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CRIMINAL LAW

HAS THE SUPREME COURT REALLY TURNED RICO UPSIDE DOWN?: AN EXAMINATION OF *NOW V. SCHEIDLER*

Michael Vitiello*

I. INTRODUCTION: ADVOCATE BLAKEY AND THE SUPREME COURT

According to disappointed advocate¹ G. Robert Blakey, in April, 1986, Joseph Scheidler, who "learned his strategy of protest from Martin Luther King, [Jr.]," told the administrator of a women's health clinic "to get out of the abortion business because some day she would have to answer to Almighty God."² The next day, Scheidler, a peaceful protester, was arrested and charged with trespassing and harassment for demonstrating at the clinic. He was eventually found guilty of trespass, but was not found guilty of harassment.³

Thereafter, as part of what Blakey calls a strategy of intimidation,⁴ the National Organization for Women (NOW) sued Scheidler, among others, alleging violations of RICO.⁵ The federal district court dis-

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¹ This Article refers to G. Robert Blakey alternatively as Advocate Blakey or Professor Blakey where necessary to make clear whether it is referring to his position in "The RICO Racket" (Advocate Blakey) or to his position in his considerable scholarly writings about RICO (Professor Blakey).

² G. Robert Blakey, *The RICO Racket*, NAT'L REV., May 16, 1994, at 61.

³ *Id.*

⁴ *Id.*

⁵ *Id.* RICO is the acronym for title IX of the Organized Crime Control Act of 1970, entitled "Racketeer Influenced and Corrupt Organizations." 18 U.S.C. §§ 1961-1968 (1988).

missed the RICO claims because NOW did not allege an economic motive for the defendant's actions.⁶ The United States Court of Appeals for the Seventh Circuit affirmed.⁷ The United States Supreme Court reversed and found that the complaint did state a claim under RICO.⁸

In a recent volume of a prominent conservative journal, Blakey, who represented Scheidler before the Supreme Court, excoriated the Court for its decision in *National Organization for Women v. Scheidler*.⁹ The spirit of the article was captured in the evocative headlines: *Perversion of Intent* and *Now that the RICO Law Has Been Turned Upside Down, Where is the ACLU?*¹⁰

Blakey's article does not focus specifically on the ACLU, but his message is clear. Blakey argues that liberal critics of RICO, like the ACLU,¹¹ abandoned their principles by not coming to the defense of peaceful anti-abortion demonstrators. According to Blakey, with its decision in *Scheidler*, the Supreme Court affirmed NOW's strategy of intimidating First Amendment rights of political and social protesters.¹² Blakey is critical of the Court's method as well. He accuses the Court of deciding *Scheidler* based on a "new judicial philosophy," the "New Textualism," focusing exclusively on textual language, ignoring congressional intent.¹³ He suggests, too, that RICO is designed to criminalize Vito Corleone's extortionist tactics, but not Dr. Spock's

⁶ *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 802 (1994).

⁷ *Id.*

⁸ *Id.* at 803.

⁹ Blakey, *supra* note 2, at 61.

¹⁰ *Id.* This is an especially curious headline in light of the amicus brief the ACLU filed in *Scheidler*. See discussion *infra* note 61. The ACLU espoused a position quite similar to that of Professor Blakey: While the amicus brief was in support of neither party, it urged the Court to "include a set of constitutional guidelines designed to mitigate the civil liberties risks that are inherent in virtually every RICO litigation," Brief Amicus Curiae of the American Civil Liberties Union in Support of Neither Party at 3, *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994) (No. 92-780), if the Court remanded the case for trial. The Court did not follow the ACLU's recommendation and left unresolved the First Amendment implications in *Scheidler*.

¹¹ His attack is similar to the conservative attack on NOW for not coming to Paula Jones' defense in her charges against President Clinton. *Paula Jones Lawsuit Making for Strange Bedfellows* (National Public Radio, May 20, 1994 (transcript # 1350-2)) (radio interview with Lynn Neary in which she stated: "Sexual harassment is not an issue that conservatives have embraced wholeheartedly. Feminists, on the other hand, have made the issue their own. But, in the case of Paula Jones, a curious role reversal has occurred. Just last week, Patrick Mahoney, a former leader of Operation Rescue, announced that he was helping to organize a legal defense fund for Jones. He challenged women's groups, like the National Organization for Women, to join the cause. But leaders of the women's movement, wary of Jones' connections to conservatives, are maintaining a polite distance.").

¹² Blakey, *supra* note 2, at 76.

¹³ *Id.*

protests at a draft center.¹⁴

This essay examines those charges. It reviews Blakey's specific criticisms of the Court's decision.¹⁵ It then analyzes each of those criticisms. This essay concludes that Blakey is crying wolf. Blakey is incorrect when he argues that the Supreme Court affirmed the intimidation of political and social protesters. In fact, the Court in *Scheidler* decided only a narrow question concerning the meaning of "enterprise"¹⁶ and did not decide whether "non-violent" protest is chargeable as a RICO offense. This essay also examines Blakey's suggestion that RICO is available against extortionists like Don Corleone, but not protesters like Dr. Spock. Despite his suggestion in "The RICO Racket" that RICO is suitable for one class of criminals but not another, Professor Blakey has repeatedly argued that RICO applies to everyone who violates its broadly worded substantive provisions. Following Professor Blakey's lead, courts have taken an expansive view of RICO's legislative history and rejected efforts to limit RICO to a specific class of criminal defendants.¹⁷ Further, in assessing Blakey's claim that *Scheidler* is symptomatic of the New Textualism, this essay examines the Supreme Court's decisions interpreting RICO's substantive provisions. Most of those decisions antedate the current Court's flirtation with the New Textualism. This examination shows that Blakey's claim that *Scheidler* represents a different approach to statutory construction is unfounded.¹⁸

Finally, this essay compares the position Professor Blakey took on RICO in his past writings with the position he takes in "The Rico Racket." As RICO's primary draftsman, Blakey has been an influential commentator.¹⁹ Throughout the RICO debate, Professor Blakey has been the primary advocate of reading RICO's terms broadly. His past writings have consistently criticized efforts to limit RICO,²⁰ and he has shown scorn for those who complain when their constituencies have been impaled on RICO.²¹ By contrast, in "The RICO Racket," it is

¹⁴ *Id.* at 62.

¹⁵ See *infra* notes 23 to 29 and accompanying text.

¹⁶ See *infra* notes 30 to 62 and accompanying text (discussing the holding of *Scheidler*).

¹⁷ See *infra* notes 67 to 156 and accompanying text.

¹⁸ See *infra* notes 157 to 215 and accompanying text.

¹⁹ Numerous sources refer to Professor Blakey as a prominent spokesman on the subject of RICO and describe Blakey's ongoing activities regarding the RICO debate. See, e.g., Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 669 (1990); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 670 (1987) [hereinafter *RICO*]; Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 775 (1990) [hereinafter *Guide to RICO Reform*].

²⁰ See *infra* notes 130 to 150 and accompanying text.

²¹ See *infra* note 216.

Advocate Blakey who has failed to demonstrate his high principles now that the tables have been turned and his client has felt the sting of RICO.²²

II. "THE RICO RACKET": ADVOCATE BLAKEY'S CRITIQUE OF THE COURT

In "The RICO Racket," Blakey accuses the Supreme Court of coming "perilously close to equating demonstrators with 'racketeers.'"²³ Blakey argues that when RICO was originally proposed by Senator McClellan, Senators Phillip Hart and Ted Kennedy objected that it might be applied "beyond organized crime" to antiwar demonstrators.²⁴ To meet their objections and those of the ACLU, Senator McClellan told Blakey to strike the language that gave the senators concern. Blakey did so, and "[n]o offense relating to trespass or vandalism in the context of protests was included in the final version of RICO."²⁵ Hence, Blakey claims, RICO was intended to reach only "organized commercial exploitation,"²⁶ and posed no threat to First Amendment rights.

In "The RICO Racket," Blakey implies that in rejecting the economic motive requirement for a RICO enterprise, the Supreme Court was wrong in deciding the case based on what he calls a "new judicial philosophy aptly termed the 'New Textualism.'"²⁷ He claims that the Court has allowed NOW to turn RICO into a "weapon of terror against First Amendment freedoms."²⁸

"The RICO Racket" argues that a person like Scheidler, a proponent of non-violence, is not an intended target of RICO. Blakey states that there is "[a] world of legal difference . . . between a Vito Corleone who uses a mob-dominated union" to extort money from a restaurateur and "a Benjamin Spock who sits in a draft-board office to protest the war in Vietnam."²⁹ In context, Blakey may be arguing only that RICO should cover merely extortion and not non-violent protests. But it also suggests that only some defendants, "mobsters" or Mafiosi, are suitable targets of RICO.

Thus, Blakey raises two or possibly three distinct and sharp objec-

²² See *infra* notes 212 to 257 and accompanying text.

²³ Blakey, *supra* note 2, at 61.

²⁴ *Id.* at 62.

²⁵ *Id.*

²⁶ *Id.* This was also the position that he argued before the Supreme Court. See *Health Care: Abortion—Federal Relief from Campaign to Close Clinics—RICO*, 62 U.S.L.W. 3403 (1993) [hereinafter *Health Care*].

²⁷ Blakey, *supra* note 2, at 76.

²⁸ *Id.*

²⁹ *Id.* at 62.

tions to *Scheidler*. First, the Court endorsed a policy that allows harassment of non-violent protesters and the trampling of their First Amendment freedom; second, the decision in *Scheidler* allows the government to use RICO against unsuitable classes of defendants, like the Dr. Spocks of the world, instead of exclusively the Don Corleones; third, the Court ignored clear legislative history that would have produced a contrary result and deferred improperly to RICO's text.

III. DOES *SCHEIDLER* CHILL POLITICAL AND SOCIAL PROTEST OF ALL TYPES?

The Court's decision in *Scheidler* has obvious political overtones. It is one more battle in the abortion wars. In 1993, pro-choice forces were rebuffed by the Court when they attempted to use civil rights legislation to create a basis for federal law enforcement involvement against anti-abortion protesters.³⁰ The decision in *Scheidler* leaves open the possibility of federal involvement. But it is easy to overstate the case. The plaintiffs in *Scheidler* are far from succeeding at trial.³¹ Rather, they merely withstood a motion to dismiss for a failure to state a claim for relief. As discussed below, as a tool against anti-abortion foes, RICO is fraught with difficulty. The 1994 legislation criminalizing specified conduct at abortion clinics will be a far more effective law enforcement tool.³²

Even if *Scheidler* is a victory for the pro-choice movement, it is certainly not a violent blow to First Amendment freedoms, as Blakey alleged. In *Scheidler*, the Court answered a very narrow question and did so in a rather non-controversial manner. In fact, abortion foe Chief Justice Rehnquist³³ wrote the opinion in *Scheidler* and did so for a unanimous court.³⁴

³⁰ *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 758-64 (1993) (holding that § 1985(3) does not provide a federal cause of action against persons obstructing access to abortion clinics).

³¹ See discussion *infra* notes 55 to 56.

³² S. Res. 636, 103d Cong., 1st Sess. (1994) (enacted) (known as the Freedom of Access to Clinic Entrances Act of 1993).

³³ Chief Justice Rehnquist has written numerous anti-abortion opinions. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Cruzan v. Director, Miss. Dep't of Health*, 497 U.S. 261 (1990); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Roe v. Wade*, 410 U.S. 113 (1973).

