1990

Symposium: Law and the Continuing Enterprise: Perspectives on RICO: Foreword

G. Robert Blakey
Notre Dame Law School

Foreword

*G. Robert Blakey**

Such then is the nature of a general law, that while the imperative part of it . . . shall not take up above two or three words, its expository appendage, without which that imperative part could not rightly perform its office, may occupy a considerable volume.

—Jeremy Bentham[1]

I. Introduction

October 15, 1990 marked the twentieth anniversary of the Organized Crime and Control Act, Title IX of which is known as the Racketeer Influenced and Corrupt Organizations Act, or "RICO."[2] In the year before the passage of RICO, Mario Puzo published his landmark bestseller, *The Godfather*. The book powerfully described the Mafia in a way that fascinated the American people. In it, Michael Corleone, son of the original godfather, Vito Corleone, described how the family's activities had to evolve to succeed in the society of the twentieth century:

> My father's time is done. The things he did can no longer be done except with a great deal of risk. Whether we like it or not the Corleone Family has to join that society. But when they do I'd like us to join it with plenty of our own power; that is, money and ownership of other valuables.[3]

Michael Corleone realized that his family had to evolve in order to maintain its vitality as a profit-making enterprise. It had to take its assets and use them to gain control of other businesses.[4] This transformation threatened to place the mob families beyond the reach of traditional criminal law. RICO was one of the ways the law evolved to meet the

* William J. and Dorothy O'Neill Professor of Law, Notre Dame Law School. A.B., 1957, J.D., 1960, University of Notre Dame. Faculty Advisor to the Notre Dame Law Review for this Symposium, *Law and the Continuing Enterprise: Perspectives on RICO*, 65 NOTRE DAME L. REV. 873 (1990).

My thanks to Matthew Fricker for his tireless assistance during the preparation of earlier drafts of this Foreword.

1 J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. XVII, concluding note, ¶ 20, at 330 (special ed. 1986) (1st ed. 1789).

2 Pub. L. No. 91-452, 84 Stat. 922 (1970), *codified at* 18 U.S.C. §§ 1961-68 (1988).

3 M. PUZO, THE GODFATHER 366 (1969). *See also* 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?"*, 43 VAND. L. REV. 851, 982-87 & nn. 435-43 (1990) (an analysis of the popular literature and movies relating to organzied crime and RICO) [hereinafter *RICO Myths*].

4 The Corleone family, like some actual mob families, chose casinos in Las Vegas. *Id.* at 384-85. *See generally* SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, THE KEFAUVER COMMITTEE REPORT ON ORGANIZED CRIME 71-74 (undated) (Didier, New York, publisher) ("As a case history of legalized gambling, Nevada speaks eloquently in the negative"); S. BRILL, THE TEAMSTERS (Pocket ed. 1979) (relating career of Allen Dorfman); W. TURNER, GAMBLER'S MONEY: THE NEW FORCE IN AMERICAN LIFE (1965); E. REID & O. DEMARIS, THE GREEN FELT JUNGLE (Pocket ed. 1964).

challenge of organized crime and its evolution in the latter half of the twentieth century.

The past twenty years witnessed a sea change in the way that organized crime is investigated, prosecuted, and sanctioned, both criminally and civilly. RICO allowed the law to catch up with the rest of society. In the twentieth century, organizations, not people, control the important elements of society such as: government, commerce and labor. Until the passage of RICO, organizations as such were seldom the focus of the law—outside of, perhaps, the antitrust statutes. This is no longer true.

RICO, however, is not limited to the activities of traditional Mafia families. It does not matter to a racketeering victim what type of organization steals his money, a crime family or a family bank. Accordingly, Congress passed a statute in 1970 that encompassed the activities of both legitimate and illegitimate organizations.

RICO also provided for innovative criminal and civil sanctions. Forfeiture, injunctions, triple damages, and counsels' fees all work to enhance the sanction of the wrongdoer and recovery for the wronged.

This Symposium[5] provided an opportunity to look ahead at some of the key issues we must face in life with RICO as it enters its third decade. Before taking that look, this Foreword will provide a brief background on the development and the concepts of RICO.

