in positive instead of permissive terms") (1947). The development of the general federal rule of criminal and civil entities' responsibility is traced to and was upheld in New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495 (1909) (no valid objection in law, and every reason in public policy, to hold corporation, profiting from actions of its agents and officers, punishable by fine because of "knowledge and intent of its agents to whom it has intrusted authority to act"); Salt Lake City v. Hollister, 118 U.S. 256, 261 (1885) (when acts are not founded on contract, but on tortious or quasi-criminal exercises of power corporation may be held pecuniarily responsible to injured party); and United States v. MacAndrews & Forbes Co., 149 F. 823, 835-36 (Cir. Ct. S.D.N.Y. 1906) (antitrust criminal conspiracy upheld).

[93] H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2905 (1989); *Sedima*, 473 U.S. at 500 (inappropriate for courts to amend statute); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restrictions*, 95 HARV. L. REV. 1101, 1118-21 (1982) (RICO better addressed by Congress than courts); *see also* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) (regardless of arguments' merits this is matter for Congress, not

Like Lacovara and Nicoli, Robert D. Luskin is deeply dissatisfied with RICO.[94] His essay, which relies heavily on Justice Scalia's concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[95] raises a constitutional challenge: void for vagueness. Luskin, however, is disenchanted with more than RICO; he also calls into question well-settled aspects of the void-for-vagueness jurisprudence of the Supreme Court, including the general rule that, absent first amendment considerations, such challenges are entertained only on an "as-applied" basis.[96] He also ignores other well-established principles mandating that even where successful, such challenges should result in only partial invalidity.[97] Finally, Mr. Luskin ignores the implications of *United States v. Batchelder*,[98] which deals with uncertainty in the combined application of one or more statutes.[99] At bottom, however, the Luskin essay is unsatisfy-

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courts, to resolve); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 748 (1975) ("the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of . . . expansive . . . liability"). *But see* K&S Partnership v. Continental Bank, 913 F.2d 1296, 1302-05 (8th Cir. 1990) (RICO liability requires showing that corporation had knowledge of scheme and provided substantial assistance in violation). The Eighth Circuit's position is inconsistent with reasoning articulated by the Supreme Court and other circuit courts. *See, e.g.*, American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 573-74 (1984) (vicarious liability available under antitrust laws); Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1356-62 (3d Cir. 1987) (*respondeat superior*, and aiding and abetting liability available under RICO); Morley v. Cohen, 610 F. Supp. 798, 811 (D. Md. 1985) (corporation or partnership can be held liable for acts of agents in scope of authority), *aff'd*, 888 F.2d 1006, 1008 (4th Cir. 1989); United States v. Local 560, IBT, 581 F. Supp. 279, 332 n.30, 337 (D.N.J. 1984) (union executive board aided and abetted extortionist act and satisfied RICO's predicate requirement), *aff'd*, 780 F.2d 267, 284 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

[94] *See* Luskin, *Behold, The Day of Judgment: Is the RICO Pattern Requirement Void for Vagueness?*, 64 ST. JOHN'S L. REV. 779 *passim* (1990).

[95] 109 S. Ct. 2893, 2906-09 (Scalia, J., concurring).

[96] *See, e.g.*, Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 501 (1982) (court should uphold vagueness challenge only if enactment is impermissibly vague in *all* applications).

[97] *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-04 (1985) (even in first amendment area, "normal rule" of partial, rather than facial invalidity is required course).

[98] 442 U.S. 114 (1979).

[99] *Id.* at 123-25 (vagueness not present where two statutes, each with differing penalty, apply, since defendant knows maximum, and no more doubt present than when statute permits alternative punishments). If *Batchelder* is good law, uncertainty regarding whether RICO, or one of its predicate offenses, or both, is applicable to a defendant's conduct does not produce a valid void-for-vagueness objection. The line is drawn at the predicate offenses. If the predicate offenses are "not unconstitutionally vague, [then RICO] cannot be vague either." Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 54-58 (1989); *see also* S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969) ("no due process constitutional barrier . . . [because] any proscribed act . . . must violate an independent statute"). But a statute, including RICO, is not vague, in the constitutional sense, merely because it is difficult to deter-

ing for more fundamental reasons. Luskin conflates breadth, ambiguity, and vagueness.[100] As such, he confuses that kind of uncertainty of application that stems from breadth of meaning caused by the use of broad terms, that kind of uncertainty of application that stems from multiplicity of meaning caused by ambiguity, and that kind of impossibility of application that stems from vagueness caused by the use of terms having no meaning at all. In fact, RICO is neither ambiguous nor vague; it is broad,[101] and breadth raises a question of policy, not constitutionality. Here, too, the objection belongs before Congress, not the courts.