³⁴ *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994) (Souter & Kennedy, JJ., concurring). Chief Justice Rehnquist has expressed concern about the broad reach of civil RICO. Chief Justice William Rehnquist, *Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9 (1989) (originally presented at the Brookings Institu-

NOW's complaint alleged, among other things, three RICO violations.³⁵ The district court dismissed all three claims, largely because the plaintiffs failed to allege "some profit-generating purpose."³⁶ The Seventh Circuit affirmed that judgment.³⁷

The Supreme Court granted certiorari to resolve an inter-circuit conflict whether a RICO enterprise must have an economic motive.³⁸ The Supreme Court reversed the Seventh Circuit.³⁹ Its analysis was straightforward. It examined RICO's definition of "enterprise" and found that the term was broadly defined and did not require that an enterprise have an economic motive.⁴⁰ The Court examined the requirement that the enterprise's activity affect interstate commerce and concluded, without discussion, that an enterprise can have such an effect "without having its own profit-seeking motives."⁴¹

The strongest argument in favor of limiting RICO claims to profit-seeking activities is that §§ 1962(a)-(b) refer to enterprises run for profit and that "enterprise" in § 1962(c) should be defined narrowly. The Court concluded that, while an "enterprise" in §§ 1962(a) and (b) will usually be a profit seeking entity, such enterprises may lack an economic motive.⁴² Therefore, a subsection (c) enterprise also need not be profit-motivated.

The Seventh Circuit concluded, as had the Second Circuit in

tion's Eleventh Seminar on the Administration of Justice, April 7, 1989).

³⁵ *National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 614 (7th Cir. 1992).

³⁶ *National Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 941-44 (N.D. Ill. 1991). The district court dismissed a claim under § 1962(a) because the income alleged to have come from a pattern of racketeering was from voluntary donations, not from the pattern of racketeering. *Id.* at 941. That issue was not before the Supreme Court. "We granted certiorari . . . to resolve a conflict among the courts of appeal on the putative economic motive requirement of 18 U.S.C. § 1962(c) and (d)." *Scheidler*, 114 S. Ct. at 802.

³⁷ *Scheidler*, 968 F.2d at 612.

³⁸ *Scheidler*, 114 S. Ct. at 802. The Supreme Court resolved the conflict between *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (holding that for purposes of RICO, an enterprise must be directed toward an economic goal), *cert. denied*, 488 U.S. 974 (1988), and *Northeast Women's Ctr., Inc., v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) (holding that because the predicate offense does not require economic motive, RICO requires no additional economic motive).

³⁹ *Scheidler*, 114 S. Ct. at 806.

⁴⁰ *Id.* at 803-04 ("RICO broadly defines 'enterprise' in § 1961(4) . . . nowhere in either § 1962(c), or in the RICO definitions in § 1961, is there any indication that an economic motive is required.").

⁴¹ *Id.* at 804.

⁴² *Id.* Before the Court, Advocate Blakey argued that "the common everyday meaning of 'enterprise' is a business venture." *Health Care*, *supra* note 26. Conceding that a government may be a RICO enterprise, he argued that the "commercial dimension" permeates the statute and "lies in the word 'affairs.'" Further, he stated that "illicit gain" can be found in the statute because its interpretation is a "holistic" endeavor. *Id.* The Supreme Court did not respond to these specific arguments.

United States v. Bagaric,⁴³ that the legislative history supported an economic motive element.⁴⁴ Specifically, the Second Circuit pointed to Congress' statement in its findings that criminal syndicates "drain[] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."⁴⁵

The Supreme Court was unimpressed. First, the Court found that, even if the predicate offenses did not benefit the protesters, these offenses could have an effect on the economy by damaging the targeted businesses.⁴⁶ Second, the Supreme Court previously refused to limit RICO's application to the specific evil that gave rise to RICO.⁴⁷ While RICO originated with concern about organized crime, "Congress . . . chose to enact a more general statute, one which . . . was not limited in application to organized crime."⁴⁸

Despite the fact that the Court found that RICO applies to activities that are not profit-motivated, the decision in *Scheidler* does not come "perilously close to equating demonstrators with 'racketeers.'"⁴⁹ First, despite Blakey's statements in "The RICO Racket," the record does not support his claim that his client was a non-violent protester. Before trial, Scheidler prevailed on a Rule 12(b)(6) motion.⁵⁰ At that stage, the district court must assume that all of the non-moving party's allegations are true.⁵¹ The complaint alleged that the defendants were not peaceful demonstrators.⁵² For example, the plaintiffs al-

⁴³ *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983).

⁴⁴ National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 629 (7th Cir. 1992), rev'd, 114 S. Ct. 798 (1994).

⁴⁵ *Bagaric*, 706 F.2d at 57 n.13 (quoting Organized Crime Control Act of 1970, 84 Stat. 922).

⁴⁶ *Scheidler*, 114 S. Ct. at 805.

⁴⁷ The Court stated that:

Congress did nothing to indicate that "enterprise" should exclude those entities whose sole purpose was criminal. The parallel to the present case is apparent. Congress has not, either in the definitional section or in the operative language, required that an "enterprise" in § 1962(c) have an economic motive.

Id. (citing *United States v. Turkette*, 452 U.S. 576 (1981) (rejecting the limitation on enterprise to be confined to legitimate businesses)).

⁴⁸ *Id.* (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989)).

⁴⁹ Blakey, *supra* note 2, at 61.

⁵⁰ National Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 939 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), rev'd, 114 S. Ct. 798 (1994).

⁵¹ For standard of review for 12(b)(6) motion, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.22 (1985). See, e.g., *Louisville & Nashville Ry. Co. v. Palmes*, 109 U.S. 244 (1883); *Masline v. New York, New Haven & Hartford Ry. Co.*, 112 A. 639 (1921).

⁵² See National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992), rev'd, 114 S. Ct. 798 (1994):

The complaint alleged that the defendants . . . engaged in the following illegal activities . . . : extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie

leged, among other things, that the defendants engaged in acts of extortion, physical and verbal intimidation against personnel and patients at the various health clinics, and destruction of clinic advertising and clinic property.⁵³ The Seventh Circuit also noted that, the district court, in rejecting the defendants' Rule 11 motion, found that Scheidler had "links with arsonists who have fire-bombed health centers."⁵⁴

Second, the Supreme Court did not decide whether the various defendants' conduct in fact amounted to extortion.⁵⁵ If, as Blakey asserted, Scheidler merely made a statement that the administrator of the clinic should get out of the abortion business, Scheidler may be found not guilty or, if found guilty, a court may find that his conduct did not amount to extortion as a matter of law.⁵⁶ The Court in

up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.

Id.

⁵³ *Id.*

⁵⁴ *Id.* at 615 n.5.

⁵⁵ National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798, 801 n.2 (1994).

⁵⁶ If, as Advocate Blakey asserted, Scheidler simply suggested to the clinic administrator that "she would have to answer to Almighty God," Blakey, *supra* note 2, at 61, his conduct would not amount to extortion. Typically, extortion requires at a minimum a threat made with the intent to acquire another's property. WAYNE R. LA FAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 8.12(a), at 790 (2d ed. 1986); MODEL PENAL CODE § 223.4 commentary at 201-02 (1980). Scheidler did not intend to acquire anything from the clinic. See Dag E. Ytreberg, Annotation, *What Constitutes "Property" Obtained Within Extortion Statute*, 67 A.L.R. 3d 1021 (1975); MODEL PENAL CODE § 223.4 commentary at 202-03 (1980). His statement, threatening divine retribution is not the typical threat of harm contemplated by extortion statutes. See Phillip E. Hassman, Annotation, *Danger to Reputation as Within Penal Extortion Statute Requiring Threat of "Injury to the Person,"* 74 A.L.R. 3d 1255 (1976) (giving examples of two kinds of harm necessary for extortion or blackmail). The closest analogous case may be one involving a threat to cause economic harm, for example, when a corrupt labor leader threatens to call a strike. See *United States v. Compagna*, 146 F.2d 524 (2d Cir. 1944), *cert. denied*, 342 U.S. 867 (1945); *People v. Bolanos*, 121 P.2d 753 (Cal. Ct. App. 1942); MODEL PENAL CODE § 223.4 commentary at 218-19 (1980). But those cases turned on the additional fact that the union leader was threatening the strike for an improper motive, a monetary tribute to the defendant. By contrast, strikes seeking higher wages have a recognized claim of right defense. See MODEL PENAL CODE § 223.1(3) (1980).

During oral argument, Justice Scalia asked the assistant solicitor general, Miguel Estrada, whether the government believed that the defendants' conduct amounted to extortion. Mr. Estrada responded accurately that the Court had not granted certiorari on that question. *Health Care*, *supra* note 26, at 3404. While the respondents did challenge the applicability of the Hobbs Act, 18 U.S.C. § 1951(a), the Supreme Court expressed no view on that issue. *Scheidler*, 114 S. Ct. at 801 n.2.

It is unclear whether the Hobbs Act covers the behavior of anti-abortion activists. In oral argument, respondent contended that the Hobbs Act "was modeled on New York law, under which extortion required an obtaining of property." *Health Care*, *supra* note 26, at 3404. At least one federal court has read § 1951(a) as broad enough to include the conduct of anti-abortion protesters. See *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). The Third Circuit found that

Scheidler did not absolve NOW from proving two predicate offenses and a pattern of racketeering activity.

Third, only two justices addressed whether using RICO in this case would violate the First Amendment.⁵⁷ As the majority noted, the parties did not present the Court with the constitutional question whether application of RICO to anti-abortion protesters chills First Amendment rights.⁵⁸ Thus, that question remains open.⁵⁹

Hence, "The RICO Racket" inaccurately portrays the Court's decision. The Court had no occasion to suggest, no less hold, that peaceful demonstrators are within RICO's proscriptions. Based on the narrow holding in *Scheidler*, a peaceful protester would not feel constrained when contemplating a protest rally or demonstration.⁶⁰

rights like the right to conduct an abortion business are property rights within the meaning of § 1951(a). *Id.*

Even if that interpretation of § 1951(a) prevails, Blakey's assertion that peaceful protest is now within RICO is still misleading. Cases like *McMonagle* have turned on far more aggressive tactics than peaceful protest. One wonders why anti-abortion protesters who threaten clinic workers with violence should be immune from liability under RICO when Mafiosi who want to close down a rival's business by making similar threats are not. For example, in *McMonagle*, the protesters knocked down clinic workers, entered the premises illegally, strewed medical supplies on the floor, and damaged clinic property. *Id.* at 1345-46. Substitute labor racketeers for anti-abortion protesters and the example from *McMonagle* looks more like Advocate Blakey's hypothetical mobsters attempting to close down a restaurateur's business.

⁵⁷ *Scheidler*, 114 S. Ct. at 806.

⁵⁸ *Id.* at 801.

⁵⁹ If the allegations in the complaint are true, this is not a First Amendment case. At most, abortion protesters have a right to demonstrate at or near a facility that performs abortions. Even that conduct may be regulated, as the Supreme Court reaffirmed at the end of the recently completed term. *Madsen v. Women's Health Ctr., Inc.*, 129 L. Ed. 2d 593 (1994). *Scheidler*'s conduct in trespassing went well beyond protected speech. *Scheidler*, 114 S. Ct. at 807 (Souter & Kennedy, JJ., concurring).

Contrary to Advocate Blakey's suggestion that the ACLU sat by and allowed the Court to turn RICO upside down, Blakey, *supra* note 2, at 61, 76, its amicus curiae brief proposed a series of guidelines to protect peaceful protesters. See Brief Amicus Curiae of the American Civil Liberties Union in Support of Neither Party at 3, *Scheidler* (No. 92-780).

⁶⁰ Clarke Forsythe, vice president and general counsel of Americans United for Life said this decision "may trigger RICO's abuse as a nuclear weapon against free speech rights." John Corcoran, *High Caliber Deterrent*, JURIS, Spring 1994, at 32, 34 (quoting Lyle Denniston, *Abortion Protests May Be Costly*, PITTSBURGH POST GAZETTE, January 25, 1994, at A9). Bruce Ledewitz, Professor of Law at Duquesne University, asserted "if abortion demonstrators twice push their way into a clinic's waiting room, occupy it and block the hallways and refuse to move, the demonstrators are subject to RICO. They may be jailed for 20 years . . . and be made to pay treble damages and/or punitive damages." Professor Ledewitz asserted that a sit-in should be discouraged by local trespass laws, not felony prosecution under RICO. Corcoran, *supra*, at 32, 34 (quoting Bruce Ledewitz, *RICO's Latest Victim-Social Protest*, WALL ST. J., February 2, 1994, at A17).

