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

Michael Vitiello*

I. INTRODUCTION: ADVOCATE BLAEY AND THE SUPREME COURT

According to disappointed advocate 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.” 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.

Thereafter, as part of what Blakey calls a strategy of intimidation, the National Organization for Women (NOW) sued Scheidler, among others, alleging violations of RICO. 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).


3 Id.

4 Id.

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

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. 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?

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, 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. 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. He suggests, too, that RICO is designed to criminalize Vito Corleone's extortionist tactics, but not Dr. Spock's

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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.\textsuperscript{14}

This essay examines those charges. It reviews Blakey's specific criticisms of the Court's decision.\textsuperscript{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 \textit{Scheidler} decided only a narrow question concerning the meaning of "enterprise"\textsuperscript{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.\textsuperscript{17} Further, in assessing Blakey's claim that \textit{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 \textit{Scheidler} represents a different approach to statutory construction is unfounded.\textsuperscript{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.\textsuperscript{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,\textsuperscript{20} and he has shown scorn for those who complain when their constituencies have been impaled on RICO.\textsuperscript{21} By contrast, in "The RICO Racket," it is

\textsuperscript{14} Id. at 62.

\textsuperscript{15} See infra notes 23 to 29 and accompanying text.

\textsuperscript{16} See infra notes 30 to 62 and accompanying text (discussing the holding of \textit{Scheidler}).

\textsuperscript{17} See infra notes 67 to 156 and accompanying text.

\textsuperscript{18} See infra notes 157 to 215 and accompanying text.


\textsuperscript{20} See infra notes 130 to 150 and accompanying text.

\textsuperscript{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.\textsuperscript{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.'"\textsuperscript{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.\textsuperscript{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."\textsuperscript{25} Hence, Blakey claims, RICO was intended to reach only "organized commercial exploitation,"\textsuperscript{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.'"\textsuperscript{27} He claims that the Court has allowed NOW to turn RICO into a "weapon of terror against First Amendment freedoms."\textsuperscript{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."\textsuperscript{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-

\textsuperscript{22} See infra notes 212 to 257 and accompanying text.
\textsuperscript{23} Blakey, supra note 2, at 61.
\textsuperscript{24} Id. at 62.
\textsuperscript{25} Id.
\textsuperscript{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 (1998) [hereinafter Health Care].
\textsuperscript{27} Blakey, supra note 2, at 76.
\textsuperscript{28} Id.
\textsuperscript{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.\(^3\) 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.\(^3\) 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.\(^3\)

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 Rehnquist\(^3\) wrote the opinion in *Scheidler* and did so for a unanimous court.\(^3\)

\(^3\) 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).

\(^3\) See discussion *infra* notes 55 to 56.


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

The Supreme Court granted certiorari to resolve an inter-circuit conflict whether a RICO enterprise must have an economic motive. The Supreme Court reversed the Seventh Circuit. 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. 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."

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. Therefore, a subsection (c) enterprise also need not be profit-motivated.

The Seventh Circuit concluded, as had the Second Circuit in National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 614 (7th Cir. 1992).
that the legislative history supported an economic motive element. 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."

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. Second, the Supreme Court previously refused to limit RICO's application to the specific evil that gave rise to RICO. 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."

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.'" 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. At that stage, the district court must assume that all of the non-moving party's allegations are true. The complaint alleged that the defendants were not peaceful demonstrators. For example, the plaintiffs al-

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)).
49 Blakey, supra note 2, at 61.
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. 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."

Second, the Supreme Court did not decide whether the various defendants' conduct in fact amounted to extortion. 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.

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

\[\text{id.}^{53}\]

\[\text{id.}^{54}\] at 615 n.5.


\[\text{id.}^{56}\] 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).
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. 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. Thus, that question remains open.

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.

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.

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).

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. 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. 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. As noted, the ACLU filed an amicus brief in support of neither party. 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. 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

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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.


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.\textsuperscript{66}

IV. Is There a "World of Difference Between Don Corleone . . . and Benjamin Spock?"\textsuperscript{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, \textit{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,"\textsuperscript{68} possibly suggesting that Congress intended RICO to target specific classes of defendants. For years, litigants have argued unsuccessfully for this kind of limitation.\textsuperscript{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 \textit{Scheidler} that RICO addresses only entities like La Cosa Nostra, motivated by financial gain.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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-

\begin{thebibliography}{99}
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Blakey, \textit{supra} note 2, at 61, 62.
\item \textsuperscript{68} Id.
\item \textsuperscript{70} Blakey, \textit{supra} note 2, at 61, 62, 76.
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. A few years later, Joseph Valachi, Mafioso turned informant, confirmed police suspicions about the purpose of that meeting specifically and the structure and operation of La Cosa Nostra generally. Both Valachi’s testimony and a background check of the various participants at the New York meeting suggested the wide array of criminal activity in which the mob engaged.