II. Background of RICO

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as RICO.[6] Congress enacted the 1970 Act "to strengthen[] the legal tools in the evidence-gathering process, [to] establish[] new penal prohibitions, and [to] provid[e][] enhanced sanctions and new remedies . . . ."[7] RICO covers violence, the provision of illegal goods and services, corruption in labor or management relations, corruption in government, and criminal fraud.[8] Congress found that "the sanctions and remedies available" under the law as it existed in 1970 were "unnecessarily limited in scope and impact."[9] 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.[10] At the time, these sanctions were called for by

5 The Symposium was held February 8-10, 1990, at the Notre Dame Law School, and was cosponsored by the Notre Dame Law School and the Notre Dame Law Review.

6 For fuller discussions of the origins and underlying concepts of RICO, see generally Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009 (1980); Blakey, *The RICO Civil Fraud Action in Context: Reflection on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982) [hereinafter *Civil Action*]; Blakey & Cessar, *Equitable Relief Under Civil RICO*, 62 NOTRE DAME L. REV. 526 (1987) [hereinafter *Equitable Relief*]. *See also* ORGANIZED CRIME AND RACKETEERING SEC., CRIM. DIV., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS (3rd rev. ed. Sept. 1990).

7 84 Stat. 923 (1970).

8 *Civil Action*, *supra* note 6, at 300-06.

9 84 Stat. 923 (1970).

10 18 U.S.C. §§ 1963, 1964(c) (1988).

no less than the President,[11] the President's Commission on Law Enforcement and the Administration of Justice,[12] and the American Bar Association.[13]

The near-universal approval of the Act was evidenced by the overwhelming majorities in both houses that voted for RICO. The Senate passed the bill seventy-three to one.[14] The House passed an amended bill 431 to twenty-six.[15] The Senate then passed the House bill after debate, but without objection,[16] and President Richard M. Nixon signed the legislation on Oct. 15, 1970.[17]

The innovative approach to crime control embodied in the RICO bill is reflected in legislation adopted by a majority of state legislatures. Since 1970, twenty-nine states have enacted similar state RICO legislation.[18]

A. *Standards of Unlawful Conduct: Criminal and Civil*

1. Standards

RICO sets forth "standards" of "unlawful" conduct, which are enforced through "criminal" and "civil" sanctions. Section 1963 of Title 18 sets out the criminal remedies. Section 1964 of Title 18 sets out 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."[19] Accordingly, because the civil scope of RICO is *broader* than its criminal scope, RICO is *not* primarily criminal and punitive, but primarily preventive and remedial.[20] RICO's civil remedies, based on a showing of the preponderance of the evidence, are available to the government or other parties.[21]

---

11 "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) [hereinafter *Senate Hearings*].

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

13 *Senate Hearings*, *supra* note 11, at 259; *Organized Crime Control: Hearings on S.30 Before the Subcomm. No. 5, House Committee on the Judiciary*, 91st Cong, 2nd Sess. 537 (1970).

14 116 CONG. REC. 972 (1970).

15 *Id.* at 35,363.

16 *Id.* at 36,296.

17 *Id.* at 37,264.

18 The first state to pass its own "little RICO" statute was Hawaii in May, 1972. The most recent was Minnesota in August, 1989. *See RICO Myths*, *supra* note 3, at 988-1011 (1990) (chart in appendix analyzing the law of the various states).

19 In Re Action Industries Tender Offer, 572 F.Supp. 846, 849 (E.D. Va. 1983). See 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."); 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").

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

21 United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) (government suit); Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, 530-32 (9th Cir. 1987) (private suit); *Sedima*, 473 U.S. at 491 ("[N]o indication . . . depart from [preponderance]").

2. Liberal Construction

Congress also directed that RICO "be liberally construed to effectuate its remedial purposes."[22] This clause sets RICO apart from the bulk of federal criminal law. As the Supreme Court noted, "[T]his is the only substantive federal criminal statute that contains such a directive . . . ."[23] The directive is a "mandate."[24] Accordingly, courts are required by the statute to read the language of the statute in the same fashion, whatever the character of the suit.[25]

3. No Supersession

While broad, RICO does not displace other bodies of law, federal or state. RICO was, of course, an innovation: "Congress was well aware that it was [with RICO] entering into a new domain . . . ."[26] The issue was not whether the 1970 Act should apply to the conduct prohibited by its predicate offenses, but whether it should preempt other laws. Congress expressly saved "provision[s] of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO.[27] 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."[28] The Supreme Court itself acknowledges that such overlap between statutes "is neither unusual nor unfortunate."[29] The existence of cumulative remedies furthers remedial purposes.[30]

---

22 84 Stat. 941 (1970).