The student author of *High Caliber Deterrent* suggests that protesters may be unwilling to "be a test case for RICO" because of exposure to severe sanctions. That ignores the fact that *Scheidler* is already a test case for whether peaceful protest can amount to extortion or other underlying predicate offenses for purposes of RICO. As discussed above, the

Blakey faults the ACLU for abandoning the position it had advocated when RICO was first before Congress.⁶¹ But that criticism is off the mark. According to Blakey's own statements, liberal senators and the ACLU lobbied to have the underlying predicate offenses changed so that trespass and vandalism, crimes of not so peaceful antiwar protesters, were not among the predicate offenses.⁶² The decision in *Scheidler* is a far cry from holding that protesters could be liable based on that conduct alone. The time to assess the ACLU's performance is after a fact finder determines that Scheidler did nothing more than engage in peaceful protest or in the kind of vandalism and trespass in which antiwar protesters engaged. Blakey then may fault the ACLU if it were to fail to join a challenge to RICO.

"The RICO Racket" is also curious for its claim that the ACLU sat idly by while the Court turned RICO on its head.⁶³ As noted, the ACLU filed an amicus brief in support of neither party.⁶⁴ The ACLU argued, consistent with Professor Blakey's published views, that the Court should not read an economic motive requirement into the statute. But the ACLU then urged the Court to adopt careful guidelines if it remanded the case to the district court for trial. It stated specifically, consistent with its previous position concerning RICO generally, that RICO prosecutions are fraught with potential First Amendment problems.⁶⁵ The ACLU also reminded the Court of important limitations that the Court had imposed in other cases involving protest activity. For example, the Court has distinguished between peaceful protest and acts of extortion and between those who further legitimate goals of an organization and those who have the specific intent

Supreme Court did not decide that issue and, if NOW prevails in the *Scheidler* case, that issue will be litigated on appeal. *High Caliber Deterrent* also ignores the possibility of a declaratory judgment action to decide whether the government may use RICO against protesters. See, e.g., *Steffel v. Thompson*, 415 U.S. 452 (1974). That remedy would be available as long as the case was ripe and there were no pending proceedings.

The antiabortion foes quoted in *High Caliber Deterrent* are inaccurate. For example, Professor Ledewitz's hypothetical ignores other RICO requirements. In his example, there is no "pattern" as defined in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). It is also unclear whether pushing one's way into a health clinic is within RICO's predicate offenses. The Court simply did not decide this issue in *Scheidler*.

⁶¹ Blakey, *supra* note 2, at 61, 76 (suggesting that the ACLU originally expressed concern that RICO might apply to political protesters). For a detailed discussion of the ACLU's position, see Senator John L. McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?* 46 N.D. LAWYER 55 (1970).

⁶² Blakey, *supra* note 2, at 61, 62.

⁶³ Blakey, *supra* note 2, at 61, 76.

⁶⁴ See *supra* note 10.

⁶⁵ See generally Brief Amicus Curiae of the American Civil Liberties Union in Support of Neither Party, *Scheidler* (No. 92-780).

to further an organization's illegal goals.⁶⁶

IV. IS THERE A "WORLD OF DIFFERENCE BETWEEN DON CORLEONE . . . AND BENJAMIN SPOCK?"⁶⁷

Blakey's comparison between Don Corleone and Dr. Spock must be placed carefully in context. Blakey does not say that the Court should have imposed an organized crime limitation, *i.e.*, that RICO is available only if the prosecuting party demonstrates a link to organized crime. He states that there is "[a] world of legal difference . . . between a Vito Corleone who uses a mob-dominated union to throw a picketline to extract a payoff from the hapless restaurateur, and a Benjamin Spock who sits in a draft-board office to protest the war in Vietnam,"⁶⁸ possibly suggesting that Congress intended RICO to target specific classes of defendants. For years, litigants have argued unsuccessfully for this kind of limitation.⁶⁹

Blakey's argument, however, is broader, despite his choice of a Mafioso as his model of an appropriate RICO target. Advocate Blakey is justifying his argument before the Supreme Court in *Scheidler* that RICO addresses only entities like La Cosa Nostra, motivated by financial gain.⁷⁰ Both arguments rely on the same point: a RICO "enterprise" ought to be defined in light of legislative history.

RICO grew out of almost twenty years of concern about the influence of the Mafia or La Cosa Nostra. Interest in the Mafia in America began in earnest in the early 1950s with Senate hearings chaired by Estes Kefauver.⁷¹ In 1951 Kefauver's committee concluded that "[t]here is a Nation-wide crime syndicate known as the Mafia, whose tentacles are found in many large cities."⁷² Not only did the Mafia engage in muscle and murder, but it also gained political influence, engaging in bribery and intimidation to protect its profit seeking op-

⁶⁶ *Id.*

⁶⁷ Blakey, *supra* note 2, at 61, 62.

⁶⁸ *Id.*

⁶⁹ *Northwestern Moravian Dev. Corp. v. Dow Chem. Co.*, 651 F. Supp. 144, 146 (E.D. Pa. 1986) ("nothing in the statute limits its application to organized crime"); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied sub nom.*, *Moss v. Newman*, 104 S. Ct. 1280 (1984); *Adair v. Hunt Int'l*, 526 F. Supp. 736 (N.D. Ill. 1981).

⁷⁰ Blakey, *supra* note 2, at 61, 62, 76.

⁷¹ Sen. Special Comm. to Investigate Organized Crime in Interstate Commerce, *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951) (known as the Kefauver Commission).

⁷² THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 1 n.1 (1967) [hereinafter TASK FORCE REPORT] (citing Sen. Special Comm. to Investigate Organized Crime in Interstate Commerce, *supra* note 71, at 3).

erations.⁷³ The existence of the Mafia seemed confirmed in the late 1950s when New York police broke up a gathering of reputed Mafia chieftains in upstate New York.⁷⁴ A few years later, Joseph Valachi, Mafioso turned informant, confirmed police suspicions about the purpose of that meeting specifically⁷⁵ and the structure and operation of La Cosa Nostra generally.⁷⁶ Both Valachi's testimony⁷⁷ and a background check of the various participants at the New York meeting⁷⁸ suggested the wide array of criminal activity in which the mob engaged.

With the waning of Communism as a threat in the 1960s,⁷⁹ the F.B.I. paid increasing attention to the Mafia threat.⁸⁰ By the mid-1960s, the mob had become a law enforcement priority. In 1965, President Johnson signed an executive order creating the President's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission) to study organized crime.⁸¹

The Commission's report was an important step towards passage of RICO.⁸² It focused on organized crime, and although it vacillated in its definition of organized crime, its primary focus was on "an entity with particular members, a defined hierarchy, and even an official name."⁸³ Dean Cressey, a consultant to the Commission, drafted a

⁷³ *Id.*

⁷⁴ *Id.* See also *United States v. Bonanno*, 683 F. Supp. 1411 (E.D.N.Y. 1988), *aff'd*, 879 F.2d 20 (2d Cir. 1989); *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

⁷⁵ PETER MAAS, *THE VALACHI PAPERS* 40 (1968).

⁷⁶ *Id.* at 38.

⁷⁷ *Id.* at 46.

⁷⁸ TASK FORCE REPORT, *supra* note 72 (the core of organized crime is the supplying of illegal goods and services—gambling, loan sharking, narcotics, and other forms of vice—to countless numbers of citizen customers) (citing to Earl Johnson Jr., *Organized Crime: Challenge to American Legal System* (pts. 1-3), 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 399, 402-04 (1962), 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 127 (1963)) (but organized crime is also extensively and deeply involved in legitimate business and in labor unions).

⁷⁹ Michael Vitiello, *The Permanent Subcommittee on Investigations Report on Hotel Employees & Restaurant Employees International Union: Will RICO Take a Walk on the Boardwalk with Local 54?*, 16 RUTGERS L.J. 671, 685 (1985) (citing Labor-Management Reporting and Disclosure Procedure Act, 29 U.S.C. 504 (1975)). See also *RICO*, *supra* note 19, at 668 n.35 (discussing the focus on both Communism and organized crime in the early 1950s).

⁸⁰ MAAS, *supra* note 75, at 35 (discussing the dramatic increase of FBI agents assigned to organized crime). For example, in the New York office in 1959, four agents were assigned to organized crime. This number increased to 150 by 1962.

⁸¹ *RICO*, *supra* note 19, at 666 n.22.

⁸² *Id.*

⁸³ *Id.* at 668. "Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively Italian, they are in frequent communication with each other, and their smooth functioning is ensured by a national body of overseers. . . . FBI intelligence indicates that the organization as a whole has changed its name from the Mafia to La Cosa Nostra." *Id.* at 667 (quoting TASK FORCE REPORT, *supra* note 72, at 6-10).

resource paper that was more explicit—naming names of particular Mafiosi and uncovering specific roles within the organization of the Mafia.⁸⁴

The Commission identified the specific social evil of the Mafia. Organized crime presented a distinct and greater evil than did crime generally. By amassing vast profits from the sale of illegal goods and services, the Mafia used its economic power to “undermine free competition,”⁸⁵ and gain unfair economic advantage over legitimate businesses.⁸⁶ It also gained a stranglehold on unions, destroying union democracy and providing the mob with extortionate power over the national economy.⁸⁷ Further, organized crime members bought off law enforcement officers and politicians.⁸⁸ The primary evil of the Mafia, however, was its ability to take over and invest in legitimate businesses.⁸⁹

The Commission’s report did not propose substantive law reform; it suggested that conspiracy law was sufficient.⁹⁰ The primary problems in fighting the mob were procedural and evidentiary. Therefore, greater resources were needed to induce witnesses to testify against the mob and to protect them before and after they testified.⁹¹

RICO’s substantive provisions were the product of a series of proposed bills introduced in Congress over the next two years. Senator Roman Hruska proposed legislation in 1967, specifically to enact the

⁸⁴ Donald Cressey, *The Functions and Structure of Criminal Syndicates*, in TASK FORCE REPORT, *supra* note 72, at 32. Federal and local law enforcement continue to follow closely the activities of La Cosa Nostra as evidenced, for example, by information disclosed during the 1988 hearings into organized crime. See generally, *Organized Crime: 25 Years After Valachi: Hearing Before the Permanent Subcomm. on Investigations of the Committee on Governmental Affairs*, 100th Cong., 2d Sess. (1988).

⁸⁵ TASK FORCE REPORT, *supra* note 72, at 5. See also Johnson, *supra* note 78, at 406-07; RICO, *supra* note 19, at 670; RONALD GOLDSTOCK, NEW YORK STATE ORGANIZED CRIME TASK FORCE, INTERIM REPORT, CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY (1987) (presenting dramatic evidence of the continuing economic power of organized crime).

⁸⁶ RICO, *supra* note 19, at 729, 758.

⁸⁷ TASK FORCE REPORT, *supra* note 72, at 5. See also G. Robert Blakey & Ronald Goldstock, “On the Waterfront”: RICO and Labor Racketeering, 17 AM. CRIM. L. REV. 341, 341-42 (1980). See also Vitiello, *supra* note 79, at 672.

⁸⁸ TASK FORCE REPORT, *supra* note 72, at 2, 6. See generally RICO, *supra* note 19, at 736.

⁸⁹ RICO, *supra* note 19, at 677-78. Lynch’s article includes a thorough rebuttal of Blakey and Gettings’ assertion that Congress intended to include illegitimate entities as well. *Id.* at 678-82.

⁹⁰ The laws of conspiracy have provided an effective substantive tool with which to confront the criminal groups. TASK FORCE REPORT, *supra* note 72, at 16.

⁹¹ *Id.* at 16 (“[T]oo few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponsor.”).