The essay by Steven L. Kessler,[102] in which he compares and contrasts RICO with New York's Organized Crime Control Act of 1986, is reminiscent of Steinberg's famous *New Yorker* cover, illustrating the dictum that civilization ends at the Hudson River. At each point of difference, Kessler offers his confident judgment that

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mine if "marginal" cases fall within it. United States v. Powell, 423 U.S. 87, 93 (1975). Vagueness is present only when the terms employed have "*no* core" meaning. *Village of Hoffman Estates*, 455 U.S. at 495 n.7 (emphasis in original). Those who engage in a pattern of predicate criminal offenses that are themselves not vague can hardly complain in "surprised innocence" when their behavior is found unlawful. United States v. Ragen, 314 U.S. 513, 523-24 (1942); United States v. Masters, No 89-2851, & slip. op. at 6 (7th Cir. Feb. 6, 1991) ("provided the statutes criminalizing the predicate acts are not unconstitutionally vague . . . the defendants are on adequate notice. . . ."); *see, e.g.*, United States v. Glecier, No. 88-3417, slip op. at 2 n.1 (7th Cir. Jan. 8, 1991) ("RICO statute is not unconstitutional despite Justice Scalia's statements"); United States v. Pungitore, 910 F.2d 1084, 1102-05 (3d Cir. 1990) (not vague); United States v. Angiulo, 897 F.2d 1169, 1179 (1st Cir.) (term "pattern" as applied "not even . . . close" to being vague to render statute void), *cert. denied*, 111 S. Ct. 130 (1990). Finally, the strict construction rule is not applicable to RICO since Congress mandated that RICO be "liberally construed." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 947 (1970). The strict construction rule is merely "a principle of [statutory] construction," *Batchelder*, 442 U.S. at 121, "a long-established practice," Dunn v. United States, 442 U.S. 100, 112 (1979), or "a maxim of construction," United States v. Culbert, 435 U.S. 371, 379 (1978). It is not a rule of constitutional dimension. Tarrant v. Ponte, 751 F.2d 459, 465-66 (1st Cir. 1985). As such, Congress may abrogate its application, subject only to the constitutional doctrine of void-for-vagueness. *See generally* Note, *"Mother of Mercy—Is This the End of RICO"—Justice Scalia Invites Constitutional Void for Vagueness Challenge to RICO Pattern*, 65 NOTRE DAME L. REV. 1106 (1990).

[100] *See generally* R. DICKERSON, FUNDAMENTALS OF LEGAL DRAFTING 22-33 (1965) (analysis of "major diseases of language": ambiguity, vagueness and generality); Blakey, *Is Pattern Void for Vagueness?*, 5 Civil RICO Rep. 6 (Dec. 12, 1989); Williams, *Language and the Law*, 61 L.Q. REV. 71, 82-86 (1945) (four parts) (classic analysis of semantics and legal usage).

[101] *See Sedima*, 473 U.S. at 499 (RICO "demonstrates breadth," not "ambiguity") (citing Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985)).

[102] Kessler, *And a Little Child Shall Lead Them: New York's Organized Crime Control Act of 1986*, 64 ST. JOHN'S L. REV. 797 (1990).

the New York statute represents better public policy.[103] It would have been more instructive if he had made a similar comparison of the other twenty-eight state RICO statutes.[104] Had he done so, the starkness of New York's unique view would have been cast in sharper contrast. Similarly, the view that New York's law offers adequate protection, criminally or civilly, against white-collar crime is a proposition to be proven, not merely asserted. Time, however, will be the best judge of Kessler's position. No one doubts that organized crime, at least in the narrow sense of Mafia families, is centered in New York.[105] Law enforcement authorities in New York are among the most sophisticated in the nation. Federal RICO is generally credited with making a major difference in how organized crime is prosecuted in the federal system.[106] If a similar track record is not achieved under the New York statute, objective observers ought to question whether New York passed an organized crime control act in name only.