23 Russello v. United States, 464 U.S. 16, 21 (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.

W. 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 has abolished the common law rule. The statutes are collected in *Civil Action*, *supra* note 6, at 245 n.25. Strict construction is not a rule of constitutional dimension. Tarrant v. Ponte, 751 F.2d 459, 466 (1st Cir. 1985).

24 Lou v. Belzberg, 834 F.2d 730, 737 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988) (quoting *Sedima*, 473 U.S. at 492 n.10).

25 *Sedima*, 473 U.S. at 489; *cf.* Northern Securities 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.").

26 United States v. Turkette, 452 U.S. 576, 586 (1981).

27 84 Stat. 947 (1970).

28 Haroco v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 6060 (1985) (emphasis added).

29 *See, e.g.*, S.E.C. v. National Securities, Inc., 393 U.S. 453, 468 (1969).

30 Herman & McLean v. Huddleston, 459 U.S. 375, 386 (1983).

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) the use or investment of the income in the acquisition, establishment, or operation by a defendant (3) of an "enterprise" (4) engaged or affecting interstate commerce.[31]

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.[32]

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 by or participated in by a defendant through a "pattern" of racketeering activity.[33]

Section 1962(d). The standards of section 1962(d) embody the conspiracy dimension of RICO. Section 1962(d) makes it "unlawful for any person to conspire to violate [subsections (a), (b) or (c)]."[34]

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.[35] 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,[36] or up to $500,000 if an entity is convicted,[37] or, alternatively, twice the gain or loss.[38] Further, sentencing courts can order defendants to pay restitution to victims of an offense.[39] RICO itself

31 Schreiber Distributing 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). *See RICO Myths*, *supra* note 3, at 961-68 (analyzing the six-step process of *H.J. Inc.* and due process vagueness issue). The best two pre-*H.J., Inc.* analyses of "pattern" appear in Goldsmith, *RICO and Pattern*, 73 CORNELL L. REV. 971 (1988) and Note, *Reconsideration of Pattern in Civil RICO Offense*, 62 NOTRE DAME L. REV. 83 (1986).

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

32 Medallion Television Enterprises, Inc. v. SelecTV of California, Inc., 833 F.2d 1360, 1362 (9th Cir. 1987); United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

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

34 *See generally* United States v. Tille, 729 F.2d 615, 619-20 (9th Cir.), *cert. denied*, 469 U.S. 845 (1984); United States v. Truglio, 731 F.2d 1123, 1132-33 (4th Cir.), *cert. denied*, 469 U.S. 862 (1984); Note, *Conspiracy to Violate RICO*, 58 NOTRE DAME L. REV. 1001 (1983).

35 18 U.S.C. § 1963(a) (1988).

36 18 U.S.C. § 1963(a) (1988) provides that violators "shall be fined under this title." Section 3571(b) of Title 18 provides for fines that an individual may be sentenced to pay.

37 *Id.* at § 3571(c).

38 *Id.* at § 3571(d).

39 *See id.* at §§ 3556, 3663-64.

mandates that forfeiture can be of illicit proceeds, related property, or any interest in an enterprise.[40]

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.[41] The antitrust laws have been aptly termed "the Magna Charta of free enterprise."[42] 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."[43] A private "treble-damages remedy [is needed] . . . precisely for the purpose of encouraging *private* challenges to antitrust violations."[44] Such "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[45] Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the antitrust statutes.[46]

Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators and provide[s] ample compensation to the victims."[47] In fact, RICO and the antitrust statutes are well integrated.[48]

---

40 *Id.* at § 1963.

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

42 United States v. Topco Associates, 405 U.S. 596, 610 (1972).

43 *Id.*

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

45 Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965).

46 *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 argues on economic grounds forcefully 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 Equitable Relief*, *supra* note 6, at 531 n.17 (history and rationale of treble damages).

47 Blue Shield of Virginia 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*, 473 U.S. at 493 ("private attorney provision . . . designed to fill prosecutive gaps" (citing *Reiter*, 442 U.S. at 344)).

48 "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 also* American C & L Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exercised through force or fraud or agreement."). *See generally* Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 533-34 (1986) ("(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.").

D. *Organized Crime and Beyond*

The scope of RICO began, but did not end, with an effort to sanction the Corleones' traditional, illegitimate 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."[49] The Supreme Court noted in *United States v. Turkette* that although "[t]he major purpose of Title IX . . . [was] to address the infiltration of legitimate business by organized crime," the statute is not limited because "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises."[50] As the Court observed last year:

> [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.[51]

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 McCory, a floor manager of RICO, stated this intention:

> [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.[52]

The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.* observed that legitimate businesses, in short, "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[53] As such, RICO fits easily into a consistent pattern of federal legislation enacted as general reform over the past half century, aimed at a specific target, but drafted without limiting it to the specific target.[54]

---

49 *Russello*, 464 U.S. at 26.