Commission's recommendations.⁹² He left no doubt about the evil that he sought to eradicate, the monolithic "Mafia" and its infiltration of legitimate business.⁹³

During the next Congress, Senator McClellan, who had conducted earlier hearings into labor racketeering, introduced legislation based on the Katzenbach Commission's report, emphasizing procedural and evidentiary reform that would become an important part of the legislation eventually passed.⁹⁴ He identified the same evils—the Mafia and its threat to legitimate business—that Senator Hruska had identified.⁹⁵

Senators Hruska and McClellan eventually joined forces, resulting in legislation that included RICO's substantive provisions as well as provisions dealing with procedural reforms.⁹⁶ Their earliest proposed bills aimed at attacking the infiltration of legitimate business by organized crime syndicates.⁹⁷ During the long process when various bills were proposed and eventually passed, neither senator attempted to define organized crime.⁹⁸ That is almost certainly because of serious doubts that a bill criminalizing membership in the Mafia would be constitutional.⁹⁹ At best, it would be impolitic.¹⁰⁰ Defining organized crime in structural terms also seemed daunting.¹⁰¹

Instead, Congress adopted a functional approach to defining organized crime.¹⁰² RICO creates three substantive offenses. First, in § 1962(a), RICO makes it unlawful to invest income obtained through a pattern of racketeering in an enterprise.¹⁰³ Second, in § 1962(b), RICO makes it unlawful for a person to gain an interest in an enterprise through a pattern of racketeering.¹⁰⁴ Third, in § 1962(c), RICO contains a catchall provision, now the most frequently used subsection, that makes it unlawful to conduct the affairs of an enterprise

⁹² *RICO*, *supra* note 19, at 673.

⁹³ *Id.* at 674.

⁹⁴ *Id.* at 675-76.

⁹⁵ *Id.*

⁹⁶ *Id.* at 676-77.

⁹⁷ *Id.* at 677.

⁹⁸ *Id.* at 683.

⁹⁹ L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050, 1051 (1990).

¹⁰⁰ Jonathan Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 VILL. L. REV. 239, 241 n.12 (1988) (stating that "RICO's drafters consciously avoided defining such terms as 'organized crime' or 'organized criminal' for both practical and strategic reasons. Practically, such a definition was thought to be fraught with constitutional and even racial difficulties . . .").

¹⁰¹ *RICO*, *supra* note 19, at 685-88; Turley, *supra* note 100, at 239, 241 n.12.

¹⁰² See discussion *infra* notes 108 to 112 and accompanying text.

¹⁰³ 18 U.S.C. § 1962(a) (1988).

¹⁰⁴ 18 U.S.C. § 1962(b) (1988).

through a pattern of racketeering.¹⁰⁵ Sections 1962(a) and (b) conform most closely to the specific evil identified by the Katzenbach Commission and by Senators McClellan and Hruska.¹⁰⁶ RICO would have been a minor and unimportant statute had Congress not added § 1962(c).¹⁰⁷

The statute does not define "pattern of racketeering." Instead, it requires commission of at least two enumerated offenses from a long list of state and federal offenses.¹⁰⁸ That is the functional, rather than structural, approach to defining organized crime.¹⁰⁹ But instead of enumerating only the stereotypical Mafia crimes, like gambling, prostitution, loan sharking, extortion, and traffic in narcotics,¹¹⁰ Congress included a wide array of federal offenses, including mail and wire fraud and securities fraud.¹¹¹ Congress chose this open-ended approach after learning about the way in which La Cosa Nostra did business, shifting its activity to maximize its profits.¹¹²

From the beginning of the legislative process, Congress was concerned with organized crime¹¹³ and its infiltration of legitimate business.¹¹⁴ But RICO did not make organized crime a material element of any of its substantive provisions. Nor did it expressly limit its provisions to the take over or operation of legitimate, as opposed to illegitimate businesses.¹¹⁵

¹⁰⁵ 18 U.S.C. § 1962(c) (1988).

¹⁰⁶ *RICO*, *supra* note 19, at 675.

¹⁰⁷ *Id.* at 726-27; G. Robert Blakey & Scott D. 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, 590 (1987); *Guide to RICO Reform*, *supra* note 19, at 770.

¹⁰⁸ 18 U.S.C. § 1961(1) (1988) (listing predicate acts).

¹⁰⁹ *RICO*, *supra* note 19, at 687-88.

¹¹⁰ *Id.* at 669.

¹¹¹ 18 U.S.C. § 1961(1) (1988) (listing predicate acts).

¹¹² See e.g., MAAS, *supra* note 75, at 185-94 (discussing how the Mafia made money running a black market in wartime gasoline coupons); see also TASK FORCE REPORT, *supra* note 72, at 4-5. Senator McClellan has stated that organized criminals are "sufficiently resourceful" to make possible "an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." 116 CONG. REC. 18,940 (1980).

¹¹³ *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 805 (1994). See also 116 CONG. REC. 35,204 (1970) (Rep. Mikva states that the purpose of RICO was to control organized crime in the United States); 18 U.S.C. § 1961 (1982) (stating purpose of OCCA is to eradicate organized crime in United States). See *infra* note 152.

¹¹⁴ *United States v. Turkette*, 452 U.S. 576, 592-93 (1981) ("Undoubtedly, the infiltration of legitimate businesses was of great concern").

¹¹⁵ *Turkette*, 452 U.S. at 582 (1981).

Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.

For several years after its passage, RICO was seldom used either by prosecutors or by civil RICO plaintiffs.¹¹⁶ This changed in the mid-1970s when prosecutors and plaintiffs discovered RICO. Not surprisingly, civil RICO plaintiffs have been enamored with RICO's treble damage and attorney's fee provisions.¹¹⁷ RICO also provides access to federal court jurisdiction in cases in which federal district court may provide procedural advantages.¹¹⁸ Prosecutors gain advantages as well, including favorable procedural and evidentiary rules applicable in RICO cases and heightened criminal penalties, including forfeiture of assets.¹¹⁹

RICO's "slow start" may be attributed to the belief that it was limited to organized crime cases and to infiltration of legitimate businesses.¹²⁰ This belief stemmed from the fact that numerous lower federal courts attempted to limit RICO in various ways. For instance, some lower federal courts found that RICO required a showing that the defendant was engaged in organized crime;¹²¹ Courts of appeals held that RICO was inapplicable to wholly illegitimate enterprises.¹²² A number of courts excluded purely ideological organizations by holding that, for purposes of § 1962(c), a prosecutor or plaintiff had to demonstrate that the racketeering enterprise was for economic gain;¹²³ and other courts found that a pattern of racketeering was not established solely by showing that the defendant committed two predi-

Id.

¹¹⁶ See Jeff Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: *Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 3 n.21 (1978) (stating that very few cases were brought until 1975).

¹¹⁷ Critics claim that RICO encourages frivolous lawsuits because it offers a private plaintiff the advantages of a federal forum and the prospect of treble damages and attorney's fees. Leigh Ann MacKenzie, Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566, 572 (1985). See also L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050, 1065 (1990).

¹¹⁸ *Tafflin v. Levitt*, 493 U.S. 455 (1990) (holding that jurisdiction over civil RICO claims is concurrent, giving the plaintiff the choice of a federal or state forum).

¹¹⁹ Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 170 (1980).

¹²⁰ That was the view taken by a number of federal courts in some of the early RICO cases. See *infra* note 122.

¹²¹ The following courts have held that only those activities with some connection to organized crime may be the subject of civil RICO suits. *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. Cal. 1981); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975).

¹²² *United States v. Turkette*, 632 F.2d 896, 905-06 (1st Cir. 1980) (holding that a RICO indictment against someone participating in only criminal activities was invalid); see also, *United States v. Sutton*, 642 F.2d 1001, 1006-09 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912 (1981); see also *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

¹²³ See *supra* note 38.

cate offenses.¹²⁴ Courts developed various tests to define the "pattern" element, the most restrictive of which required that the defendant engage in more than one criminal scheme rather than merely in multiple criminal acts.¹²⁵ In civil RICO cases, courts developed additional limitations, including a requirement that plaintiffs show that they suffered a "racketeering injury," and that an action could not proceed unless the defendant had been convicted of the underlying predicate offenses.¹²⁶

Attempts to limit RICO are understandable when one considers RICO's potential breadth. As the Justice Department recognized even before it put in place stringent guidelines, many "nickel and dime" cases come within the literal provisions of the act.¹²⁷

Advocate Blakey argues in "The RICO Racket" that the Supreme Court should have relied on the legislative history in its interpretation of "enterprise," and, therefore, the Court should have limited RICO to predatory commercial enterprises.¹²⁸ Thus, in "The RICO Racket," Blakey takes a view similar to those litigants and federal courts who wanted to limit RICO's sweeping provisions.

RICO's advocates, however, have sharply criticized commentators

¹²⁴ Most Courts of Appeals have rejected the interpretation of RICO's pattern concept in *Superior Oil Co. v. Fulmer*, 785 F.2d (8th Cir. 1986), *reh'g denied*, where the Eighth Circuit required an allegation and proof of multiple schemes. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 235 n.2 (1989); *United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir. 1989) (en banc); *United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 789 (D.C. Cir. 1988); *Bartichek v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39-40 (3d Cir. 1987); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987); *Sun Sav. and Loan Ass'n v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928-29 (10th Cir. 1987); *Bank of Amer. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975-76 (7th Cir. 1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985).

¹²⁵ *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), *reh'g denied*.

¹²⁶ *Sedima*, 741 F.2d 482, 493 (2d Cir. 1984), *rev'd*, 473 U.S. 479, 480 (1985); *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983); *King v. Lasher*, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 852 (E.D. Va. 1983); *Guerrero v. Kafzen*, 571 F. Supp. 714, 721 (D.C. Cir. 1983); *Van Schaick v. Church of Scientology of Cal., Inc.* 535 F. Supp. 1129, 1137 & n.11; *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Johnsen v. Rogers*, 551 F. Supp. 281, 285 (C.D. Cal. 1982); *Gitterman v. Vitoulis*, 564 F. Supp. 46, 49 (S.D.N.Y. 1982); *Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

¹²⁷ See Atkinson, *supra* note 116, at 16 (quoting telephone interview with John Dowd, Attorney in Charge of Department of Justice Strike Task Force 18 (Washington D.C., Oct. 4, 1977)).

¹²⁸ Blakey, *supra* note 2, at 61, 76.

and courts that have sought to limit RICO in light of legislative history.¹²⁹ And there has been no more aggressive advocate for the expansive application of RICO than Professor Blakey.¹³⁰ His key role in drafting the legislation has given him special prominence in the debate.¹³¹

As a scholar interpreting RICO, Blakey's position has been consistent throughout a substantial body of literature, including law review articles, debates, and newspaper articles. Blakey's position on RICO can be summarized as follows: RICO contains a liberal construction provision and that provision should be given effect.¹³² Cases limiting RICO to infiltration of legitimate businesses, for example, did so contrary to the plain meaning of the statute. In one article, Blakey criticized the Sixth Circuit's decision in *United States v. Sutton*, which limited RICO to legitimate businesses, for its reading of legislative history.¹³³ According to Professor Blakey, the Court should have determined the scope of RICO primarily from the statute and its statutory statement of purposes, not its legislative history.¹³⁴

Insofar as Blakey has recognized the relevance of RICO's legislative history, he has argued that the history supports a broad reading of the statute. For example, despite primary interest in organized crime, Congress also discussed the extent to which RICO might apply to white collar criminals.¹³⁵ Blakey has argued repeatedly that Congress deliberately drafted RICO to apply to *everyone* who violated the statute.¹³⁶

Blakey has summarized his own position on the proper interpre-

¹²⁹ See Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988).

¹³⁰ Professor Blakey has authored numerous articles regarding RICO. For a sampling of his works, see G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); G. Robert Blakey et al., *What's Next?: The Future of RICO*, 65 NOTRE DAME L. REV. 1073 (1990); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God - Is This the End of RICO?"*, 43 VAND. L. REV. 851 (1990).

¹³¹ See *supra* note 19.