John M. Nonna's and Melissa P. Corrado's essay on RICO reform requires little comment.[107] It is a workmanlike effort to review the major issues in the Senate bill, which, for reasons not unrelated to those articulated by Nonna and Corrado, appear to be dead. Hopefully, they will turn their attention next to the House bill.[108]

Professor Laura Ginger[109] and Yolanda Eleni Stefanou[110] separately concentrate their attention on more narrowly focused topics. Professor Ginger surveys the confusing and contradictory jurisprudence of standing and causation under RICO. Her competent analysis makes it possible for all plainly to see the extent to which the lower courts are departing from the text of the statute, particularly its liberal construction directive, and its express legislative history,

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[103] *Id. passim.*

[104] *See Myths, supra* note 2, at 988 (chart of state statutes).

[105] *See A Battered and Ailing Mafia Is Losing Its Grip on America: The Mob Decline*, N.Y. Times, Oct. 22, 1990, at A12.

[106] *See supra* note 67 and accompanying text.

[107] Nonna & Corrado, *RICO Reform: "Weeding Out" Garden Variety Disputes Under the Racketeer Influenced and Corrupt Organizations Act*, 64 ST. JOHN'S L. REV. 825 (1990).

[108] H.R. 5111, 101st Cong., 2d Sess. (1990); Hughes, *RICO Reform, How Much Is Needed?*, 43 VAND. L. REV. 639, 645-47 (1990) (discussion of proposals before introduction of H.R. 5111).

[109] Ginger, *Causation and Civil RICO Standing: When Is a Plaintiff Injured "By Reason of" a RICO Violation?*, 64 ST. JOHN'S L. REV. 849 (1990).

[110] Stefanou, *Concurrent Jurisdiction Over Federal Civil RICO Claims: Is It Workable? An Analysis of* Tafflin v. Levitt, 64 ST. JOHN'S L. REV. 877 (1990).

as well as the teachings of the Supreme Court in *Sedima* and *Haroco*.[111] Only two comments are in order. First, her essay would be more candid if she explicitly acknowledged what her analysis demonstrates: conventional legal reasoning cannot adequately explain the divergent views of the courts. Extrajudicial considerations are at work, be they legitimate concerns with docket[112] or illegitimate concerns with another view of justice.[113] Second, her call

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[111] Ginger, *supra* note 109, *passim*. The developing jurisprudence under 18 U.S.C. section 1962(d) that would narrowly restrict standing under RICO, noted by Professor Ginger, is also inconsistent with the general approach followed under the common law and other federal statutes. As such, it is particularly hard to justify a narrow reading of RICO, since it is one of the only statutory provisions that has an explicit liberal construction directive.