50 *Turkette*, 452 U.S. at 591, 590. 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).

51 H.J., Inc. v. Northwestern Tel. Co., 109 S.Ct. 2893, 2903, 2905 (1989). *See also Sedima*, 473 U.S. at 495 ("not just mobsters"); Owl Construction Co. v. Ronald Adams Contractor, Inc., 727 F.2d 540, 542 (5th Cir. 1984), *cert. denied*, 469 U.S. 831 (1984) ("[C]ourts and . . . commentators have persuasively and exhaustively explained why . . . RICO . . . [is not limited to] organized crime . . . .").

52 116 CONG. REC. 35,204 (1970) (remarks of Rep. Robert McCory, a House floor manager of RICO).

53 473 U.S. 479, 495 (1985). Finally, "the courts [are also] all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate business." United States v. Turkette, 452 U.S. 576, 591 (1981) (emphasis in original).

54 *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 6, at 529 n.13 (other cases collected).

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.[55] The Department of Justice has also begun to implement the civil provisions.[56] Since 1970, criminal RICO has been effectively used against:

1. organized crime groups;[57]
2. political corruption;[58]
3. white-collar crime;[59] and
4. violent groups.[60]

Independent studies conclude that RICO is effective against sophisticated forms of crime. The President's Commission on Organized Crime had high praise for RICO and recommended that states adopt similar legislation.[61] 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 facilitates 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

55 *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].

56 *Id.* at 116-17. (litigation against mob-controlled unions reviewed).

57 *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).

58 *See, e.g.*, United States v. Friedman, 854 F.2d 535, 541 (2nd Cir. 1988) (conviction of public officials in N.Y.C. parking scandal); United States v. Mandel, 431 F. Supp. 90 (D. Md. 1977), *rev'd*, 591 F.2d 1347 (4th Cir.) *aff'd per curiam by equally divided court*, 602 F.2d 653 (4th Cir. 1979)(en banc) (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, 107 S. Ct. 2875 (1988) and 18 U.S.C. § 1346 (1988) (*McNally* result set aside), *passed at*, 134 CONG. REC. H11207 (daily ed. Oct. 21, 1988)).

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

60 *See, e.g.*, United States v. Yarbrough, 852 F.2d 1522, 1526-28, 1540, 1546 (9th Cir. 1988) (prosecution of "Order" or "Bruders Schweigh," white-hate group for robbery and murder of Alan Berg), *cert. denied*, 109 S.Ct. 171 (1989). *See generally*, S. SINGULAR, TALKED TO DEATH: THE MURDER OF ALAN BERG AND THE RISE OF THE NEO-NAZIS (1989).

61 THE REPORT TO THE PRESIDENT FROM THE PRESIDENT'S COMMISSION ON ORGANIZED CRIME (April 1986) concludes that RICO is one of the most powerful and effective weapons in existence for fighting organized crime. *Id.* at 133-34.

its leaders in directing that behavior could be captured and presented.[62]

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 and undertook judicially to redraft the statute in an effort to dismiss civil suits in all possible ways.[63] Indeed, before *Sedima*, sixty-one percent of the reported decisions were dismissed on various motions of the defendants.[64]

The first effort to redraft civil RICO involved reading an "organized crime" limitation into it. Because that limitation had no support in the text of the statute—it was specifically rejected in the legislative debates—the Second, Fifth, Seventh and Eighth Circuits quickly rejected it.[65] The next effort involved reading a "competitive injury" limitation into the statute. The Seventh and Eighth Circuits quickly turned this effort aside.[66] Then, the district courts hit upon the "racketeering injury" and the "criminal conviction" limitations. Both limitations, although adopted by a sharply divided Second Circuit, were repudiated by the Supreme Court in *Sedima*.[67]

---

62 GENERAL ACCOUNTING OFFICE, EFFECTIVENESS OF THE GOVERNMENT'S ATTACK ON LA COSA NOSTRA, (April 14, 1988). 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 GOVERMENT'S USE OF THE RICO STATUTE AND OTHER EFFORTS AGAINST ORGANIZED CRIME, S. REP. No. 407, 101st Cong., 2d Sess. 31-32 (1990). *The New York Times*, in a recent special report, "The Mob in Decline," discussed RICO's utility in the fight against organized crime:

> 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 leaders of organized-crime families and relying largely on the Racketeer Influenced and Corrupt Organizations Act, or RICO, as a courtroom tool.
>
> By concentrating on enterprises rather than individuals, Federal prosecutors in the last five years have removed the high commands of families through the convictions and long prison sentences of almost 100 top Cosa Nostra leaders.