With the waning of Communism as a threat in the 1960s, the F.B.I. paid increasing attention to the Mafia threat. 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.

The Commission’s report was an important step towards passage of RICO. 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.” Dean Cressey, a consultant to the Commission, drafted a
resource paper that was more explicit—naming names of particular
Mafiosi and uncovering specific roles within the organization of the
Mafia.\textsuperscript{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 com-
petition,"\textsuperscript{85} and gain unfair economic advantage over legitimate busi-
nesses.\textsuperscript{86} It also gained a stranglehold on unions, destroying union
democracy and providing the mob with extortionate power over the
national economy.\textsuperscript{87} Further, organized crime members bought off
law enforcement officers and politicians.\textsuperscript{88} The primary evil of the
Mafia, however, was its ability to take over and invest in legitimate
businesses.\textsuperscript{89}

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

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

\textsuperscript{84} Donald Cressey, \textit{The Functions and Structure of Criminal Syndicates}, in \textit{Task Force Report}, supra note 72, at 52. 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, \textit{Organized Crime: 25 Years After Valachi: Hearing Before the Permanent Subcomm. on Investigations of the Committee on Governmental Affairs}, 100th Cong., 2d Sess. (1988).


\textsuperscript{86} \textit{RICO}, supra note 19, at 729, 758.

\textsuperscript{87} Task Force Report, supra note 72, at 5. See also G. Robert Blakey & Ronald Gold-

\textsuperscript{88} Task Force Report, supra note 72, at 2, 6. See generally \textit{RICO}, supra note 19, at 736.

\textsuperscript{89} \textit{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. \textit{Id.} at 678-82.

\textsuperscript{90} The laws of conspiracy have provided an effective substantive tool with which to con-

\textsuperscript{91} \textit{Id.} at 16 ("[T]oo few witnesses have been produced to prove the link between crimi-
nal group members and the illicit activities that they sponsor.").
Commission's recommendations. He left no doubt about the evil that he sought to eradicate, the monolithic "Mafia" and its infiltration of legitimate business.

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. He identified the same evils—the Mafia and its threat to legitimate business—that Senator Hruska had identified.

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

Instead, Congress adopted a functional approach to defining organized crime. 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. Second, in § 1962(b), RICO makes it unlawful for a person to gain an interest in an enterprise through a pattern of racketeering. 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...

\[\text{footnotes}...\]
through a pattern of racketeering.\textsuperscript{105} Sections 1962(a) and (b) conform most closely to the specific evil identified by the Katzenbach Commission and by Senators McClellan and Hruska.\textsuperscript{106} RICO would have been a minor and unimportant statute had Congress not added § 1962(c).\textsuperscript{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.\textsuperscript{108} That is the functional, rather than structural, approach to defining organized crime.\textsuperscript{109} But instead of enumerating only the stereotypical Mafia crimes, like gambling, prostitution, loan sharking, extortion, and traffic in narcotics,\textsuperscript{110} Congress included a wide array of federal offenses, including mail and wire fraud and securities fraud.\textsuperscript{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.\textsuperscript{112}

From the beginning of the legislative process, Congress was concerned with organized crime and its infiltration of legitimate businesses.\textsuperscript{113} 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.\textsuperscript{114}

\begin{footnotes}
\item[119] 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 44. 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).
\item[114] United States v. Turkette, 452 U.S. 576, 592-93 (1981) (“Undoubtedly, the infiltration of legitimate businesses was of great concern”).
\item[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.
\end{footnotes}
For several years after its passage, RICO was seldom used either by prosecutors or by civil RICO plaintiffs. 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. RICO also provides access to federal court jurisdiction in cases in which federal district court may provide procedural advantages. Prosecutors gain advantages as well, including favorable procedural and evidentiary rules applicable in RICO cases and heightened criminal penalties, including forfeiture of assets.

RICO's "slow start" may be attributed to the belief that it was limited to organized crime cases and to infiltration of legitimate businesses. 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; Courts of appeals held that RICO was inapplicable to wholly illegitimate enterprises; 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; and other courts found that a pattern of racketeering was not established solely by showing that the defendant committed two predi-

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118 Taflin 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).


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


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. 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. 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.

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.

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. 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

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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), rev'd, 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 699, 899 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), rev'd, reh'g denied.


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. And there has been no more aggressive advocate for the expansive application of RICO than Professor Blakey. His key role in drafting the legislation has given him special prominence in the debate.

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. 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. 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.

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. Blakey has argued repeatedly that Congress deliberately drafted RICO to apply to everyone who violated the statute.

Blakey has summarized his own position on the proper interpre-

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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).
135 Blakey & Perry, supra note 130, at 868 (citing Sedima v. Imrex Co., 473 U.S. 479, 497-98 (1985)).
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).
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.
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-
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

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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.

