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Crime Legislation and the Public Interest: Lessons from Civil RICO

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Articles

CRIME LEGISLATION AND THE PUBLIC INTEREST: LESSONS FROM CIVIL RICO

*Douglas E. Abrams**

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I. INTRODUCTION

On December 22, 1995, the Private Securities Litigation Reform Act¹ became law when the Senate overrode President Clinton's veto.² The House of Representatives had overridden the President's veto two days earlier.³ For the first time, Congress restricted the reach of "civil RICO," the expansive private treble-damage remedy created by the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO).⁴

Ever since the so-called "civil RICO explosion" began in the early 1980s, private plaintiffs had joined civil RICO claims in litigation and arbitration alleging wrongs also actionable under other sources of law, including the federal securities acts.⁵ Except where the defendant is convicted in connection with the underlying fraud, the 1995 Act removes civil RICO from claims actionable as fraud in the purchase or sale of securities.⁶ Civil RICO continues to apply in full force outside the securities context.

This Securities Symposium provides an opportunity to evaluate civil RICO's place in American law at the end of the private remedy's first quarter-century. In its essence, civil RICO is the unfortunate product of crime legislation hastily enacted in the heat of a national political campaign. Rushing toward adjournment, Congress enacted RICO on October 12, 1970 as Title IX of the omnibus Organized Crime Control Act (OCCA).⁷ President Nixon signed the OCCA on October 15.⁸ Less than three weeks later, Americans preoccupied with crime went to the polls in off-year congressional elections after a shrill campaign dominated by "law and order" rhetoric from the President and Congress alike.⁹

1. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

2. See 141 CONG. REC. S19,146-54, S19,180 (1995). The President's veto message appears at 141 CONG. REC. H15,214-16 (daily ed. Dec. 20, 1995).

3. 141 CONG. REC. H15,223-24 (daily ed. Dec. 20, 1995).

4. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1994), amended by Pub. L. No. 104-67, 109 Stat. 737 (1995).

5. See DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* §§ 1.1-1.3, 2.10, 5.3.3 (1991 & Supp. 1996).

6. See Pub. L. No. 104-67, § 107, 109 Stat. 737, 758 (1995), which is quoted *infra* text accompanying note 189.

7. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961-68 (1994)).

8. See President Nixon's Remarks on Signing the Organized Crime Control Act of 1970, PUB. PAPERS 846 (Oct. 15, 1970) [hereinafter President Nixon's Remarks].

9. Concerning the law-and-order climate in 1970, see, e.g., ROWLAND EVANS, JR. & ROBERT D. NOVAK, *NIXON IN THE WHITE HOUSE: THE FRUSTRATION OF POWER* 303-46 (1971); WILLIAM SAFIRE, *BEFORE THE FALL: AN INSIDE VIEW OF THE PRE-WATERGATE WHITE HOUSE* 316-40 (1975); TOM WICKER, *ONE OF US: RICHARD NIXON AND THE AMERICAN DREAM* 635-39 (1991). During House and Senate debates on the OCCA bill, supporters and opponents alike perceived organized crime and racketeering as symptoms of an incipient national breakdown of law and order. See *infra* notes 91, 129 and accompanying text.

RICO's goal was to eliminate the infiltration of organized crime and racketeering into businesses, labor unions, and other legitimate organizations operating in interstate commerce.¹⁰ The legislation followed on the heels of the 1967 report of the President's Commission on Law Enforcement and Administration of Justice, the "Katzenbach Commission."¹¹ The Commission had found that organized crime was "extensively and deeply involved" in these legitimate organizations and that it "employ[ed] illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out and control lawful ownership and leadership."¹²

Congress sought to achieve the goal with a three-prong attack. RICO authorizes the government to move against defendants in criminal prosecutions,¹³ civil proceedings,¹⁴ or both. Whether or not the government has moved against a particular person, civil RICO authorizes private persons to sue and recover treble damages and costs, including reasonable attorneys' fees, for injury to their business or property caused by a RICO violation.¹⁵

RICO's story illustrates the dangers inherent in congressional consideration of high-profile crime bills amid the passions of a political campaign. In the months preceding the OCCA's enactment, Congress paid virtually no attention to the likely efficacy of private RICO relief because RICO included only the government's civil and criminal remedies until late in the deliberation process.¹⁶ When the private remedy was inserted shortly before the final House and Senate votes on the OCCA bill, the lawmakers were racing against the clock to pass crime legislation before adjourning for last-minute campaigning. In their haste to appear before the electorate as "tough on crime," they enacted civil RICO with "only abbreviated discussion,"¹⁷ and without anticipating the breadth of its ultimate operation.

10. See S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969) [hereinafter SENATE REPORT].

11. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1969) [hereinafter CHALLENGE OF CRIME]. The Commission was popularly known by the name of its chairman, U.S. Attorney General Nicholas deB. Katzenbach.

12. *Id.* at 187.

13. 18 U.S.C. § 1963 (1994).

14. *Id.* § 1964(a), (b).

15. *Id.* § 1964(c), amended by Pub. L. No. 104-67, 109 Stat. 737 (1995). Civil RICO is thus a civil remedy designed to enlist "private attorneys general" in the battle against persons RICO identifies as criminals. Because civil RICO was enacted as an integral part of crime legislation, the story of its enactment and operation yields lessons relevant to congressional consideration of such legislation.

The 1995 Securities Litigation Reform Act amended only 18 U.S.C. § 1964(c), the provision creating civil RICO, the private treble-damages remedy. The 1995 Act left untouched the government's criminal and civil remedies created by 18 U.S.C. §§ 1963 and 1964(a), (b), respectively.

16. Civil RICO also largely escaped the media's attention. For example, in their accounts of the October 15 presidential signing ceremony, the *Washington Post* and the *New York Times* made no mention of the private remedy. Rather, the focus was on RICO's criminal remedy and on OCCA provisions designed to combat terrorist bombings. ABRAMS, *supra* note 5, § 1.1, at 2.

17. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

If Congress had debated civil RICO dispassionately, the lawmakers might have anticipated that the private remedy would have little or no effect on the fight against organized crime and racketeering. How many "private attorneys general" would have the temerity to sue organized crime members and racketeers in open court for treble damages?