¹³² See Blakey & Gettings, *supra* note 130, at 1011 (noting many commentators that have endorsed this liberal interpretation of RICO's provisions). Some have argued that this liberal construction clause prohibits courts from constructing the pattern requirement narrowly. See *id.* at 1031-33.

¹³³ *Id.* at 1025 n.91 (faulting the Court for its reading of legislative history).

¹³⁴ G. Robert Blakey & Brian Gettings, *RICO's Problem in the Courts: A Classic Case of Misreading*, NAT'L L.J., March 9, 1991, at 26.

¹³⁵ Blakey & Perry, *supra* note 130, at 863 (citing *Sedima v. Imrex Co.*, 473 U.S. 479, 497-98 (1985)).

¹³⁶ G. Robert Blakey, *RICO Isn't Just For Racketeers Anymore RICO Is Working*, THE BRIEF, V. 14-15, Summer 1985, at 18; see also Blakey et al., *supra* note 130, at 1080.

tation of RICO: "‘Nothing on the face of . . . [RICO] suggests a congressional intent to limit its coverage’ In fact, the ‘words do not lend themselves to restrictive interpretation.’ ‘The language of the statute . . . [is] the most reliable evidence of its intent’ ‘[I]n the absence of clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.’"¹³⁷

His answer to critics who suggest that RICO has gone beyond congressional intent has been sharp. He cites evidence in the legislative debates that demonstrates that "[a] conscious decision was made by the Senators that this bill would be systemic reform, not limited to organized crime."¹³⁸ He has repeatedly argued that Congress intended RICO to apply to everyone who violated the statute.¹³⁹

Armed with that view of the legislative history and those maxims of statutory construction, one might have analyzed *Scheidler* just as the Supreme Court did. RICO, according to Professor Blakey, is broad and clear in its language, and courts should construe this language liberally. Nothing in § 1961's definition of "enterprise" indicates a congressional intent to limit "enterprise" to economically motivated activities.¹⁴⁰ While some enterprises listed in § 1961 are profit driven, others are not. The obvious example of a listed enterprise not necessarily driven by an economic motive is an enterprise that consists of individuals associated in fact. An association of individuals is open-ended and can readily include associations with nonprofit motives. Thus, Professor Blakey would assert that since Congress could easily have specified a requirement that an enterprise have an economic motive, but did not, courts should not read one into RICO.¹⁴¹

Litigants and commentators have argued that Congress had in mind a specific kind of profit driven organization, the Mafia.¹⁴² But

¹³⁷ Blakey, *supra* note 130, at 248 (citations omitted).

¹³⁸ G. Robert Blakey & Abner J. Mikva, Debate Transcript - *RICO and Its Progeny: Good or Bad Law?*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 369, 379 (1986).

¹³⁹ Blakey, *supra* note 136, at 18. In fact, Professor Blakey has specifically urged that Congress overrule the result of *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), and stated that "RICO was designed to apply to any form of sophisticated criminal group engaging in specific kinds of activities, including violence, without regard to the motive of the perpetrators." Blakey & Perry, *supra* note 130, at 970. Before the Supreme Court, he argued that the *Ivic-Bagaric* rule was implicit in the statute. *Health Care*, *supra* note 26, at 3404.

¹⁴⁰ 18 U.S.C. § 1961 (1984) ("enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity).

¹⁴¹ *United States v. Turkette*, 452 U.S. 576, 593 (1981) ("If Congress had intended the more circumscribed approach espoused by the Court of Appeals, there would have been some positive sign that the law was not to reach organized criminal activities that give rise to the concerns about infiltration.").

¹⁴² Representative Biaggi proposed an amendment that would have made membership in the Mafia or La Cosa Nostra an offense. Ultimately, however, this amendment was re-

Blakey has argued repeatedly against reliance on that kind of general view of legislative history.¹⁴³

Blakey argues in "The RICO Racket" that there was a "clearly expressed legislative intent" contrary to the result in *Scheidler*,¹⁴⁴ but he does not cite to one. He cites only Senators Kennedy and Hart's concern that the government might expand its use of "beyond organized crime."¹⁴⁵ However, Blakey has previously cited Kennedy's and Hart's remarks—and Senator McClellan's response to the effect that there is no clear way to draw the line between organized and white collar crime—as evidence of RICO's broad scope.¹⁴⁶ He has repudiated any arguable inference from Kennedy's and Hart's remarks that RICO is limited to organized crime.¹⁴⁷

Blakey eliminated certain offenses from the list of predicate offenses to prevent RICO's application to non-violent (or only moderately violent) protesters.¹⁴⁸ He did not "protect" demonstrators by defining enterprise to include an economic motive. Back to Professor Blakey's rationale: if Congress intended to limit RICO, this intent should be apparent in the statutory language. Any proposed limitation must be in the predicate offenses to RICO. As discussed,¹⁴⁹ the Court did not reach the issue of whether a protester like *Scheidler* committed extortion.

The inconsistency between Blakey's position generally and his position in "The RICO Racket" is readily apparent. How might RICO apply to an anti-abortion group that prevented abortions by murdering doctors who performed abortions? Advocate Blakey appears to argue that Congress did not intend RICO to apply to wholly ideologi-

jected due to the potential for finding the amendment unconstitutional. See 116 CONG. REC. 35,343 (Oct. 7, 1970).

¹⁴³ For some of Blakey's articles on the subject, see Blakey & Gettings, *supra* note 130; Blakey et al., *supra* note 130; Blakey & Cessar, *supra* note 107; Blakey, *supra* note 130; Blakey & Perry *supra* note 130.

¹⁴⁴ Blakey, *supra* note 2, at 76.

¹⁴⁵ *Id.* at 62.

¹⁴⁶ Blakey et al., *supra* note 130, at 1084 ("I am not equating organized crime and white collar crime, but they are not wholly different.") White collar crime is very similar to organized crime both in methods and economic effects. See White Collar Crime Symposium, 17 AM. CRIM. L. REV. 271 (1980).

¹⁴⁷ Blakey & Cessar, *supra* note 107, at 576-77 n.217 (citing L.A. TIMES, Feb. 15, 1984, at 20, col. 1, when Prof. G. Robert Blakey stated "We knew we weren't limiting. . . [RICO] to organized crime.").

¹⁴⁸ Blakey, *supra* note 2, at 62 ("No offense relating to trespass or vandalism in the context of protests was included in the final version of RICO. The offense of 'extortion' ('obtaining property by fear') was included, but it was modeled on the early English common law, which emphasized 'obtaining' property ('to get'), not 'depriving' someone of property (forcing them 'to give up').").

¹⁴⁹ See *supra* text accompanying notes 55 to 56.

cally motivated enterprises. Therefore, presumably, even if Scheidler and his cohorts resorted to murder, RICO would not apply. Professor Blakey would give short shrift to this argument, replying that § 1961 contains no such limitation, and as long as the crimes are predicate offenses and they meet the pattern element, RICO applies.¹⁵⁰

As developed below, had Advocate Blakey argued *Scheidler* a decade earlier, his position would have been plausible.¹⁵¹ Congress had two clear goals when it enacted RICO: preventing infiltration of legitimate businesses and combatting organized crime, especially the Mafia.¹⁵² It had heard testimony during various hearings on how La Cosa Nostra conducted business.¹⁵³ La Cosa Nostra was clearly economically motivated; it represented a distinct economic threat to free competition.¹⁵⁴ Ten or fifteen years ago, the Court might have read RICO narrowly in light of Congress' primary goals.¹⁵⁵ But that, according to Professor Blakey, would have been wrong.¹⁵⁶ RICO is broad and clear

¹⁵⁰ In fact, Professor Blakey has specifically urged that Congress overrule the result of *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), and stated that "RICO was designed to apply to any form of sophisticated criminal group engaging in specific kinds of activities, including violence, without regard to the motive of the perpetrators." Blakey & Perry, *supra* note 130, at 970.

In that same article, written before he argued the *Scheidler* case, Blakey addressed the use of RICO against abortion protesters. There he argued that docket concerns and potential chill of first amendment rights, although not limited to RICO cases, militated in favor of some reform by Congress to prevent discovery abuse and to strengthen guidelines to protect first amendment rights. *Id.* at 976-77. That position is quite similar to the ACLU's position in its amicus curiae brief in *Scheidler*. Brief Amicus Curiae of the American Civil Liberties Union in Support of Neither Party, National Org. for Women, Inc. v. *Scheidler*, 968 F.2d 612 (7th Cir. 1992) (No. 92-780). But during oral argument, Advocate Blakey relied on the very cases that Professor Blakey argued the Court decided wrongly. *Health Care*, *supra* note 26.

¹⁵¹ See *infra* text accompanying notes 157 to 190 (discussing Supreme Court's rejection of limitations imposed by lower federal courts).

¹⁵² Examples of Supreme Court cases identifying primary goals as preventing infiltration of legitimate businesses and combatting organized crime are: *Alexander v. United States*, 113 S. Ct. 2766 (1993); *Moskal v. United States*, 498 U.S. 103 (1990); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *United States v. Turkette*, 452 U.S. 576 (1981).

¹⁵³ 115 CONG. REC. 5872-75 (1969) (Describing and depicting structure and activities of organized crime groups). See also 116 CONG. REC. 18,913-14 (1970) (Senator McClellan observed: "Members of La Cosa Nostra . . . are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reached most of the commercial activities of organized crime, yet does not include offenses roughly commonly committed by persons outside organized crime as well.").

¹⁵⁴ TASK FORCE REPORT, *supra* note 72, at 25-26.

¹⁵⁵ *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981); *United States v. Sutton*, 642 F.2d 1001, 1006-09 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981).

¹⁵⁶ Blakey & Gettings, *supra* note 130, at 1035 n.117 ("While RICO had as one of its purposes preventing the takeover of legitimate business by organized crime, it is myopic to read RICO as if that were its only purpose.").

and applies to everyone who violates its provisions. Whether Joseph Scheidler is within RICO's provisions depends on whether he committed the underlying predicate offenses. But it is certainly curious to hear Blakey complain that the Court failed to read into the enterprise concept a narrowing gloss not in its express language.

V. RICO IN THE SUPREME COURT

In "The RICO Racket," Blakey also criticizes the Court for deciding *Scheidler* pursuant to a "new judicial philosophy, aptly termed the 'New Textualism.'"¹⁵⁷ This section examines the Supreme Court's methodology before *Scheidler* in cases interpreting RICO's substantive provisions. Contrary to Blakey's suggestion, *Scheidler* is hardly an aberration, reflecting a new philosophy. The Supreme Court has done what Professor Blakey has frequently advocated. It has always given effect to RICO's plain meaning and applied RICO to any defendant who violated its provisions.

Given RICO's high visibility¹⁵⁸ and complex terminology,¹⁵⁹ it is surprising how seldom the Supreme Court has reviewed RICO cases. The Supreme Court did not decide a RICO case until 1981. Between 1981 and 1993, prior to its decision in *Scheidler*, the Supreme Court examined RICO's substantive provisions in only five cases.¹⁶⁰

¹⁵⁷ Blakey, *supra* note 2, at 76.

¹⁵⁸ Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035 (1990).

¹⁵⁹ *Guide to RICO Reform*, *supra* note 19, at 661 ("RICO's complexity has attracted several efforts to unscramble the many issues of interpretation it poses.").

¹⁶⁰ *United States v. Turkette*, 452 U.S. 576 (1981) (holding that RICO "enterprise" applies to both legitimate and illegitimate organizations); *Russello v. United States*, 464 U.S. 16 (1983) (holding that interests subject to forfeiture under § 1963(a)(1) are not limited to interests in the enterprise and include "profits" and "proceeds"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (holding that there was no support in the statute's history, language, or considerations of policy for a requirement that a private treble damages action can proceed only against a defendant who has already been criminally convicted. Thus, given the facts, *Sedima's* action is not barred. The Court also concluded that no "racketeering injury" is required.); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) (holding that to prove a pattern of racketeering activity under RICO, a plaintiff or prosecutor must show at least two predicates that are related and that amount to, or threaten the likelihood of continued criminal activity.); *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993) (holding that for defendants to be guilty under RICO they must have participated in the operation or management of the enterprise.).