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


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.").


156 Blakey & Gettings, supra note 130, at 1085 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.'" 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 visibility and complex terminology, 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.

157 Blakey, supra note 2, at 76.
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. 1165 (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. 148 (1987) (holding that civil RICO claims are arbitrageable); Taflin v. Levit, 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, 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. The First Circuit, in United States v. Turkette, had held that RICO covered only legitimate enterprises.

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." Further, Congress could have limited the definition of enterprise had it wanted to do so. 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.

In Russello v. United States, the defendant arranged for arsonists to burn a building he owned. He received in excess of $300,000 from his insurance company. 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. The sole issue before the Supreme Court was "whether profits and proceeds derived from racketeering constitute an 'interest' within the meaning of" § 1963(a). 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)." It then analyzed the meaning of "interest," a term not defined in RICO. The Court found that "[t]he ordinary meaning of 'interest' surely encompasses a right to profits or proceeds."
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.\textsuperscript{174}

In both \textit{Turkette} and \textit{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”\textsuperscript{175} and had intended to separate organized crime from its economic power derived from its vast illegal profits.\textsuperscript{176} However, the idea that RICO might be limited to organized crime was short lived.

In \textit{Sedima, S.P.R.L. v. Imrex Co.}, the Court rejected limitations that the Second Circuit imposed on civil RICO.\textsuperscript{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 “racketeering injury.”\textsuperscript{178} The Supreme Court rejected these limitations,\textsuperscript{179} speaking about a broad purpose for RICO as “an aggressive initiative to . . . develop new methods for fighting crime,”\textsuperscript{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.’”\textsuperscript{181} The suggestion that RICO was limited to organized crime was dead after \textit{Sedima}.\textsuperscript{182}

In \textit{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-

\textsuperscript{174} \textit{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.”).

\textsuperscript{175} \textit{Id.} at 26.

\textsuperscript{176} \textit{Id.} at 28. \textit{See also} United States v. Turkette, 452 U.S. 576, 588-92 (1981).


\textsuperscript{178} \textit{Sedima}, 741 F.2d at 482 (“racketeering injury” left undefined but was based on analogy to federal “antitrust injury”).

\textsuperscript{179} \textit{Sedima}, 473 U.S. at 488-95.

\textsuperscript{180} \textit{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 \textit{Turkette} and \textit{Russello} that RICO might be so limited.

\textsuperscript{181} \textit{Id.}

\textsuperscript{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 \textit{H.J., Inc. v. Northwestern Bell Tel. Co.}, 492 U.S. 229 (1989).
velop a meaningful concept of ‘pattern.’”

The Eighth Circuit attempted to do just that. In Superior Oil Co. v. Fulmer, 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,” 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.’”

Subsequently, the Supreme Court granted certiorari to review this issue in H.J. Inc. v. Northwestern Bell Telephone. 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. The Court did not rely exclusively on RICO’s express language. Rather, it found in the legislative history that “pattern” required relationship plus continuity. 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.” 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 decision that narrowed RICO. In Reves v. Ernst & Young, plaintiff-investors purchased notes of a farmers’ co-operative. A local accountant was hired to audit the Co-op. The Co-op

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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)).
188 Id. at 238-40.
189 Id. at 237-39.
190 Id. at 240.
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.\textsuperscript{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.\textsuperscript{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 . . . "\textsuperscript{196} The district court granted the firm's motion for summary judgment and relied on the Eighth Circuit's holding in Bennett v. Berg\textsuperscript{197} requiring that a § 1962(c) defendant participate in the operation or management of the enterprise itself.\textsuperscript{198} The court of appeals affirmed.\textsuperscript{199}

The Supreme Court affirmed the Eight Circuit's judgment,\textsuperscript{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.\textsuperscript{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."\textsuperscript{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

\textsuperscript{194} \textit{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.").

\textsuperscript{195} \textit{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.").

\textsuperscript{196} \textit{Id.} at 1323.


\textsuperscript{198} \textit{Reves}, 113 S. Ct. at 1168.

\textsuperscript{199} \textit{Reves}, 937 F.2d at 1339.

\textsuperscript{200} \textit{Reves}, 113 S. Ct. at 1174.

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

affairs of the enterprise. The Court held that such a reading would render superfluous the noun "conduct." 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," 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."  

The Court also had to define "participate." 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." 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. 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."  

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. 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.  

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). 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.
211 Id. at 806.
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. Justices with widely different philosophies and politics 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 inculpation for Italians and no exculpation for Catholics.