Dispassionate debate might also have led Congress to recognize the dangers lurking when a statute creates criminal and private civil causes of action dependent on proof of expansive congruent elements. RICO operates against conduct, not status.¹⁸ In the effort to enact effective anti-racketeering legislation, Congress declined to prohibit membership in organized crime or in identifiable organized-crime groups. Not only did the lawmakers understand that proving organized-crime membership had traditionally been difficult and frequently impossible;¹⁹ they also concluded that an express organized-crime prohibition might have led courts to strike down RICO for creating an unconstitutional status offense.²⁰ Congress sought to reach racketeering not by legislating against racketeers directly, but by legislating against the conduct in which racketeers were thought to engage. Because Congress sought to cast the widest possible net, RICO operates against much conduct that is engaged in by racketeer and nonracketeer defendants alike.

The lawmakers cast RICO's net, however, without anticipating that government and private plaintiffs would occupy fundamentally distinct positions in RICO litigation. Congress sensed that RICO's expansive language might occasionally reach beyond organized crime members and racketeers, but the lawmakers also knew that federal prosecutors exercise a measure of discretion and would have neither the desire nor the resources to indict everyone who commits a technical RICO violation.²¹ Lawyers for private plaintiffs, on the other hand, exercise no such discretion. These lawyers have an ethical duty to allege technical civil RICO violations when the allegation can be made in good faith, particularly because final judgment for the plaintiff brings enhanced damages and attorneys' fees normally unavailable where suit is brought solely on non-

18. See, e.g., *United States v. Yarbrough*, 852 F.2d 1522, 1541 (9th Cir.) (criminal RICO prosecution), *cert. denied*, 488 U.S. 866 (1988); *United States v. De Peri*, 778 F.2d 963, 983 (3d Cir. 1985) (same), *cert. denied*, 475 U.S. 1110 (1986).

19. See, e.g., Stephen Horn, *When to Bring a Racketeering Claim*, 9 LITIGATION 33, 34 (1983) ("With all the effort that the federal government has devoted to the pursuit of organized crime, it has been able to produce only one witness to take the stand and testify to the existence of an organized criminal underworld.").

20. See 116 CONG. REC. 35,343-46 (1970).

21. See *Measures Relating to Organized Crime: Hearings on S.30 and Related Measures Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 346-47, 424 (1969) [hereinafter *Senate Hearings*]. See also U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 28 (2d rev. ed. 1988) (emphasizing prosecutorial discretion and detailing the requisite factors necessary to establish a RICO violation); Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1041-42 (1990).

RICO causes.²²

Part II.A of this Article presents the OCCA's legislative history, culminating in the Act's enactment on the eve of national elections. This history demonstrates that, as the names "Organized Crime Control" and "Racketeer Influenced and Corrupt Organizations" themselves indicate, RICO was aimed at organized crime and racketeering. Consistent with the Katzenbach Commission's findings, Congress's targets were the "Mafia" and the "Cosa Nostra." The Commission, Congress, and President Nixon perceived these targets as tightly knit, relatively small and frequently violent groups that helped finance their infiltration of legitimate enterprises with proceeds from such socially pernicious activities as illicit gambling, drug trafficking, loan-sharking, and prostitution.

Part II.B discusses civil RICO's operation in the quarter-century since its enactment. RICO's expansive language reaches much conduct (particularly fraudulent conduct) committed by ordinary defendants who have no connection whatsoever with "organized crime" and "racketeering," as Congress and the President understood these terms in 1970. This expansiveness has enabled civil RICO to operate as a general antifraud remedy, regardless of the defendant's status or other circumstance. Nowhere in the legislative history did Congress hint that it had any idea such a turnabout would occur. The unanticipated outcome has profoundly affected American law because civil RICO has federalized the regulation of much conduct that had been the subject of state regulation since the earliest days of the Republic.

Whatever the efficacy of the government's RICO remedies, civil RICO has had no perceptible effect on the fight against organized crime and racketeering. The private remedy has also squandered valuable judicial resources by burdening the federal courts with actions whose complexity far exceeds even their considerable numbers.²³ The District of Columbia Circuit Court has aptly called RICO "one of the most confusing crimes ever devised by" Congress.²⁴ Part III of this Article describes civil RICO's complexity and the peculiar burdens the private remedy has imposed on the judiciary.

Part IV presents lessons Congress and the President should learn from the mistakes that dominated enactment of civil RICO a generation ago. Civil RICO's ultimate failure demonstrates what can happen when Con-

22. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1, 1.3, 3.1 (1994) (rules requiring attorneys to competently pursue only meritorious claims and to represent clients diligently and promptly); *In Defense of RICO*, NEW REPUBLIC, Oct. 16, 1989, at 4, 53 (in civil RICO suits, "private lawyers know no restraint except the limits of their imaginations").

23. The Supreme Court has held that state courts have concurrent subject matter jurisdiction over claims arising under civil RICO. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Most civil RICO claims nonetheless are heard in federal court, either because plaintiffs file suit there initially or because state suits containing civil RICO claims are typically removed to federal court.

24. *Casey v. Department of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992). See also other decisions cited *infra* notes 277-83.

gress legislates in an evident effort to appear "tough on crime," but without carefully considering the legislation's long-term effects on crime and on the federal courts' institutional capacities. Part III concludes by discussing aspects of the debates throughout the early 1990s that culminated in enactment of the Violent Crime Control and Law Enforcement Act of 1994.²⁵ These debates, still fresh in our memories, suggest that the lessons of the unfortunate civil RICO experience have yet to be learned. With new efforts to enact crime legislation likely in these turbulent times, the lessons command our continued national attention.