The Court has decided other cases involving aspects of RICO, but not involving issues relating to RICO's substantive provisions. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987) (holding that civil RICO claims are arbitrable); *Tafflin v. Levitt*, 493 U.S. 455 (1990) (holding that state courts have concurrent jurisdiction over civil RICO claims); *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992) (holding that RICO has a proximate cause requirement to it); *Alexander v. U.S.*, 113 S. Ct. 2766 (1993) (holding that RICO's forfeiture provisions must be analyzed as to whether they resulted in an "excessive" penalty within the meaning of the Eighth Amendment's Exces-

United States v. Turkette,¹⁶¹ the first of those decisions, set the tone for the later Supreme Court cases. At issue was whether a wholly illegitimate enterprise could be charged as a RICO enterprise.¹⁶² The First Circuit, in *United States v. Turkette*, had held that RICO covered only legitimate enterprises.¹⁶³

The Court rejected this limitation based on the plain language of the statute. "Enterprise," the indictment observed, includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."¹⁶⁴ Further, Congress could have limited the definition of enterprise had it wanted to do so.¹⁶⁵ The Court relied on the statement of findings, part of the Organized Crime Control Act, the legislation in which RICO appears, and argued that it supported a broad reading of the "enterprise" element.¹⁶⁶

In *Russello v. United States*, the defendant arranged for arsonists to burn a building he owned.¹⁶⁷ He received in excess of \$300,000 from his insurance company.¹⁶⁸ At trial in the District Court for the Middle District of Florida, a jury convicted the defendant of violating § 1962(c). The court also ordered forfeiture of the insurance payments.¹⁶⁹ The sole issue before the Supreme Court was "whether profits and proceeds derived from racketeering constitute an 'interest' within the meaning of" § 1963(a).¹⁷⁰ A holding that profits and proceeds were not subject to forfeiture would have limited the effectiveness of RICO's forfeiture provision and allowed racketeers to benefit from their illegal conduct.

The Court concluded that the insurance proceeds were subject to forfeiture. First, the Court found unambiguous that the defendant "acquired the insurance proceeds at issue in violation of section 1962(c)."¹⁷¹ It then analyzed the meaning of "interest," a term not defined in RICO.¹⁷² The Court found that "[t]he ordinary meaning of 'interest' surely encompasses a right to profits or proceeds."¹⁷³ It

sive Fines Clause).

¹⁶¹ 452 U.S. 576 (1981).

¹⁶² *Id.* at 578.

¹⁶³ *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981).

¹⁶⁴ *Turkette*, 452 U.S. at 579 (citing 18 U.S.C. § 1961 (4)).

¹⁶⁵ *Id.* at 581.

¹⁶⁶ *Id.*

¹⁶⁷ *Russello v. United States*, 464 U.S. 16, 19 (1983).

¹⁶⁸ *Id.* at 18.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 20.

¹⁷¹ *Id.* at 21.

¹⁷² *Id.*

¹⁷³ *Id.*

also found that, had Congress intended to limit "interest" to an interest acquired in subsection 1962(a), an interest secured by investing in an enterprise, it would have done so expressly.¹⁷⁴

In both *Turkette* and *Russello* the Court found that, in enacting RICO, Congress had "provide[d] new weapons of unprecedented scope for an assault upon organized crime and its economic roots"¹⁷⁵ and had intended to separate organized crime from its economic power derived from its vast illegal profits.¹⁷⁶ However, the idea that RICO might be limited to organized crime was short lived.

In *Sedima, S.P.R.L. v. Imrex Co.*, the Court rejected limitations that the Second Circuit imposed on civil RICO.¹⁷⁷ The Second Circuit had held that a plaintiff could bring an action only after a defendant had been convicted and that the plaintiff could recover only for a "rackeeteering injury."¹⁷⁸ The Supreme Court rejected these limitations,¹⁷⁹ speaking about a broad purpose for RICO as "an aggressive initiative to . . . develop new methods for fighting crime,"¹⁸⁰ not just organized crime. The Court found few statements in the legislative history relating to the goal of fighting crime generally, but found this goal inherent in the "overall approach" of the statute and in statements made by RICO's opponents that RICO would be an "easy . . . weapon against 'innocent businessmen.'"¹⁸¹ The suggestion that RICO was limited to organized crime was dead after *Sedima*.¹⁸²

In *Sedima*, the Court did suggest that lower courts might limit RICO through the "pattern of racketeering" element. It observed, specifically, that the "'extraordinary' uses" to which plaintiffs had put RICO were a result of the "failure of Congress and the courts to de-

¹⁷⁴ *Id.* ("It undoubtedly was because Congress did not wish the forfeiture provision of § 1963(a) to be limited by rigid and technical definitions drawn from other areas of the law that it selected the broad term 'interest' to describe those things that are subject to forfeiture under the statute. Congress selected this general term apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth.").

¹⁷⁵ *Id.* at 26.

¹⁷⁶ *Id.* at 28. See also *United States v. Turkette*, 452 U.S. 576, 588-92 (1981).

¹⁷⁷ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985); *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984).

¹⁷⁸ *Sedima*, 741 F.2d at 482 ("racketeering injury" left undefined but was based on analogy to federal "antitrust injury").

¹⁷⁹ *Sedima*, 473 U.S. at 488-93.

¹⁸⁰ *Id.* at 498. The defendant did not argue specifically that courts should limit RICO to cases involving "organized crime," and the court's statement was contrary to the suggestion in *Turkette* and *Russello* that RICO might be so limited.

¹⁸¹ *Id.*

¹⁸² While the Court did not have to resolve whether RICO was limited to organized crime, much of its reasoning demonstrated that the argument would fail. That proposed limitation was finally laid to rest in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

velop a meaningful concept of 'pattern.'"¹⁸³

The Eighth Circuit attempted to do just that. In *Superior Oil Co. v. Fulmer*,¹⁸⁴ the Eighth Circuit found that a RICO plaintiff failed to prove that the defendants engaged in a pattern of racketeering. The Eighth Circuit cited the Court's dicta in *Sedima* that "pattern" requires a demonstration of "continuity plus relationship,"¹⁸⁵ something more than the mere commission of two predicate offenses. It found that pattern requires more than one continuing criminal scheme and observed that "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'"¹⁸⁶

Subsequently, the Supreme Court granted certiorari to review this issue in *H.J. Inc. v. Northwestern Bell Telephone*.¹⁸⁷ Contrary to the Eighth Circuit, the Supreme Court held that, although "pattern" required some relationship between the predicate offenses and some external organizing principle, it did not necessarily require multiple criminal schemes.¹⁸⁸ The Court did not rely exclusively on RICO's express language. Rather, it found in the legislative history that "pattern" required relationship plus continuity.¹⁸⁹ The Court relied on Title X of the Organized Crime Control Act to define "relationship" as "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."¹⁹⁰ Thus, like prior RICO cases, *H.J. Inc.* demonstrated the Court's willingness to read RICO broadly, rejecting yet again a lower court's effort at narrowing RICO's breadth.

In its next RICO decision and for the first time, the Court affirmed a lower court decision¹⁹¹ that narrowed RICO. In *Reves v. Ernst & Young*, plaintiff-investors purchased notes of a farmers' co-operative.¹⁹² A local accountant was hired to audit the Co-op.¹⁹³ The Co-op

¹⁸³ *Sedima*, 473 U.S. at 500.

¹⁸⁴ *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986).

¹⁸⁵ *Id.* at 256.

¹⁸⁶ *Id.* at 257 (citing *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 832 (N.D. Ill. 1985)).

¹⁸⁷ *H.J., Inc. v. Northwestern Bell Tel.*, 492 U.S. 229, 232 (1989).

¹⁸⁸ *Id.* at 238-40.

¹⁸⁹ *Id.* at 237-39.

¹⁹⁰ *Id.* at 240.

¹⁹¹ *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991).

¹⁹² *Reves v. Ernst & Young*, 113 S. Ct. at 1163 (1993); *Reves*, 937 F.2d at 1310 (giving a more detailed treatment of factual background).

¹⁹³ *Id.* at 1167. [C]o-Op retained Russell Brown to perform its 1981 financial audit—on January 2, 1982, Russell Brown and Company merged with Arthur Young and Company, which later became respondent Ernst & Young.

was in bad financial shape resulting from mismanagement and fraud of the Co-op's general manager and its accountant.¹⁹⁴ The Co-op's solvency at the time of the audit was dependent on how the auditors valued White Flame, a gasohol plant, sold to the Co-op by its general manager.

The investors based their RICO claim against the accounting firm on the firm's failure to tell the investors its conclusions relating to the insolvency of the Co-op and on its misleading presentation at the Co-op's 1982 and 1983 annual meetings.¹⁹⁵ The complaint alleged a violation of § 1962(c), arguing that the auditors "conducted or participated in the affairs of the Co-op, committing both mail fraud and securities fraud. . . ."¹⁹⁶ The district court granted the firm's motion for summary judgment and relied on the Eighth Circuit's holding in *Bennett v. Berg*,¹⁹⁷ requiring that a § 1962(c) defendant participate in the operation or management of the enterprise itself.¹⁹⁸ The court of appeals affirmed.¹⁹⁹

The Supreme Court affirmed the Eighth Circuit's judgment,²⁰⁰ effectively narrowing RICO somewhat. However, the Court's methodology was consistent with its prior RICO decisions. Its starting point was the language of the statute.²⁰¹ Section 1962(c) includes a curious repetition of the word "conduct," used both as a verb and as a noun. That section states that it is unlawful "for any person employed by or associated with any enterprise . . . to *conduct* or participate, directly or indirectly, in the *conduct* of such enterprise's affairs through a pattern of racketeering."²⁰²

According to the majority, the court could not read § 1962(c) to mean that an actor violated the section merely by participating in the

¹⁹⁴ *Id.* at 1166-67 ("In January 1980, White began taking loans from the Co-Op to finance the construction of a gasohol plant by his company, White Flame Fuels, Inc. By the end of 1980, White's debts to the Co-Op totalled approximately \$4 million. In September of that year, White and Gene Kuykendall, who served as the accountant for both the Co-Op and White Flame, were indicted for federal tax fraud.").

¹⁹⁵ *Reves*, 937 F.2d at 1319 ("Erwin did not disclose the following: Arthur Young's conclusion that the Co-op had always owned White Flame; that as a result of this conclusion White Flame was valued at \$4.5 million; . . . or that a write-down of White Flame to its fair market value would wipe out the Co-op's net worth.").

¹⁹⁶ *Id.* at 1323.

¹⁹⁷ *Bennett v. Berg*, 710 F.2d 1361 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008 (1983).

¹⁹⁸ *Reves*, 113 S. Ct. at 1168.

¹⁹⁹ *Reves*, 937 F.2d at 1339.

²⁰⁰ *Reves*, 113 S. Ct. at 1174.

²⁰¹ *Id.* at 1169. If any of the Court's RICO cases is inconsistent with its other decisions, it is *Reves*, not *Scheidler*. There, the Court engaged in strained analysis to support its questionable conclusion that its interpretation was supported by RICO's plain language.