Under the common law, once a conspiracy is shown, any injury inflicted by an overt act to further the conspiracy is civilly cognizable. *See* Nalle v. Oyster, 230 U.S. 165, 182 (1913) ("the well-settled rule is that no civil action lies for conspiracy unless there be an overt act that results in damage to the plaintiff"); Kashi v. Gratsos, 790 F.2d 1050, 1054 (2d Cir. 1986) (in common-law fraud action defendant liable to full extent, not limited to personal involvement); Hooks v. Hooks, 771 F.2d 935, 944 (6th Cir. 1985) (requiring only that act in furtherance of conspiracy injured plaintiff); Halberstam v. Welch, 705 F.2d 472, 487 (D.C. Cir. 1983) (discussing potential civil liability of conspirator); RESTATEMENT (SECOND) OF TORTS § 876(a) (1971) (persons acting in concert act "pursuant to a common design"); *id.* § 876(a) comment b (term "conspiracy" used in connection with such common design). Conspiracy is not the basis of the claim; it is the injury that flows from an overt act that forms the basis for compensation. *Id.* The rule is universally followed without difficulty by the district courts. *See, e.g.*, United States v. Excellair, Inc., 637 F. Supp. 1377, 1388 n.7 (D. Colo. 1986); Weise v. Reisner, 318 F. Supp. 580, 583 (E.D. Wis. 1970). Litigation under federal statutes follows a similar uniform path. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 103 (1971) (Civil Rights Act, 42 U.S.C. § 1985(3)); Lyon v. Ranger III, 858 F.2d 22, 28 (1st Cir. 1988) (each defendant liable as participant in "concert of action" under maritime law "not only for his own acts but also for the acts of others with whom he acts in concert"); Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1430-32 (5th Cir. 1988) (Jones Act, 46 U.S.C. § 688) (not limited to percentage of fault), *cert. denied*, 109 S. Ct. 3156 (1989); Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 744 (9th Cir. 1984) (antitrust), *cert. dismissed*, 469 U.S. 1200 (1985); Beltz Travel Serv., Inc. v. International Air Transp. Ass'n, 620 F.2d 1360, 1366-67 (9th Cir. 1980) (all members of antitrust conspiracy liable regardless of nature of own actions); Ferguson v. OmniMedia, Inc., 469 F.2d 194, 197 (1st Cir. 1972) (defendant liable for engaging in conspiracy although not participant in acts causing harm); Herpich v. Wilder, 430 F.2d 818, 819 (5th Cir. 1970) ("having allegedly joined the conspiracy and taken steps to assure its success, [defendant] may be held responsible for the acts of his coconspirators in furtherance of their scheme"), *cert. denied*, 401 U.S. 947 (1971); International Longshoremen's Union v. Joneau Spruce Corp., 189 F.2d 177, 189-90 (9th Cir. 1951) (Taft-Hartley Act, 29 U.S.C. § 187(b)), *aff'd on other grounds*, 342 U.S. 237 (1952); Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423, 1437 (S.D.N.Y. 1986) (antitrust).

[112] *See, e.g.*, Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 9-13 (1989) (discussing reform of diversity jurisdiction and civil RICO).

[113] *See, e.g.*, Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 *passim* (1989) (current federal docket clearing practices are unprincipled and inconsistent in exclusion of certain underrepresented classes from federal forum).

for congressional action reflects a view of the congressional process that is not supported by the record. RICO reformers are not trying to clarify the law to vindicate the rights of those injured by conduct falling within its scope. Rather, like the courts her survey covers, they are trying, even retroactively, to narrow RICO.[114] Thus, it is not likely that Congress will act on her well-taken recommendations.

Stefanou's examination of the issue of exclusive or concurrent jurisdiction is both comprehensive in scope and persuasive in its conclusion.[115] Except for a unanimous Supreme Court,[116] she is also in good company.[117] Congress is likely, when it passes RICO reform legislation, to confine jurisdiction under the statute to the federal courts.[118]

III. CONCLUSION

It is a matter of speculation whether RICO, the federal statute, was named after Rico, the film character.[119] Be that as it may, the statute was designed to change the ending of the movie. Rico, the film character, died at the hands of the police. The only due process he received was that of alley justice. A less memorable

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[114] Stein, *Don't Mess with RICO—Congress Should Spurn Effort to Curb It*, BARRON'S, July 3, 1989, at 14, col. 3. This article explains:

> [P]owerful people who are accustomed to stealing in peace . . . are now trying to buy retroactive immunity for their wrongs through powerful efforts spear headed by Sen. Dennis DeConcini of Arizona, who is a beneficiary of contributions from Charles Keating and his friends and who helped keep Keating's wildly mismanaged Lincoln S&L alive longer so that it could buy more Milken junk, speculate more in real estate, cost the taxpayers more, and lose hundreds of millions of dollars of debenture holders' money . . . . The Congress, like a Dark Ages pope, will grant retroactive indulgences, plenary and eternal, for fraud, bribery, looting, inside trading, cheating the government, and stock manipulation—with no countervailing gain at all except to the treasuries of individual legislators.

Id. at 14-15, cols. 3-4.

[115] *See* Stefanou, *supra* note 110.

[116] *See* Tafflin v. Levitt, 110 S. Ct. 792, 794-95 (1990) (concurrent jurisdiction over civil RICO claims).

[117] JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23-24 (1988) (exclusive jurisdiction is appropriate, "since many of the predicate acts involve violation of federal statutes exclusively enforced by federal courts").