II. CIVIL RICO'S FIRST QUARTER-CENTURY

A. LEGISLATIVE HISTORY: "TOTAL WAR AGAINST ORGANIZED CRIME"²⁶

In the halls of Congress, organized crime and racketeering were not matters of fresh concern in the late 1960s.²⁷ In 1951, for example, Senator Estes Kefauver's Special Committee to Investigate Organized Crime in Interstate Commerce had examined the infiltration of government and legitimate business by these groups.²⁸ A decade later, Senator John L. McClellan's Select Committee on Improper Activities in the Labor and Management Field had examined the groups' infiltration of labor unions.²⁹

In July of 1965, however, President Lyndon B. Johnson rekindled congressional interest when he established the Katzenbach Commission.³⁰ The President charged the Commission, among other things, with defining the menace posed by organized crime and racketeering and with developing strategies for combatting it.³¹ Calling organized crime "nothing less than a guerilla war against society,"³² the President stressed the need for immediate, sustained action. Organized crime, he said, "takes scores of lives each year in gangland violence," "terrorizes thousands of our citi-

25. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

26. President Nixon's Remarks, *supra* note 8, at 846.

27. See generally Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984) (tracing history of federal antiracketeering legislation).

28. See SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, INTERIM REPORT, S. REP. NO. 2370, 81st Cong., 2d Sess. (1950); SECOND INTERIM REPORT, S. REP. NO. 141, 82d Cong., 1st Sess. (1951); THIRD INTERIM REPORT, S. REP. NO. 307, 82d Cong., 1st Sess. (1951); FINAL REPORT, S. REP. NO. 725, 82d Cong., 1st Sess. (1951); see also DAVID HALBERSTAM, *THE FIFTIES 188-94* (1993) (discussing the Kefauver Committee); WILLIAM HOWARD MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950-1952* (1974).

29. See SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR AND MANAGEMENT FIELD, S. REP. NO. 1139, 86th Cong., 2d Sess. 487 (1960).

30. Exec. Order No. 11,236, 3 C.F.R. 9349 (1965) (establishing the Commission), reprinted in Statement by the President on Establishing the President's Commission on Law Enforcement and Administration of Justice, 2 PUB. PAPERS 785 (July 26, 1965).

31. See Remarks to the Members of the President's Commission on Law Enforcement and Administration of Justice, 2 PUB. PAPERS 982, 983 (Sept. 8, 1965) ("I want to know why organized crime continues to expand despite our best efforts to prevent it.").

32. Remarks at a Meeting with Federal Enforcement Officials to Deal with the Problem of Organized Crime, 1 PUB. PAPERS 483 (May 5, 1966).

zens,” and drains billions of dollars through “illegal gambling, narcotics, prostitution, loan-sharking, arson, and other forms of racketeering.”³³

Heeding President Johnson’s call, the Katzenbach Commission’s 1967 report urged Congress and the states to “make a full-scale commitment to destroy the power of organized crime groups.”³⁴ Consistent with the President’s perceptions, the Commission found that the activities of organized crime and racketeering ranged from “gambling, loan-sharking, narcotics, and other forms of vice” to “monopolization, terrorism, extortion, [and] tax evasion.”³⁵ After investigation and analysis, the Commission reported on “the common ethnic tie of the 5,000 or more members of organized crime’s core groups”:³⁶

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 insured 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. . . . Organized crime in its totality . . . consists of these 24 groups allied with other racket enterprises to form a loose confederation operating in large and small cities.³⁷

The Commission concluded that these “exclusively Italian” malefactors engaged in “the most sinister kind of crime in America.”³⁸

The men who control [organized crime] have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hardworking businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. . . . As the leaders of Cosa Nostra and their racketeering allies pursue their conspiracy unmolested, in open and continued defiance of the law, they preach a sermon that all too many Americans heed: The government is for sale; lawlessness is the road to wealth; honesty is a pitfall and morality a trap for suckers.³⁹

The Katzenbach Commission report profoundly influenced Congress

33. *Id.* See also Special Message to the Congress on Crime and Law Enforcement: “To Insure the Public Safety,” 1 PUB. PAPERS 183, 192 (Feb. 7, 1968) (“Organized crime[’s] . . . sinister effect pervades too many corners of America today—through gambling, loan-sharking, corruption, extortion, and large movements of narcotics. . . . It is clear that sporadic, isolated attacks on this disciplined army of the underworld cannot obtain lasting results.”); Special Message to the Congress on Crime in America, 1 PUB. PAPERS 134, 144 (Feb. 6, 1967) (“Criminal syndicates do not recognize state boundaries. Their impact is frequently nation-wide. The Federal government’s responsibility in combatting organized crime is clear and unequivocal.”); Memorandum on the Federal Government’s Drive Against Organized Crime 1 PUB. PAPERS 484 (May 5, 1966) (“Organized crime constitutes one of the most serious threats to a peaceful and prosperous society.”).

34. CHALLENGE OF CRIME, *supra* note 11, at 200.

35. *Id.* at 187.

36. *Id.* at 192.

37. *Id.* at 192-93.

38. *Id.* at 209.

39. *Id.* at 209-10.

throughout the deliberations that produced RICO three years later.⁴⁰ The first congressional efforts to implement the Commission's recommendations concerning organized crime and racketeering were Senate Bills 2048 and 2049, introduced by Senator Roman L. Hruska (R-Neb.) on June 29, 1967, four months after the Commission report appeared.⁴¹ In a floor speech replete with discussion of the report,⁴² Senator Hruska stated that "[o]rganized crime in the United States is a tightly knit and strictly disciplined criminal cartel. The largest organization is, of course, La Cosa Nostra."⁴³ The bills would have amended federal antitrust laws to reach "[t]he illegal activities of organized crime—gambling, narcotics, loan-sharking, prostitution, extortion, and the rest."⁴⁴ These activities, Senator Hruska explained, produced substantial revenue, some of which was then "funneled into legitimate business."⁴⁵

Senate Bill 2048 would have made it a violation of federal antitrust laws to invest intentionally unreported income in a business enterprise.⁴⁶ Senate Bill 2049 would have made it a crime to apply the income received from enumerated criminal activities to a business enterprise.⁴⁷ The bills would have subjected violators to existing criminal and civil antitrust remedies, including treble damages.⁴⁸

Congressman Richard H. Poff (R-Va.) introduced companion legislation in the House of Representatives the same day.⁴⁹ Like Senator Hruska, Representative Poff discussed the Katzenbach Commission report and charged "organized crime's overlords" with engaging in such activities as "gambling, bribery, extortion, counterfeiting, narcotics traffic, and white slavery."⁵⁰ Representative Poff's cosponsors shared his perception of the bills' intended targets.⁵¹

No action was taken on the Hruska or Poff bills, but the American Bar Association's Antitrust Section studied and reported on them in 1969. The Section's report cited and quoted from the Katzenbach Commis-

40. See *infra* note 52 and accompanying text. Despite (and perhaps because of) the Commission's perception that organized crime members and racketeers were "exclusively Italian," the congressional debates that produced RICO do not reveal that any of the 535 senators and House members ever noticed the unseemliness of concocting a convoluted name that produced the patently ethnic acronym "RICO."