²⁰² 18 U.S.C. § 1962(c) (1988) (emphasis added).

affairs of the enterprise. The Court held that such a reading would render superfluous the noun "conduct."²⁰³ That is, if mere participation were enough, the statute would have made it unlawful for the person to "participate in the affairs of the enterprise,"²⁰⁴ not "participate in the conduct of the affairs of the enterprise." Hence, because Congress used "conduct" as a noun as well, "'conduct' . . . include[s] an element of direction."²⁰⁵

The Court also had to define "participate."²⁰⁶ That term might mean nothing more than to render some assistance and, therefore, might not require any management or control over the affairs of an enterprise. First, the Court found that "participate" means "to take part in."²⁰⁷ Second, when read in context, one has to participate in the conduct of the affairs. But that is something less than a requirement that one conduct the affairs of the enterprise.²⁰⁸ In sum, the Court found "that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required."²⁰⁹

In *Scheidler*, as in its prior RICO decisions, the Court's primary focus was on the plain language of the statute, construed liberally to give effect to RICO's broad remedial purposes.²¹⁰ In light of the clear and unambiguous language, the Court had little need to consult legislative history. Just as in its other RICO cases, the Court recognized that the legislative history provides some support for both sides of the dispute, and, hence, is not conclusive on RICO's meaning.²¹¹

In sum, Advocate Blakey faulted the Supreme Court for two reasons: its adoption of a new methodology and its holding rejecting a narrowing interpretation of RICO's substantive provisions. The Court's decision in *Scheidler* does not demonstrate adherence to a new philosophy. It follows the approach the Court took in its previous substantive RICO decisions (and other statutory construction cases as well).²¹² This approach relies primarily on the examination of the ex-

²⁰³ *Reves*, 113 S. Ct. at 1169.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1170.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 805 (1994).

²¹¹ *Id.* at 806.

²¹² A survey of Supreme Court cases decided before 1986 that give preliminary reliance to plain language: *Carchman v. Nash*, 473 U.S. 716 (1985); *Marek v. Chesny*, 473 U.S. 1 (1985); *United States v. National Bank of Commerce*, 472 U.S. 713 (1985); *United States v. Albertini*, 472 U.S. 675 (1985); *Lowe v. Sec. and Exch. Comm'n*, 472 U.S. 181 (1985); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524 (1985); *United States*

press language of the statute. In the RICO context, this approach has been generally agreed upon with few dissents. Only *Sedima* deeply divided the Court and, even there, the disagreement did not focus on methodology.²¹³ Justices with widely different philosophies and politics²¹⁴ have shown remarkable unanimity with regard to RICO's meaning.

Advocate Blakey's argument, that the RICO enterprise should have been limited, was plausible. But that has been true in other RICO cases when the Court has been faced with efforts by lower courts to give RICO some plausible limitation. What is surprising about "The RICO Racket" is that Blakey is arguing for a narrower interpretation of RICO's statutory language. After all, it is Professor Blakey who has argued that

RICO says "any person"—not any person whose name happened to end with a vowel—not any person whose collar happened to be blue—RICO applies to anyone with a white collar—or a blue collar—or no collar at all—or—and let me go further and take this example of anti-abortionists who demonstrate—people whose collars are turned around. It makes no difference if you walk in a doctor's office whether your name is O'Neill or Corleone: if you engage in a pattern of extortion against the good doctor, RICO applies to you. No inculcation for Italians and no exculpation for Catholics.²¹⁵

The Supreme Court concurred with this view in *Scheidler*.

VI. OXEN GORED

Recently, advocates of RICO reform have found no friend in Rob-

v. Locke, 471 U.S. 84 (1985); Florida Power & Light v. Lorion, 470 U.S. 729 (1985); Park'n Fly v. Dollar Park and Fly, 469 U.S. 189 (1985); Block v. North Dakota, 461 U.S. 273 (1983); AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980); Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977); Tidewater Oil v. United States, 409 U.S. 151 (1972); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972); Shapiro v. United States, 335 U.S. 1 (1948); Helvering v. Griffiths, 318 U.S. 371 (1943); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933); George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929); Myers v. United States, 272 U.S. 52 (1926); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926).

²¹³ *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993) (7-2 decision); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) (9-0 decision); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) (Marshall, Brennan, Blackman, & Powell, JJ., dissenting) (5-4 decision); *Russello v. United States*, 464 U.S. 16 (1983) (9-0 decision); *United States v. Turkette*, 452 U.S. 576, 593 (1981) (Stewart, J., dissenting) (8-1 decision).

²¹⁴ "New Textualism" is a phrase coined by Professor William Eskridge to describe Justice Scalia's philosophy of statutory construction. See, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). Scalia considers only statutory language, not legislative history. *Id.* at 661-62. As developed in this section, the Court has consistently relied primarily on the plain language in its RICO cases, before and after Scalia was appointed to the Court. Further, the Court in *Scheidler* does not reject reliance on legislative history; it simply found the plain language unambiguous.

²¹⁵ G. Robert Blakey et al., *What's Next?: The Future of RICO*, 65 NOTRE DAME L. REV. 1073, 1080 (1990).

ert Blakey. His criticism has been sharp.²¹⁶ He has suggested, for example, that proponents of reform are motivated by their representation of special interests.²¹⁷ Even in "The RICO Racket," he could not resist a swipe at the ACLU, suggesting that the ACLU had failed to protect Scheidler against an attack upon his first amendment rights.²¹⁸

This essay has attempted to hold up Advocate Blakey's accusations to careful scrutiny and to demonstrate Blakey's failure to adhere to his previous position. Apparently, now that he has represented a person impaled on RICO's sharp sword, he has developed new insight into some of the mischief that it can cause.

Blakey is right that the ACLU and other RICO critics should be concerned if the government uses RICO as a tool to suppress First Amendment rights. But Blakey has rejected a number of other important claims over RICO's proper scope.²¹⁹ He has denigrated RICO's foes and failed to recognize that they can be motivated by legitimate concerns about its misuse,²²⁰ concerns other than those relating to the First Amendment.

This section reviews a number of principles fundamental to traditional notions of fairness and of separation of powers that overenthusiastic enforcement of RICO's open-ended provisions has impaired. While RICO's critics come in many different shapes, some with their own agenda,²²¹ this section suggests, contrary to Blakey's intemperate

²¹⁶ Timothy A. Ita, *RICO—Criminal Forfeiture of Proceeds of Racketeering Activity Under RICO*: Russell v. United States, 104 S. Ct. 296 (1983), 75 J. CRIM. L. & CRIMINOLOGY 893, 920 n.126 (1984) (citing G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 296 n.151 (1982)) ("Blakey has noted and harshly criticized the fact that the ABA House of Delegates, at the urging of the Section on Criminal Justice, adopted a recommendation that the liberal construction clause be repealed for both criminal and civil proceedings."). See also G. Robert Blakey & Scott D. 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, 575 (1987) (Blakey's criticisms of Barry Tarlow). For Blakey's criticisms of L. Gordon Crovitz, see Blakey et al., *supra* note 215, at 1084.

²¹⁷ "[A] witness, representing Bristol-Myers Co. and testifying on antitrust legislation in the 96th Congress, stated that retroactivity was unconstitutional and unfair." Blakey & Perry, *supra* note 130, at 923 (citing *Restoring Effective Enforcement of the Anti-Trust Laws: Hearings on H.R. 2060 and H.R. 2204 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 384-96 (1979) (testimony of Phillip A. Lacovara)). "Now, the same witness testifying on behalf of other interests, says that such legislation is constitutional and fair." *Id.* at 922-24 (also citing testimony of Phillip A. Lacovara).

²¹⁸ Blakey, *supra* note 2, at 61.

²¹⁹ See *supra* note 216.

²²⁰ *Id.*

²²¹ Congressman William J. Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 640 ("there is a long list of prominent organizations that have petitioned Congress to

criticism, that RICO's critics certainly can invoke legitimate, principled concerns about RICO.

As discussed, Congress enacted RICO without attempting to define "organized crime" and without including careful narrowing language tying its substantive provisions to its original narrow goals.²²² Liberal interpretation of RICO's provisions has expanded its use well beyond areas that Congress considered and endorsed.²²³ Depending on the nature of the underlying conduct, RICO can bring into federal court what would otherwise be a matter of local law.²²⁴

RICO contains a number of general terms that had little or no established juridical meaning.²²⁵ Courts could have interpreted those terms narrowly, but for the most part, they did not.²²⁶ As a result, a simple criminal conspiracy to violate state law may become a federal crime, subject to RICO's liberal procedural rules and stringent criminal penalties.²²⁷

Because of its breadth, RICO as currently interpreted can lead to

amend civil RICO. They include: The American Bar Association, National Association of Manufacturers, American Civil Liberties Union, United States Chamber of Commerce, AFL-CIO, American Institute of Certified Public Accountants, Securities Industry Association, American Bankers Association, Independent Bankers Association of America, Future Industries Association, American Council of Life Insurance, Credit Union National Association, Grocery Manufacturers of America, National Automobile Dealers Association, State Farm Insurance Companies, Alliance of American Insurers, and The American Financial Services Association").

²²² See *supra* notes 91 to 111 and accompanying text.

²²³ "Just as RICO's use in commercial litigation has expanded, so has criticism of its expanded use." Ellen M. Faro, *Telemarketing Credit Card Fraud: Is RICO One Answer?*, 1990 U. ILL. L. REV. 675, 706 (1990) (citing Jost, *The Fraudulent Case Against RICO*, CAL. L., May 1989, at 49.). "Business and professional groups say that RICO is an invitation to blackmail." *Id.*, (citing NAT'L L.J., Sept. 28, 1987, at 18, col. 1.). But see also RICO, *supra* note 19 (suggesting that Congress has in effect endorsed the expanded use of RICO); Crovitz, *supra* note 99.

²²⁴ "[S]tate evidentiary rules more restrictive than their federal counterparts might make state prosecutions difficult, providing prosecutors with a motive to bring federal charges instead." RICO, *supra* note 19, at 924 n.27. "RICO makes it possible (at least where two or more offenses have been committed) to bring state bribery charges against corrupt local officials in federal court . . ." RICO, *supra* note 19, at 743. See also Robert T. Hawkes, Note, *The Conflict over RICO's Private Treble Damages Action*, 70 CORNELL L. REV. 902, 914 n.89 (1985) (citing Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 486 (2d Cir. 1984) ("expansive interpretation of RICO allows plaintiffs to bring into federal courts many claims formerly subject only to state jurisdiction")).

²²⁵ *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.), cert. denied, 439 U.S. 953 (1978) ("[W]e are convinced that, through RICO, Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales with a new statutory concept: the enterprise.").

²²⁶ See *supra* notes 161 to 211 and accompanying text.

²²⁷ *United States v. Licavoli*, 725 F.2d 1040, 1046-47 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). See generally Atkinson, *supra* note 116; Dennis, *supra* note 19 (discussing their guidelines so that they do not criminalize local conspiracies).

disproportionate punishment. For example, assume that a defendant ran a used car lot and on several occasions turned back the odometer of cars on her lot. After she sold the cars, she mailed the requisite paper work necessary to transfer title to the cars. She would be guilty of a number of counts of mail fraud and subject to criminal penalties for that offense.²²⁸ Those penalties represent the legislature's view of the seriousness of mail fraud.²²⁹ But she may also be subject to a RICO indictment.²³⁰ RICO may add another sentence on top of the mail fraud sentences and may lead to forfeiture of her business.²³¹ But the RICO sentence may be imposed despite the fact no social harm in addition to the harm caused by the underlying crimes is shown.²³²

RICO was justified on the ground that organized crime posed a significant additional social harm beyond that posed by single criminal actors or local conspirators.²³³ According to the Katzenbach Commission, organized crime represented a threat to the "basic economic

²²⁸ *Schmuck v. United States*, 489 U.S. 705 (1989).

²²⁹ 18 U.S.C. § 1341 (1994) (Those convicted of mail fraud "shall be fined according to this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.").

²³⁰ Under liberal RICO precedent, all of the elements of a RICO violation are present. The use of the mails obviously satisfies the minimal requirement of affecting interstate commerce. *Perez v. United States*, 402 U.S. 146 (1971) (giving liberal interpretation of interstate commerce); *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981); *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980). The car dealership would serve as the RICO enterprise. See 18 U.S.C. § 1961(4) (1994) ("enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity). Consistent with *Reves*, given that the sales of the vehicle are the business of the car dealership, it is obvious that she is conducting the affairs of the enterprise. As long as the defendant committed the two acts of mail fraud, that aspect of pattern is satisfied. Whether *H.J. Inc.'s*, *H.J. Inc. v. Northwestern Bell Tel.*, 492 U.S. 229 (1989), continuity and relationship test may pose the only hard question. Relationship is almost certainly met because of the similarity of the crimes. *Id.* at 239-243. Continuity would be satisfied if charges were brought shortly after the car dealer began her activity. *Id.* Otherwise, the government would have to show that the activities took place over a substantial period of time. *H.J.* left largely undefined the relevant time frame.