[118] *See, e.g.*, H.R. No. 1046, 101st Cong., 1st Sess. 6 (1989) (exclusive federal jurisdiction over RICO).

[119] *See, e.g.*, Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982) (Shadur, J.) ("[t]his Court has always suspected the person who christened the legislation was a movie buff with a sense of humor").

character in the film was "Big Boy," the upperworld figure behind Robinson's underworld character.[120] Big Boy, however, was neither shot by the police nor prosecuted under the law. RICO was, in fact, designed to change that result. RICO is not, in short, just for those whose names end in vowels.

In April of 1990, Michael R. Milken, the "junk bond king," pleaded guilty to numerous violations of the federal securities laws.[121] RICO was a key element in his investigation and prosecution.[122] He was sentenced to ten years' imprisonment in November of 1990.[123] RICO, in short, stands for equal protection under the

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[120] *See Myths, supra* note 2, at 984 n.440.

[121] *Milken Pleads Guilty to Six Felony Counts*, Wall St. J., April 25, 1990, at A12, col. 1 (reporting pleading to defrauding investors, cheating clients, taking unlawful secret positions in stock, aiding income tax evasion, illegally concealing true ownership, and evading net-capital rules and settling for $600 million, $200 million in fines and $400 million for fund to compensate victims). The pleas "were far from" technical violations of obscure securities laws . . . , they portray[ed] a financier . . . that . . . seemed to believe himself beyond the reach of law . . . ." *Id.* Attorney General Richard Thornburgh characterized the offenses as "some of the most serious efforts undertaken to . . . subvert Wall Street's securities worksets." *Id.* at A12. Harvey Pitt, a leading securities lawyer, noted, "[The plea] vindicates the whole prosecutorial effort . . . ." *Plea Bargains Merit Balance Rewards vs. Risks in Settlements Such as Milken*, Wall St. J., April 24, 1990, at B9, col. 1. Richard C. Brieden, the chairman of the Securities and Exchange Commission, commented, "Despite the effort to mold public opinion, . . . [the plea] demonstrate[s] that . . . [Milken] stood at the center of a network of manipulation, fraud and deceit." *SEC Chief Calling for Long Term*, N.Y. Times, April 25, 1990, at C7, col. 4. In pleading guilty, Milken acknowledged that he "was wrong . . . and knew . . .[it] at the time." *Text of Statement to Court Describing 6 Felonies*, N.Y. Times, April 25, 1990. In pleading not guilty four years ago, he said, "I am confident that in the end I will be vindicated." *Friends Defend Junk-bond King*, The Detroit News,.April 22, 1990, at 3A, col 2. (reporting that evidence that led to Milken's plea bargains began with single-page letter in broken English that arrived at Merril Lynch firm in May, 1985 but ultimately culminated in at least a dozen witnesses close to Milken who gave prosecutors their case); *see also How Michael Milken Was Forced to Accept the Prospects of Guilt*, Wall St. J., April 23, 1990, at 1, col 6 (reporting grand jury was about to return superseding indictment including new charges of insider trading, bribery, cheating customers, and destroying inciminating evidence). The public accounting is not over. *See Rep. Dingell to Call Milken*, N.Y. Times, April 26, 1990 at C8, col. 2. (reporting that House Energy and Commerce Committee would ask Milken to return and complete his testimony).

[122] *See generally* C. BRUCK, THE PREDATORS' BALL: THE INSIDE STORY OF DREXEL BURNHAM AND THE RISE OF THE JUNK BOND RAIDERS 360-72 (1989); *Myths, supra* note 2, at 895 n.119 (analysis of bankruptcy of Drexel Burnham Lambert, "Ponzi" scheme, and RICO).

[123] N.Y. Times, Nov 21, 1990, at 1 col 10. *But see* N.Y. Times, Feb. 20, 1991, at 1, col. 1 (Judge recommended that Milkin be eligible for parole after three years). Harvey Pitt, a leading securities lawyer, commented: "Judge Wood is 100 percent right, and her sentence is a fitting conclusion to about four years of denials and obstruction of the Government's prosecution." N.Y. Times, Nov. 23, 1990, at D4, col 2. Richard C. Breeden, the chairman of the Securities and Exchange Commission, added, "This sentence should send the message that criminal misconduct in our financial markets will not be tolerated, regardless of one's wealth or power." *Id.* Elmer W. Johnson, a lawyer and former executive vice president, General

law—from Mulberry Street[124] to Wall Street.[125]

Motors Corp., also commented, "The stiff sentence was necessary. I am not proud of my profession and its role in the credit binge of the 80's. Many of the excesses could not have occurred but for the readiness of some of our most brilliant lawyers to prostitute themselves for large fees." Wall St. J., Nov. 23, 1990, at B1, col 2.