41. 113 CONG. REC. 17,997 (1967).

42. *Id.* at 17,997-18,005.

43. *Id.* at 17,998.

44. *Id.*

45. *Id.*

46. *Id.* at 17,999.

47. *Id.*

48. *Id.*

49. *Id.* at 17,946-47.

50. *Id.* at 17,947 (discussing "syndicated crime," "organized crime's overlords," and "the crime syndicate").

51. See *id.* at 17,948 (remarks of Rep. Hutchinson) ("interstate criminal syndicates"); *id.* at 17,949 (remarks of Rep. Wilson) ("organized crime syndicates" and "the underworld"); *id.* (remarks of Rep. Meskill) ("the continued underground existence of criminal syndicates"); *id.* at 17,950-51 (remarks of Rep. McClory) ("notorious criminal syndicate leaders," "syndicate revenue," and "organized crime lords").

sion's recommendations concerning the need for legislation to combat organized crime.⁵² The Section agreed that "[t]he time tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime," including a private treble-damages remedy.⁵³ The Section warned, however, that "use of antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery."⁵⁴ The Section called for "legislation having the purposes of adapting the machinery of the antitrust laws to the prosecution of organized crime," but "recom- mend[ed] that any such legislation be enacted as an independent statute and not be included in the Sherman Act, or any other antitrust law."⁵⁵

Congressional activity resumed on January 15, 1969, when Senator McClellan (D-Ark.) introduced Senate Bill 30, the Organized Crime Control Act, which did not contain a title on the ultimate RICO model.⁵⁶ Senators Hruska and Sam J. Ervin (D-N.C.) joined as cosponsors.⁵⁷ Senator McClellan told his colleagues that the Act's various titles sought to imple- ment several Katzenbach Commission recommendations concerning or- ganized crime and racketeering.⁵⁸ The Act, he said, targeted "a separate society, composed of closely organized and strictly disciplined criminals," marked by "its ability to milk, extort, maim, and murder."⁵⁹ The "separate society" consisted of "[twenty-four] Cosa Nostra groups oper- ating as criminal cartels in the major metropolitan areas of our Nation."⁶⁰

In a Senate floor speech on March 11, Senator McClellan spoke in con- siderable detail about the identity and activities of the targets of Senate Bill 30.⁶¹ Frequently quoting from the Katzenbach Commission report, the Senator identified "[t]he most influential core groups of organized crime, the 'families' of La Cosa Nostra."⁶² "The hierarchical structure of the families," he explained, "closely parallels that of Mafia groups that operated for almost a century on the island of Sicily."⁶³ These families, he continued, were "substantially different from other criminal opera- tions" because they had "enforcers" and "corrupters."⁶⁴ Enforcers "maintain[ed] organizational integrity by arranging for the maiming and killing of recalcitrant members or potential witnesses against the

52. 115 CONG. REC. 6994, 6995 (1969).

53. *Id.* at 6995.

54. *Id.* As examples of potential obstacles, the report pinpointed "a body of precedent . . . setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'" *Id.*

55. *Id.*

56. *Id.* at 769.

57. *Id.* at 827.

58. *Id.* at 827-29; *see also id.* at 5877 (remarks of Sen. McClellan).

59. *Id.* at 827.

60. *Id.*

61. *Id.* at 5872.

62. *Id.*

63. *Id.*

64. *Id.* at 5873.

group";⁶⁵ corrupters "[sought] to establish relations with those public officials and other influential persons whose assistance is necessary to achieve the organization's overall goals."⁶⁶

Senator McClellan told his colleagues that organized crime's "greatest source of revenue" was syndicated gambling, followed by drug trafficking (particularly in heroin) and loan-sharking.⁶⁷ He also said that organized crime had begun to infiltrate legitimate businesses and labor unions.⁶⁸

On March 20, Senator Hruska invoked the Katzenbach Commission report when he introduced Senate Bill 1623, the Criminal Activities Profits Act, which included many concepts from his two 1967 bills.⁶⁹ The Senator began his floor speech by stating that he found it "inherently offensive" that "racketeers . . . who are purveyors in murder and mayhem are at the same time dealing in lawful products and services for law abiding citizenry."⁷⁰ He explained that Senate Bill 1623 was "aimed specifically at racketeer infiltration of legitimate business" with funds gained from such activities as "gambling, loan-sharking, [and] narcotics trafficking."⁷¹ The Act drew heavily on antitrust procedures and remedies but, heeding the ABA Antitrust Section's recent recommendation, would have amended Title 18 of the United States Code (the "Crimes and Criminal Procedure" title) rather than existing antitrust statutes.⁷² The Act included a private treble-damage remedy.⁷³

During Senate Judiciary Committee hearings in mid-March on Senate Bills 30 and 1623, lawmakers and witnesses alike shared the perceptions of organized crime and racketeering identified by the Katzenbach Commission and Senators McClellan and Hruska.⁷⁴ After a few days of hear-

65. *Id.*

66. *Id.*

67. *Id.* at 5873-74.

68. *Id.* See also *Senate Hearings, supra* note 21, at 229-30 (remarks of Sen. McClellan): You know, when we get disturbed about a condition, we are prone, I guess, sometimes to exaggerate. I do not think that we should do that in this crime situation. I think we should try to hold it just to what the real facts are. . . . I certainly do not desire to use scare tactics, but I think we must deal with the problem realistically.

69. 115 CONG. REC. 6925 (1969).

70. *Id.* at 6993.

71. *Id.*

72. *Id.* at 6995.

73. *Id.* at 6996.