²³¹ 18 U.S.C. § 1963 (1994) (criminal penalty and forfeiture provision).

²³² As indicated in the Task Force Report, the Mafia created a greater social harm than that caused by other kinds of crime. Organized crime represents a threat to the economic well being of America. TASK FORCE REPORT, *supra* note 72. Senator McClellan expressed that concern in Congress. See, e.g., 115 CONG. REC. 5874-75 (1969). But the Supreme Court rejected an organized crime requirement in *H.J. Inc.*, 492 U.S. at 229. It has also held that RICO applies to illegitimate as well as legitimate businesses. *United States v. Turkette*, 452 U.S. 576 (1981). Thus, RICO now applies without a showing of any particularized social harm greater than the harm caused by the underlying predicate offenses.

²³³ TASK FORCE REPORT, *supra* note 72, at 29-30 (distinguishing between ordinary criminals and organized criminal characteristics and tendencies).

and political traditions and institutions" of the United States.²³⁴ Congress set RICO's penalties to reflect the social harm of organized crime.²³⁵ Making RICO available in "nickel and dime" cases exposes a defendant to penalties graded according to a much greater harm.

RICO poses another problem: given its "flexibility" or amorphous nature, it results in the unequal treatment of similarly situated defendants. Consider two defendants who commit identical crimes, for example, bribery. The government could charge one only with bribery, and the other with bribery and a violation of RICO.²³⁶ Although this inequality does not violate the Constitution,²³⁷ principles of proportionality and equality are fundamental to the criminal justice system.²³⁸ And that system has aimed to achieve those values above the minimum constitutional requirements.

Related to both of the previous concerns about RICO is the amount of discretion entrusted to the government. The Department of Justice (DOJ) has recognized the broad sweep of RICO and has promised self-restraint in its use.²³⁹ However, its guidelines are not legally binding²⁴⁰ and, despite its attempts at restraint,²⁴¹ the DOJ has

²³⁴ *Id.* at 25.

²³⁵ See, Atkinson, *supra* note 116, at 16-17 (discussing the penalty provisions of RICO).

²³⁶ *United States v. Fineman*, 434 F. Supp. 197, 202 (E.D. Pa. 1977). 18 U.S.C. § 201 (1988) (federal bribery statute). Non-RICO cases where the defendant engaged in multiple acts of bribery: *Dixon v. United States*, 465 U.S. 482 (1984); *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974).

²³⁷ Defendants who have their sentence increased because their conduct violates RICO almost certainly cannot raise a proportionality argument in light of the Supreme Court's begrudging approach in that area. In one instance, *Solem v. Helm*, 463 U.S. 277 (1983), the Court found that a life sentence without benefit of parole was disproportionate to the underlying offense (passing a no count check by a multiple offender) in violation of the eighth amendment's prohibition against cruel and unusual punishment. But the Court cut back on *Solem v. Helm* in *Harmelin v. Michigan*, 501 U.S. 957 (1991), where a majority of the Court found that a similar sentence for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance" did not violate the eighth amendment. While four dissenters argued that the sentence was unconstitutional, Justice Kennedy, concurring for himself and Justices O'Connor and Souter, distinguished *Helm*, thereby resisting the plurality's effort to overrule it, but with the effect of narrowing instances in which a criminal sentence may be found unconstitutional. Further, in *Hutto v. Davis*, 454 U.S. 370 (1982), the Court upheld a term of imprisonment of 40 years for possession with intent to distribute and distribution of marijuana. In light of *Harmelin* and *Davis*, it is doubtful that a term of imprisonment under RICO would be sufficiently disproportionate to violate the Eighth Amendment.

See also *Jones v. White*, 992 F.2d 1548, 1571 (11th Cir. 1993) (holding that defendant must show selective prosecution and selection motivated by "constitutionally invidious" criteria like race or religion).

²³⁸ "The sentencing decision has been seen, within limits set by a vague principle of proportionality and by concrete maximum sentences devised by legislatures in correlation to the seriousness of particular offenses." *RICO*, *supra* note 19, at 936.

²³⁹ See generally *Dennis*, *supra* note 19, at 651.

²⁴⁰ *RICO*, *supra* note 19, at 720 ("These guidelines, however, are purely self-imposed and

not always succeeded.²⁴² Granting that much discretion to the prosecutor, even in a system that allows wide prosecutorial discretion, is troubling—especially when their decisions are made without explanation to the public.²⁴³ Prosecutors might grandstand by bringing rack-teering charges against prominent defendants.²⁴⁴

Professor Lynch has argued that Congress intentionally created sweeping RICO provisions, and, therefore, that RICO's broad construction is not simply a result of liberal construction by federal courts.²⁴⁵ In addition, Lynch has argued that Congress has endorsed RICO's broad application when it has considered legislation amending or attempting to amend RICO.²⁴⁶ But even if Congress is responsible for RICO's breadth, Congress has never debated the desirability of many of its consequences.²⁴⁷ For example, Congress has never rationalized the federalism questions implicated by converting state fraud claims into federal causes of action.²⁴⁸ It has not debated whether treble damages and attorneys' fees are desirable in a wide array of federal cases.²⁴⁹ Indeed, those sanctions were appropriate to combat the evil empire identified by the Katzenbach Commission,²⁵⁰ but may be inappropriate in a wide variety of lesser, though culpable, cases.

The Katzenbach Commission urged new procedural and eviden-

do not have the force of law.") (citing U.S. Attorney's Manual at 9-110.200 (Mar. 9, 1984)). See also *United States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir. 1987) (indicating that RICO Guidelines are not enforceable); *United States v. Caceres*, 440 U.S. 741 (1979).

²⁴¹ Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 714 (1990) ("These guidelines are not binding on the government, but the Department has offered them as examples of the self-restraint it exercises in bringing RICO prosecutions.").

²⁴² *Top New Orleans Law Enforcer on Trial*, N.Y. TIMES, June 22, 1990, at B5 (describing John Volz, the United States Attorney in New Orleans, as bringing charges against Mr. Connick because of "a personal vendetta").

²⁴³ 2 LAFAVE & ISRAEL, CRIMINAL PROCEDURE §13.3 (1984) (commenting that under the "separation of powers doctrine," generally "courts do not interfere with [the] exercise of discretion by the executive branch of government") (citing *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973)). See also *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970).

²⁴⁴ *Top New Orleans Law Enforcer on Trial*, *supra* note 242, at B5.

²⁴⁵ *RICO*, *supra* note 19, at 773-774.

²⁴⁶ *Id.* at 773-74.

²⁴⁷ Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1112 n.62 (1982) ("the addition of the private right of action did not generate discussion in the House or the Senate.").

²⁴⁸ *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983) (en banc) *cert. denied*, 464 U.S. 1008 (1984) (courts should not restrict broad congressional action in the name of federalism).

²⁴⁹ Michael N. Glanz, Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1522 (1983).

²⁵⁰ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) (commonly known as the report reflecting the Katzenbach Commission recommendations).

tiary rules needed to fight the special evil of organized crime.²⁵¹ For example, under traditional rules of evidence, a defendant's prior crimes are inadmissible, not because they are irrelevant but because they are too prejudicial.²⁵² Courts and legislatures have worked out a number of exceptions to this general rule, but the rule remains intact.²⁵³ RICO makes at least part of a defendant's criminal record an essential element of the prosecutor's case.²⁵⁴ Nothing in the legislative history indicates that Congress intended to abandon traditional evidentiary rules. RICO's special rules were necessary to meet the challenge of elusive defendants like "Lucky" Luciano, who could immunize themselves by directing mob operations indirectly and who might be hard to convict because they wore the patina of respectability.²⁵⁵ Putting defendants on trial for their career as criminals was necessary to pierce the veneer of respectability.²⁵⁶

When Professor Blakey and other RICO proponents argue that the government can use RICO against only wrongdoers,²⁵⁷ they set up a strawman. The criminal law is often concerned not with simple questions of guilt and innocence, but more typically, with the offense of which the defendant is guilty, and, apart from the guilt of the defendant, whether the defendant received fair procedure. Broad use of RICO rides roughshod over those concerns.

VII. CONCLUSION

Contrary to Advocate Blakey's sharp criticism, the decision in *Scheidler* does not depart from Supreme Court precedent.²⁵⁸ It is hardly evidence of a new philosophy; it is more of the Court's interpreting RICO broadly. The plaintiffs in *Scheidler* demonstrated one more "creative use" of RICO, but hardly the first or the last.²⁵⁹ Despite Advocate Blakey's criticism, there has been no stronger advocate for this kind of creativity than Professor Blakey.²⁶⁰

Advocate Blakey was correct that RICO is strong medicine for a

²⁵¹ See *supra* notes 90 to 91.

²⁵² *Guide to RICO Reform*, *supra* note 19, at 786. See also FED. R. EVID. 404(b).

²⁵³ *Guide to RICO Reform*, *supra* note 19, at 786. See also FED. R. EVID. 404(b).

²⁵⁴ *Guide to RICO Reform*, *supra* note 19, at 786.

²⁵⁵ TASK FORCE REPORT, *supra* note 72, at 49, 56.

²⁵⁶ *Id.* at 34.

²⁵⁷ Blakey et al., *supra* note 130, at 1084 ("If ever there was a case outside of the organized crime area that seemed appropriate for RICO prosecution, it is the case against Milken & Drexel.") (citing C. BRUCK, *THE PREDATORS' BALL* 370 (1989)).

²⁵⁸ See *supra* text accompanying notes 157 to 214.

²⁵⁹ Crovitz, *supra* note 99, at 1065-66 (describing the broad uses of RICO); Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441, 483 (1988).

²⁶⁰ See *supra* text accompanying notes 130 to 143.

person like Joseph Scheidler, who may face severe criminal penalties far out of proportion with the culpability of his underlying conduct.²⁶¹ Advocate Blakey was also correct that people should be concerned about the government's ability to use RICO in cases like *Scheidler* because a decision to make Scheidler a RICO defendant is singularly within the discretion of the prosecutor and without clear congressionally defined guidelines.²⁶² Contrary to Blakey's opinion, though, Scheidler is like any number of other defendants who currently face RICO criminal charges and civil actions.

Just as Advocate Blakey accuses the ACLU for lacking principle in not defending Scheidler,²⁶³ Blakey is certainly open to criticism for his own inconsistency. For several years, the Supreme Court has done exactly what Professor Blakey has insisted it should do—it has read RICO broadly with primary reliance on the plain language of the statute.²⁶⁴ Blakey's current criticism is flatly inconsistent with the position that he has espoused in the past.²⁶⁵ As Blakey himself has noted: "Apparently, perspective is powerfully influenced by the table at which one eats."²⁶⁶

²⁶¹ These penalties stem from the mechanics of RICO's provisions—if conduct is within *civil* RICO, it is automatically within RICO's *criminal* provisions, as well. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986). See *supra* text accompanying notes 228 to 235. RICO's criminal provisions impose harsh penalties, even when the conduct was not the type of conduct that Congress had in mind when it enacted RICO. Still, Scheidler should be responsible both civilly and criminally for his conduct. Michael Vitiello, *Baby Jane Doe: Stating a Cause of Action Against the Officious Intermeddler*, 37 HASTINGS L.J. 863 (1986) (urging use of traditional tort law against pro life defendants interfering with plaintiffs' privacy rights). The only question that remains is whether he deserves the severe criminal penalties under RICO.

²⁶² See *supra* text accompanying notes 239 to 244.

²⁶³ See *supra* text accompanying notes 63 to 66.

²⁶⁴ See *supra* text accompanying notes 161 to 215.

²⁶⁵ See *supra* text accompanying notes 129 to 143.

²⁶⁶ Blakey & Perry, *supra* note 130, at 924.