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

VI. Oxen Gored

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


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.\(^{222}\) 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

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\(^{222}\) 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. \(^2\) Those penalties represent the legislature's view of the seriousness of mail fraud. \(^2\) But she may also be subject to a RICO indictment. \(^2\) RICO may add another sentence on top of the mail fraud sentences and may lead to forfeiture of her business. \(^2\) 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. \(^2\)

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. \(^2\) According the Katzenbach Commission, organized crime represented a threat to the "basic economic


\(^{229}\) 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.


\(^{232}\) 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.\textsuperscript{234} Congress set RICO's penalties to reflect the social harm of organized crime.\textsuperscript{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.\textsuperscript{236} Although this inequality does not violate the Constitution,\textsuperscript{237} principles of proportionality and equality are fundamental to the criminal justice system.\textsuperscript{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.\textsuperscript{239} However, its guidelines are not legally binding\textsuperscript{240} and, despite its attempts at restraint,\textsuperscript{241} the DOJ has

\textsuperscript{234} Id. at 25.
\textsuperscript{235} See, Atkinson, \textit{supra} note 116, at 16-17 (discussing the penalty provisions of RICO).
\textsuperscript{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 offence (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 \textit{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 \textit{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 \textit{Harmelin} and \textit{Davis}, it is doubtful that a term of imprisonment under RICO would be sufficiently disproportionate to violate the Eighth Amendment.

\textsuperscript{238} \textit{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).
\textsuperscript{239} "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." \textit{RICO}, \textit{supra} note 19, at 936.
\textsuperscript{240} \textit{RICO}, \textit{supra} note 19, at 720 ("These guidelines, however, are purely self-imposed and
not always succeeded.\textsuperscript{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.\textsuperscript{243} Prosecutors might grandstand by bringing racketeering charges against prominent defendants.\textsuperscript{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.\textsuperscript{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.\textsuperscript{246} But even if Congress is responsible for RICO's breadth, Congress has never debated the desirability of many of its consequences.\textsuperscript{247} For example, Congress has never rationalized the federalism questions implicated by converting state fraud claims into federal causes of action.\textsuperscript{248} It has not debated whether treble damages and attorneys' fees are desirable in a wide array of federal cases.\textsuperscript{249} Indeed, those sanctions were appropriate to combat the evil empire identified by the Katzenbach Commission,\textsuperscript{250} but may be inappropriate in a wide variety of lesser, though culpable, cases.

The Katzenbach Commission urged new procedural and eviden-
tiary rules needed to fight the special evil of organized crime.\textsuperscript{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.\textsuperscript{252} Courts and legislatures have worked out a number of exceptions to this general rule, but the rule remains intact.\textsuperscript{253} RICO makes at least part of a defendant’s criminal record an essential element of the prosecutor’s case.\textsuperscript{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.\textsuperscript{255} Putting defendants on trial for their career as criminals was necessary to pierce the veneer of respectability.\textsuperscript{256}

When Professor Blakey and other RICO proponents argue that the government can use RICO against only wrongdoers,\textsuperscript{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.\textsuperscript{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.\textsuperscript{259} Despite Advocate Blakey’s criticism, there has been no stronger advocate for this kind of creativity than Professor Blakey.\textsuperscript{260}

Advocate Blakey was correct that RICO is strong medicine for a

\begin{footnotes}
\item[251] See supra notes 90 to 91.
\item[252] Guide to RICO Reform, supra note 19, at 786. See also Fed. R. Evid. 404(b).
\item[253] Guide to RICO Reform, supra note 19, at 786. See also Fed. R. Evid. 404(b).
\item[254] Guide to RICO Reform, supra note 19, at 786.
\item[255] TASK FORCE REPORT, supra note 72, at 49, 56.
\item[256] Id. at 34.
\item[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)).
\item[258] See supra text accompanying notes 157 to 214.
\item[260] See supra text accompanying notes 130 to 143.
\end{footnotes}
person like Joseph Scheidler, who may face severe criminal penalties far out of proportion with the culpability of his underlying conduct.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{264} Blakey's current criticism is flatly inconsistent with the position that he has espoused in the past.\textsuperscript{265} As Blakey himself has noted: "Apparently, perspective is powerfully influenced by the table at which one eats."\textsuperscript{266}

\textsuperscript{261} These penalties stem from the mechanics of RICO's provisions—if conduct is within \textit{civil} RICO, it is automatically within RICO's \textit{criminal} provisions, as well. Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1402 (9th Cir. 1986). \textit{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 Vitello, \textit{Baby Jane Doe: Stating a Cause of Action Against the Officious Intermeddler}, 37 \textit{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.

\textsuperscript{262} \textit{See supra} text accompanying notes 239 to 244.

\textsuperscript{263} \textit{See supra} text accompanying notes 68 to 66.

\textsuperscript{264} \textit{See supra} text accompanying notes 161 to 215.

\textsuperscript{265} \textit{See supra} text accompanying notes 129 to 143.

\textsuperscript{266} Blakey & Perry, \textit{supra} note 130, at 924.