74. See *Senate Hearings, supra* note 21, at 108. Attorney General John N. Mitchell remarked:

Organized crime is America's principal supplier of illegal goods and services, such as gambling, easily obtainable but usurious loans, narcotics and illicit drugs, prostitution, and other forms of vice [O]rganized crime is increasingly operating in fields of legitimate business, where it employs such illegitimate techniques as bankruptcy frauds, tax evasion, extortion, terrorism, arson, and monopolization.

Id. See also *id.* at 151 (statement of Sen. Hruska) ("There is no greater scourge in this nation than the deliberate use of violence and vice that is the trademark of organized crime."); *id.* at 163 (remarks of Sen. Tydings) ("You are dealing with a virtual hydra, with almost unlimited resources and powers of regeneration when you are talking about the Mafia, the Cosa Nostra, the organized criminal elements in this country."); *id.* at 175 (state-

ings, the two Senators introduced Senate Bill 1861, the "Corrupt Organizations Act," on April 18.⁷⁵ The bill, which resembled the ultimately enacted RICO, authorized the government to seek criminal sanctions and equitable relief under Title 18, but did not create a private right of action.⁷⁶

In a special message to Congress on April 23, President Nixon presented his Program to Combat Organized Crime in America.⁷⁷ The Message voiced support for legislation to combat "the 24 Cosa Nostra families," which he described as an "alien organization . . . a totalitarian and closed society operating within an open and democratic one."⁷⁸ Consistent with the Katzenbach Commission's perceptions, the President stated that organized crime "relies on physical terror and psychological intimidation, on economic retaliation and political bribery. . . ."⁷⁹ "Its economic base," he continued, "is principally derived from its virtual monopoly of illegal gambling, the numbers racket, and the importation of narcotics. To a large degree, it underwrites the loan-sharking business in the United States and actively participates in fraudulent bankruptcies."⁸⁰ Sounding the law-and-order theme, the President asserted that organized crime "encourages street crime by inducing narcotics addicts to mug and rob. It encourages housebreaking and burglary by providing efficient disposal methods for stolen goods."⁸¹

The Judiciary Committee reported an amended Senate Bill 30, the Organized Crime Control Act, to the full Senate on January 21, 1970.⁸² The Committee report reiterated that "the most influential core groups of organized crime" were "the 'families' of La Cosa Nostra," whose "hierarchical structure . . . closely parallels that of Mafia groups that operated for almost a century on the island of Sicily."⁸³ On the Senate floor, Senator McClellan told his colleagues that the bill embodied the best of the Katzenbach Commission's recommendations concerning organized crime and racketeering.⁸⁴ The former Senate Bill 1861, still without provision

ment of Paul J. Curran, Chairman, N.Y. State Comm'n of Investigation) ("From gambling, narcotics, and loan-sharking [organized crime] has extended its tentacles into the field of commerce and industry. . . . [T]he means used by racketeers to penetrate and to gain control of legitimate business, or simply to engage in extortion, ranged from old-fashioned muscle and violence to . . . more sophisticated techniques. . . ."); *id.* at 273-74 (remarks of John P. Diuguid, Counsel, Ass'n of Fed. Investigators) ("The principal areas in which organized crime is involved are: gambling, loan-sharking, narcotics traffic, extortion, labor racketeering, and the corruption of public officials.").

75. 115 CONG. REC. 9512 (1969).

76. *Id.* at 9567, 9569.

77. See Special Message to the Congress on a Program to Combat Organized Crime in America, PUB. PAPERS 315 (Apr. 23, 1969) [hereinafter Special Message to Congress].

78. *Id.* at 316.

79. *Id.* at 315-16; see also Special Message to the Congress on the Administration's Legislative Program, PUB. PAPERS 719, 728 (Sept. 11, 1970) (discussing organized crime's illegal gambling and drug trafficking activities).

80. Special Message to Congress, *supra* note 77, at 315.

81. *Id.*

82. 116 CONG. REC. 575 (1970).

83. SENATE REPORT, *supra* note 10, at 36.

84. 115 CONG. REC. 39,906 (1969).

for a private right of action, was included as Title IX and named *Racketeer Influenced and Corrupt Organizations*.⁸⁵

In the Judiciary Committee report, Senators Philip A. Hart and Edward M. Kennedy published a separate statement warning that Senate Bill 30 reached "beyond organized criminal activity."⁸⁶ The six-sentence statement objected that the bill proposed "substantial changes in the general body of criminal procedures," and established "new rules of evidence and procedure applicable to all criminal jurisprudence."⁸⁷ The two Senators expressed disapproval that the bill had not been "[a]mended to restrict its scope solely to organized criminal activity and to assure the protection of individual rights."⁸⁸

With Senate Bill 30 still not containing a private right of action, Senate debate on the bill began on January 20, 1970.⁸⁹ Senator McClellan opened the debate by reiterating that "the bill incorporate[d] the best of the recommendations" of the Katzenbach Commission designed to strike at the "families of La Cosa Nostra."⁹⁰ During the brief ensuing debate, other Senators favorably cited the Commission's findings and recommendations concerning organized crime and racketeering.⁹¹

Throughout the debate, Senators left no doubt about Senate Bill 30's

85. 116 CONG. REC. 581-83 (1970).

86. SENATE REPORT, *supra* note 10, at 215 (statements of Sen. Hart and Sen. Kennedy). See also 116 CONG. REC. 845 (remarks of Sen. Kennedy) (reiterating criticism that the bill went "far beyond organized criminal activity").

87. SENATE REPORT, *supra* note 10, at 215.

88. *Id.*

89. 116 CONG. REC. 393 (1970).

90. *Id.* at 585 (remarks of Sen. McClellan).