Raab, *A Battered and Ailing Mafia Is Losing Its Grip on America*, N.Y. Times, Oct 22, 1990, at A12, col. 1. *See also*, *Organized Crime: 25 Years after Valachi: Hearings before the Permanent Subcommittee on Investigations of the Senate Comm. on Governmental Affairs*, 100th Cong., 2d Sess. 72 (1988) (testimony of David C. Williams, Director of Special Investigations, General Accounting Office); McFadden, *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, 1986 at 24; *The Mob on Trial*, Newsday, Sept. 7, 1986 at 4, col. 1.

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

64 Trott Testimony, *supra* note 55, at 127.

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

66 Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983) (the organized crime limitation "revived under . . . [a new] guise"); Bennett v. Berg, 685 F.2d 1053, 1058-59 (9th Cir.), *aff'd. on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).

67 The Second Circuit suggested in *Sedima* that civil RICO suits against "respected and legitimate enterprises" were "extraordinary, if not outrageous." Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 487 (2d Cir. 1984), *rev'd.*, 473 U.S. 479 (1985). Included among the cited legitimate enterprises was E.F. Hutton. *But see* BUSINESS WEEK, Feb. 24, 1986, at 98, col. 1 (Hutton pleads guilty to 2000 counts of mail fraud multiple-million dollar bank scam); Haroco, Inc. v. Am. Nat'l Bank and Trust Co., 747 F.2d 384, 395 n.14 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) ("[T]he white collar

III. The Continuing Enterprise of RICO: Issues

RICO provides fertile ground for legal scholarship—perhaps too fertile.[68] Nevertheless, given its innovative approach—mandating new procedures and new sanctions—RICO continues to merit meaningful criticism. This is particularly true when the analysis comes from sources other than the round up of the usual suspects, i.e., law school professors or students. Instead, the participants in this Symposium were largely practitioners drawn from both sides of the RICO bar, who possess a wealth of RICO litigation experience. The Symposium also benefitted from contributions by respected members of the media and academia.

The papers of the symposium address several RICO issues that are presently the foci of heated debate in legislatures and law schools around the country. Two papers address the proper role of civil RICO. Geoffrey Aronow, in a piece replete with culinary analogies,[69] sketches the legislative background of recent civil RICO reform proposals. He then explains the evolving rationales for civil RICO, finds them inadequate, and argues that major reform is necessary. Arthur Mathews, focusing specifically on civil RICO in the securities context, initially outlines the elements of traditional securities claims for relief, and contends that the securities laws adequately address securities violations. He then explains the advantages that plaintiffs gain by using RICO in securities cases, advantages that have resulted in the overuse of RICO in the securities context. He concludes that Congress should delete the private civil cause of action based on commercial fraud.

Section 1963 forfeiture, one of the RICO's most controversial provisions, is the subject of two papers. William Taylor addresses forfeiture from the perspective of the defendant, and argues that RICO forfeitures are disproportionate when they reach property not connected to criminal activity. He proposes that forfeiture be limited to property obtained by, or directly used in, the criminal conduct. Graeme Bush addresses forfeiture from the perspective of the third party, faced with the possible loss of property accepted in return for legitimate goods or services. He notes that third parties face the unenviable task of estimating their own possible exposure to a forfeiture order, and urges that a tracing requirement be adopted.

---

crime alleged in some RICO complaints against 'legitimate' businesses is in some ways at least as disturbing . . . ."). Those who make such remarks are apparently unaware of the substantial body of literature on white-collar crime by so-called respected businesses. *See, e.g.*, Ross, *How Lawless Are Big Companies*, FORTUNE, Dec. 1, 1980, at 57 (the 1043 major corporate violations between 1970-1980 included: 117 convictions or consent decrees for 98 antitrust violations; 18 kickbacks, briberies or illegal rebates; 21 illegal political contributions; 11 frauds; and five tax evasions).