Rep. John Dingell, chairman of the House Energy and Commerce Committee, placed the sentence in a broader context:

> The Milken sentence appears substantial, but only because the sentences in so many other financial manipulation and fraud cases have been so genteel. Its apparent harshness is more illusion than reality. The harsh fact of the matter is that it will take the American public much longer than 10 years and much more than $600 million to pay for the mess these financial engineering schemes have left behind in our savings and loans, our insurance firms, our pension funds and our once-healthy corporations.

Id. In January, 1991, federal banking regulators filed a $6 billion suit against Milkin for allegedly manipulating the market by inflating junk bond pricing and creating "an illusion of liquidity" in violation of antitrust laws and federal RICO. See *Milkin and S. & L. Executives Sued*, N.Y. Times, Jan. 19, 1991, at 23, cols. 2-3. Other defendants named include savings executives Charles H. Keating, Jr. of Lincoln Savings & Loan, David L. Paul of CenTrust Savings Bank, and Thomas P. Spiegel of Columbia Savings & Loan. *Id.* at col. 2; *see also FDIC Suit Accuses Milken, Others of Duping S & Ls; Seeks $6 Billion*, Wall St. J., Jan. 21, 1991, at B4, col. 2 (suit seeks treble damages under RICO); *U.S. Filing $6.8 Billion Drexel Claim*, N.Y. Times, Nov. 15, 1990, at C1, col. 6 (federal regulators in RICO suit for "willfully plundering" more than forty failed thrifts through bribery, extortion and fraud); *Junks King's Legacy: Milken Sale Pitch on High-Yield Bonds is Contradicted by Data*, Wall St. J., Nov. 20, 1989, at 1, col. 6 (reporting junk bonds did not perform as Milken promised); *Did Junk Bonds Help Small Businesses? Sometimes But Not As Much As Claimed*, Wall St. J., Nov. 20, 1989, at A15, col. 1.

[124] The Ravenite Social Club on Mulberry Street in Manhattan's Little Italy allegedly functions for organized crime as does the New York Stock Exchange on Wall Street in Manhattan's financial district for the securities industry. *See* R. BLUMENTHAL, THE LAST DAYS OF THE SICILIANS: THE FBI'S WAR AGAINST THE MAFIA 16 (1989).

[125] *See generally From Milken to the Mafia*, BARRON'S, Nov. 26, 1990, at 12, 25-26. In an excerpt of an interview with former United States Attorney for the Southern District of New York Rudolph Giuliani, the following comments were made:

> *Q*: There has been an enormous criticism of RICO and of your use of RICO.
>
> *A*: The racketeering statute has been used . . . infrequently in white-collar cases. [But] there is no doubt that it was intended from the very beginning to be used for major white-collar crime.
>
> *Q*: Not just for the mob, in other words.
>
> *A*: The legislative history of the statute makes it quite clear that it was intended to be applied beyond just the mob. That is the reason why white-collar crimes were included in the statute, crimes such as wire fraud and mail fraud. They weren't added; they were included right from the very beginning. And what the critics confuse is motivation and intent. The motivation for that statute going back seven, eight, nine years, was to deal with organized crime. However, in debating and drafting and expanding it, the intent of it was essentially to deal with all forms of substantial, ongoing enterprise crime. Where people, in essence, create a formal or informal business to commit substantial crime—whether it is fraud or bribery or extortion. And the real fairness or unfairness in the application of the statute is whether or not you are actually using it to deal with major-league . . . substantial crime. Crime that is conducted like an enterprise, rather than just individuals committing crimes here and there.

Id.; *see also* M. PUZO, THE GODFATHER 52 (1969) (Don Corleone: "A lawyer with his briefcase can steal more than a hundred men with guns").