91. *Id.* at 601 (remarks of Sen. Hruska) (OCCA "adopt[s] . . . the best features of the recommendations" of the Commission); *id.* at 606 (remarks of Sen. Byrd); *id.* at 845 (remarks of Sen. Kennedy); *id.* at 962 (remarks of Sen. Murphy); *id.* at 970 (remarks of Sen. Bible). Supporters and opponents alike perceived organized crime and racketeering as symptoms of an incipient nationwide breakdown of "law and order." *Id.* at 586 (remarks of Sen. McClellan) (La Cosa Nostra's success is "symbolic of the breakdown of law and order increasingly characteristic of our society."); *id.* at 600 (remarks of Sen. McClellan) (OCCA "can have a significant effect in reducing street crime . . . across the Nation."); *id.* at 601 (remarks of Sen. Hruska) ("Crime and the very fear of crime are daily eroding the basic quality of life of millions of American. Nowhere is this erosion more critical than in the field of organized crime."); *id.* at 606 (remarks of Sen. Byrd) ("Organized crime is just as great a threat to the well-being of our Nation as are the continued upsurge of street violence and the work of militants who seek to burn down our cities or destroy our educational institutions."); *id.* (remarks of Sen. Byrd) (discussing "devotion to law and order"); *id.* at 844 (remarks of Sen. Kennedy) ("[O]rganized crime . . . is perhaps the single factor most responsible for the frightening increase in street crime."); *id.* at 952 (remarks of Sen. Thurmond) ("[T]he growth of organized crime has contributed greatly to crime in the streets.").

targets: “the Cosa Nostra,”⁹² “the Mafia,”⁹³ “the mob,”⁹⁴ “gangsters,”⁹⁵ “the underworld,”⁹⁶ “families,”⁹⁷ and “syndicates.”⁹⁸ Lawmakers stressed the targets’ involvement in such nefarious activities as gambling, drug trafficking, prostitution, loan-sharking, bootlegging, usury, robbery, larceny, and arson.⁹⁹

Senators also expressed concern about organized crime’s capacity to infiltrate legitimate business and labor unions. Senator McClellan told his colleagues that “the mob” ordinarily achieved infiltration through “terror tactics,” “violence,” and “its rigidly enforced code of silence.”¹⁰⁰

Senate debate concluded with Senate Bill 30’s passage on January 23, with only one dissenting vote. Title IX was RICO, which granted the government a criminal remedy and civil remedies for injunctive and other

92. See, e.g., *id.* at 585-86 (remarks of Sen. McClellan) (“[T]he most influential of [the organized crime groups] are the 26 families of La Cosa Nostra,” whose “internal organization . . . is patterned after the ancient Mafia groups of Sicily.”); *id.* at 592-95 (remarks of Sen. McClellan); *id.* at 607 (remarks of Sen. Byrd); *id.* at 846 (remarks of Sen. McClellan); *id.* at 952, 953 (remarks of Sen. Thurmond) (discussing the “insidious and invisible empire designated by various names, the best known of which are the Mafia and the Cosa Nostra”); *id.* at 956 (remarks of Sen. Hruska); *id.* at 963 (remarks of Sen. McClellan) *id.* at 970 (remarks of Sen. Bible).

93. See, e.g., *id.* at 586, 589, 592, 593, 600 (remarks of Sen. McClellan); *id.* at 832 (remarks of Sen. Case); *id.* at 846 (remarks of Sen. McClellan); *id.* at 953 (remarks of Sen. Thurmond); *id.* at 957 (remarks of Sen. Hruska).

94. See, e.g., *id.* at 591, 592 (remarks of Sen. McClellan).

95. See, e.g., *id.* at 591 (remarks of Sen. McClellan); *id.* at 819 (remarks of Sen. Scott).

96. See, e.g., *id.* at 602 (remarks of Sen. Hruska).

97. See, e.g., *id.* at 593 (remarks of Sen. McClellan).

98. See, e.g., *id.* at 591 (remarks of Sen. McClellan); *id.* at 819, 820 (remarks of Sen. Scott); *id.* at 845 (remarks of Sen. Kennedy); *id.* at 970 (remarks of Sen. Bible); *id.* at 971 (remarks of Sen. Williams).

99. See, e.g., *id.* at 586 (remarks of Sen. McClellan) (syndicated gambling, narcotics importation and distribution, and loan-sharking); *id.* at 590-91 (remarks of Sen. McClellan); *id.* at 601 (remarks of Sen. Hruska) (gambling, narcotics, loan-sharking, robbery, larceny, and arson); *id.* at 602 (remarks of Sen. Yarborough) (narcotics distribution and gambling); *id.* at 603, 605 (remarks of Sen. Allott) (gambling and narcotics); *id.* at 606 (remarks of Sen. Byrd) (syndicated gambling, loan-sharking, prostitution, and narcotics trafficking); *id.* at 819 (remarks of Sen. Scott) (gambling, loan-sharking, narcotics, prostitution, and other forms of vice, extortion, and terrorism); *id.* at 844 (remarks of Sen. Kennedy) (gambling and narcotics); *id.* at 952 (remarks of Sen. Thurmond) (narcotics, gambling, loan-sharking, and other forms of vice); *id.* at 962 (remarks of Sen. Murphy) (narcotics, gambling, and loan-sharking); *id.* at 970 (remarks of Sen. Bible) (“fence” operations, usury, gambling, drug traffic, and loan-sharking); *id.* at 971 (remarks of Sen. Williams) (narcotics distribution, gambling, and loan-sharking).

100. *Id.* at 590 (remarks of Sen. McClellan); see also *id.* at 601, 602 (remarks of Sen. Hruska) (“[O]rganized crime . . . has become entrenched in legitimate business and labor unions where it employs terrorism, extortion, tax evasion, bankruptcy fraud and manipulation, and other measures”; organized crime “employs physical brutality, fear and corruption to intimidate competitors and customers to achieve increased sales and profits.”); *id.* at 602 (remarks of Sen. Yarborough) (“terrorizing . . . physical and economic threats”); *id.* at 603 (remarks of Sen. Allott) (organized crime’s “primitive code of terror”); *id.* at 607 (remarks of Sen. Byrd) (discussing organized crime’s “brutal and strong-arm tactics” and “terrorism”); *id.* at 819 (remarks of Sen. Scott) (discussing organized crime’s “laws rigidly enforced through terror”); *id.* at 970 (remarks of Sen. Bible) (Organized crime’s “methods range from hoodlum intimidations to armed violence and murder.”).