68 "So much analysis exists in praise of condemnation of RICO that it is becoming increasingly difficult to provide new insight into the subject." Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1035 (1990).

69 Aronow, *In Defense of Sausage Reform: Legislative Changes to Civil RICO*, 65 NOTRE DAME L. REV. 964 (1990). Mr. Aronow describes "the 'sausage-like' qualities of the current [reform] proposal" and then illuminates the reader by "unpeel[ing] this onion and see[ing] if there is anything there that justifies the preservation of civil RICO . . . ." *Id.* at 969, 975. He concludes that the existing civil RICO "is incapable of separating the wheat from the chaff" and that although the present reform proposals may not be exactly delicious, "the fact that the sausage may not be a filet mignon is not a reason to send it back to the kitchen . . . ." *Id.* at 980, 982.

A third group of papers focuses on the actual targets of RICO suits. Paul Coffey provides a glimpse into the inner workings of the Organized Crime and Racketeering Section, the Department of Justice office that authorizes federal RICO prosecutions. His piece explains the three stages—selection, analysis, and finally approval—through which all federal RICO prosecutions pass before the indictments are filed. While Mr. Coffey focuses on how defendants are chosen, Jay Wright focuses on who should worry about becoming RICO defendants—specifically, professionals. Mr. Wright initially relates how traditional limitations on professional liability were eroding even before RICO, and then explains that RICO gives plaintiffs even greater incentive to reach the deep pockets of professionals. Gordon Crovitz presents a view of RICO from Wall Street, and in a stinging critique of RICO, focuses on why certain groups should not face RICO prosecutions. He argues that RICO when drafted was not meant to apply to legitimate businesses, that DOJ prosecuting guidelines re-emphasized this principle, but that in the 1980s prosecutors ignored these restrictions and proceeded to unfairly attack entities like Princeton/Newport Partners Ltd. and Drexel Burnham Lambert.

One last paper, by Bruce Baird and Carolyn Vinson, discusses how RICO pretrial restraints operate, using the recent case involving Princeton/Newport Partners Ltd. as a starting point. They conclude that due process requires a pre-seizure hearing.

In addition the articles presented live at the symposium, this issue includes a student note addressing what is perhaps the last serious constitutional challenge to RICO, that the statute's use of "pattern" makes RICO void-for-vagueness. Several of the articles in this issue refer to this potentially lawbusting challenge.[70] The Note pays special attention to circuit court precedent and RICO's legislative history, and concludes that "pattern" is sufficiently definite to pass constitutional muster.

IV. Conclusion

This Symposium did not consist solely of papers delivered, in short form, to a passive audience. This was a *live* symposium in the true sense of the word, where the presentation of the papers always provoked discussion and often sparked sharp disagreement. The value of such exchanges is reflected in the difference between the papers as delivered and the papers as printed.

Unfortunately, not all of the conversations and discussions produced by this symposium can be presented. Nevertheless, the proceedings of the last day of the symposium were recorded and are included. The debate and discussion featured symposium authors Paul Coffey and Gordon Crovitz, symposium moderator John Coffee, and this author.[71]

70 *See id.* at 969; Coffey, *supra* note 68, at 1035, 1037 & nn. 2 & 17; Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050, 1066-67 (1990); and Mathews, *Shifting the Burden of Losses in Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME L. REV. 896, 929-31 nn. 175-83 (1990).

71 This author also delivered a draft of a paper titled "RICO and Time Bars." This piece was originally scheduled to appear in this issue but was delayed so that work could be done for Congress during the processing of H.R. 5111, "The RICO Amendments Act of 1990," which was reported to

The transcript includes some very powerful passages, passages that, while perhaps not as polished as the usual published pieces, seem to capture more effectively the emotions that RICO evokes from opponents and proponents alike..

On a personal note, I would like to thank the principal speakers and the two moderators.[72] All the participants brought years of experience working with RICO, and their insights created a sense of excitement during the symposium. It is this author's belief that RICO changed the course of criminal and civil law over the last twenty years. It was a pleasure hosting the attorneys who will play major roles in the course of RICO over the next twenty years.

the House by the Judiciary Committee on September 18, 1990. *See* 6 Civil RICO Report (BNA), No. 16, at 1 (Sept. 25, 1990).

72 Special thanks to Norman Abrams, Professor of Law, University of California at Los Angeles School of Law, and to John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University School of Law. Professor Abrams moderated the first six sessions of this symposium. Professor Coffee moderated the last five sessions and appears in the Debate and Discussion.