equitable relief.¹⁰¹ The title did not create a private right of action.¹⁰²

On January 26, Senate Bill 30 was referred to the House Judiciary Committee, which did not begin hearings until May 20, 1970.¹⁰³ On May 23, President Nixon wrote the president of the American Bar Association seeking his support in urging Congress to act swiftly on the bill.¹⁰⁴ The House Committee's first witness was Senator McClellan, who again called the OCCA "a truly comprehensive attack on the crime syndicate."¹⁰⁵ The Senator specified the control that the Cosa Nostra and the Mafia held over the narcotics trade and over their "biggest single illegal activity," unlawful gambling.¹⁰⁶ Later witnesses recognized that these groups were the legislation's targets.¹⁰⁷

Witnesses warned, however, that Title IX was broad enough to authorize criminal prosecution of nonracketeers.¹⁰⁸ The Attorney General, for example, voiced strong support for Senate Bill 30, which would provide "innovative measures . . . necessary for the effective prosecution of organized crime cases," which had resisted "the traditional law enforcement process."¹⁰⁹ He predicted that the bill would enable federal prosecutors to strike at the "greatly expanded Cosa Nostra" and to loosen its grip on illicit gambling, loan-sharking, and the drug trade.¹¹⁰ He warned, however, that the OCCA contained provisions that "do not relate solely to organized crime."¹¹¹

Concerned that some Senate Bill 30 provisions threatened constitutional guarantees, the Association of the Bar of the City of New York cautioned against "a hasty effort to clear a path through the criminal law to get at organized crime."¹¹² The Association of the Bar generally supported Title IX, but recommended that it be "sufficiently circumscribed so as to exclude from its scope those against whom it is not directed and

101. *Id.* at 972.

102. *Id.* at 1103.

103. *See Organized Crime Control: Hearings on S. 30, and Related Proposals, Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970)* [hereinafter *House Hearings*].

104. Letter to the President of the American Bar Association About Pending Anticrime Legislation, PUB. PAPERS 456-57 (May 23, 1970).

105. *House Hearings, supra* note 103, at 86. Senator McClellan stated:

Never in the history of America has organized crime had greater adverse impact and widespread control over the social, political, and economic lives of our citizens and institutions than it does today. Never has the national criminal syndicate known as La Cosa Nostra managed with greater success than now to maintain profitable operations in so many areas and in such a variety of illegal interprises [sic].

Id.

106. *Id.* at 87.

107. *See, e.g., id.* at 151-57 (statement of Atty. Gen. John N. Mitchell); *id.* at 469-71 (statement of Rep. Koch).

108. *See, e.g., id.* at 185 (statement of Atty. Gen. John N. Mitchell).

109. *Id.* at 156.

110. *Id.* at 152-53.

111. *Id.* at 185.

112. *Id.* at 294.

. . . minimize the possibilities of abuse by law enforcement agencies.”¹¹³ Similarly, the American Civil Liberties Union (ACLU) opposed Senate Bill 30 on the ground that it contained “numerous fundamental—and in many ways misguided—revisions of procedural and substantive provisions cutting across the entire system of criminal law.”¹¹⁴ The ACLU warned specifically that RICO could reach activities that went “well beyond those associated with racketeering.”¹¹⁵

In a floor speech on June 9, Senator McClellan responded to these criticisms by acknowledging that RICO might occasionally reach beyond infiltration of legitimate entities by organized crime.¹¹⁶ “It is impossible,” he told his colleagues, “to draw 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.”¹¹⁷ The reason was straightforward: “Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit.”¹¹⁸

“The Senate report,” Senator McClellan continued, “does not claim . . . that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime.”¹¹⁹ In an effort to allay fears that commission of such offenses by persons outside organized crime would subject them to RICO prosecution, the Senator stated that RICO would reach only a person who “engages in a pattern of such violations.”¹²⁰ Senator McClellan made no mention of any need for a private right of action.

On June 17, Representative Sam Steiger (R-Ariz.) submitted a statement for inclusion in the hearing record to the House Judiciary Committee.¹²¹ “One possible amendment . . . for your consideration would add a private civil damage remedy similar to the private damage remedy found

113. *Id.* at 331.

114. *Id.* at 490 (statement of Lawrence Speiser, Director, American Civil Liberties Union, Washington office). The ACLU had expressed similar views before the Senate Committee. *Senate Hearings, supra* note 21, at 456 (statement of Lawrence Speiser).

115. *House Hearings, supra* note 103, at 490.

116. 116 CONG. REC. 18,912 (1970). Senator McClellan began by reiterating that Senate Bill 30 incorporated the best of the recommendations of the Katzenbach Commission. *Id.* He explained that RICO sought to remove organized crime from legitimate organizations by arming the government with three primary devices—criminal forfeiture, equitable antitrust-type remedies, and civil investigative procedures available to the Attorney General. *Id.* at 18,939.

117. *Id.* at 18,940. Senator McClellan continued:

The listed offenses lend themselves to organized commercial exploitation . . . and experience has shown they are commonly committed by participants in organized crime. That is all the [T]itle IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

Id.

118. *Id.*

119. *Id.*

120. *Id.*

121. *House Hearings, supra* note 103, at 520.

in the anti-trust laws. . . . [T]hose who have been wronged by organized crime," Representative Steiger told the Committee without elaboration, "should at least be given access to a legal remedy."¹²² On July 21, 1970, RICO's treble-damages remedy won the endorsement of Senator McClellan, who stated (also without elaboration) that the remedy "should prove . . . to be a major new tool in extirpating the baneful influence of organized crime in our economic life."¹²³

On September 30, the Judiciary Committee favorably reported Senate Bill 30 with the ultimately enacted private treble-damages remedy in Title IX.¹²⁴ The Committee report devoted only two sentences to the newly inserted private remedy.¹²⁵ In a fifteen-page dissenting statement opposing Senate Bill 30, three Judiciary Committee members devoted only a scant paragraph specifically to the private remedy.¹²⁶

On October 2, the ACLU urged House members to oppose Senate Bill 30. The ACLU's letter warned that RICO would authorize the Attorney General to issue civil investigative demands which would "enable the government to engage in vast 'fishing expeditions'" in support of its criminal and civil remedies.¹²⁷ The letter did not mention the private civil RICO remedy that the House Committee had reported a few days earlier.

When he summarized Senate Bill 30 on the floor on October 7, Representative Poff, the bill's House sponsor, described RICO's treble-damages remedy as "another example of the antitrust remedy being adapted for use against organized criminality."¹²⁸ House debate on the bill then echoed the earlier Senate debate. House members favorably cited the Katzenbach Commission report's findings and recommendations concerning organized crime and racketeering.¹²⁹ Like their Senate counter-

122. *Id.*

123. 116 CONG. REC. at 25,190 (remarks of Sen. McClellan). Two days later, the President-elect of the American Bar Association testified before the House Committee in favor of a private treble-damages cause of action. *House Hearings, supra* note 103, at 543-44, 548, 559 (statement of Edward L. Wright).

124. See H.R. REP. No. 1549, 91st Cong., 2d Sess. 58, reprinted in 1970 U.S.C.C.A.N. 4007. See also 18 U.S.C. § 1964(c) (1994), amended by Pub. L. No. 104-67, 109 Stat. 737 (1995) (discussed *infra* notes 188-89 and accompanying text).

125. H.R. REP. No. 1549, *supra* note 124, reprinted in 1970 U.S.C.C.A.N. at 4007, 4010, 4034.

126. *Id.* at 187, reprinted in 1970 U.S.C.C.A.N. at 4007, 4083 (dissenting views of Reps. Conyers, Mikva, and Ryan).

127. 116 CONG. REC. at 35,213 (remarks of Rep. Bingham) (inserting into the record the letter of Lawrence Speiser, director, ACLU, Washington office).

128. *Id.* at 35,295 (remarks of Rep. Poff).

129. See, e.g., *id.* at 35,192 (remarks of Rep. Poff); *id.* at 35,199 (remarks of Rep. Rodino); *id.* at 35,215 (remarks of Rep. Halpern); *id.* at 35,303 (remarks of Rep. Railback); *id.* at 35,319 (remarks of Rep. Roth); *id.* at 35,320 (remarks of Rep. Price). Supporters and opponents alike saw organized crime and racketeering as one indicator of an incipient national breakdown of law and order. See, e.g., *id.* at 35,195 (remarks of Rep. Celler) ("We must care not only for law and order but for justice as well."); *id.* at 35,205 (remarks of Rep. Mikva) (OCCA will not "deter street crime, about which people are up so tight."); *id.* at 35,205-06 (remarks of Rep. Clancy) ("[C]rime and violence, both in the streets and on our campuses, are . . . threatening our heritage, our traditions . . ."); *id.* at

parts had done a few months earlier, House members pinpointed Senate Bill 30's targets: "the Cosa Nostra,"¹³⁰ "the Mafia,"¹³¹ "mobsters,"¹³² "the mob,"¹³³ "gangsters,"¹³⁴ "the underworld,"¹³⁵ "crime families,"¹³⁶ and "syndicates."¹³⁷ Like their counterparts, House members stressed the involvement of the bill's targets in gambling, drug trafficking, prostitution, extortion, arson, terrorism, loan-sharking, and bootlegging.¹³⁸ A

35,206 (remarks of Rep. Kleppe) ("America's internal enemies today are the criminals, the lawbreakers. . ."); *id.* at 35,214 (remarks of Rep. Alexander) ("[N]o other national concern preys upon the minds of decent, law-abiding citizens more than the consistent and inexcusable rise in criminal activities in this Nation."); *id.* at 35,299 (remarks of Rep. Mayne) (discussing need "to maintain law, order, and decency in this Nation"); *id.* at 35,305 (remarks of Rep. Hogan) ("much of our street crime is directly linked to organized crime"); *id.* at 35,306 (remarks of Rep. Scheuer) (people "want . . . some security in the streets, security in their homes"); *id.* at 35,309 (remarks of Rep. Mizell) ("the restoration of law and order is not just a catch phrase in an election year"); *id.* at 35,313 (remarks of Rep. Minish) ("[C]rime is on the increase and . . . we must act before it is too late to stem this lawlessness."); *id.* at 35,314 (remarks of Rep. Ruth) (discussing "our commitment to law and order in America"); *id.* at 35,319 (remarks of Rep. Anderson) (OCCA is "an answer to the crime wave that has been sweeping the Nation."); *id.* (remarks of Rep. Monagan) (OCCA is "another link in the chain of legislation we are forging to deal with the menace of crime in this country."); *id.* at 35,328 (remarks of Rep. Meskill) ("[T]he citizens of this land are afraid to walk the city streets at night."); *id.* at 35,355 (remarks of Rep. Arends) ("Our free society of God-fearing, law abiding people is fast becoming a lawless society.").

130. *See, e.g., id.* at 35,312 (remarks of Rep. Fountain) ("the hoodlums of the Mafia or La Cosa Nostra"); *id.* at 35,312 (remarks of Rep. Brock); *id.* at 35,309 (remarks of Rep. Brotzman) ("[O]rganized crime's chain of command is closely guarded, and all too often only minor functionaries in the ladder . . . can be apprehended.").

131. *See, e.g., id.* at 35,215 (remarks of Rep. Bennett); *id.* at 35,311 (remarks of Rep. Fountain); *id.* at 35,312 (remarks of Rep. Brock).

132. *See, e.g., id.* at 35,309 (remarks of Rep. Brotzman) ("fat-cat mobsters"); *id.* at 35,311 (remarks of Rep. Fountain); *id.* (remarks of Rep. Broomfield); *id.* at 35,321 (remarks of Rep. Price); *id.* at 35,321 (remarks of Rep. Stratton).

133. *See, e.g., id.* at 35,311 (remarks of Rep. Broomfield).

134. *See, e.g., id.* (remarks of Rep. Fountain); *id.* (remarks of Rep. Broomfield).

135. *See, e.g., id.* at 602 (remarks of Sen. Hruska).

136. *See, e.g., id.* at 35,200 (remarks of Rep. St Germain); *id.* at 35,328 (remarks of Rep. Meskill); *id.* at 35,309 (remarks of Rep. Mizell) ("lords of organized crime").

137. *See, e.g., id.* at 35,201 (remarks of Rep. Poff); *id.* at 35,205 (remarks of Rep. Mikva); *id.* at 35,215 (remarks of Rep. Fascell); *id.* at 35,290 (remarks of Rep. Poff); *id.* at 35,305 (remarks of Rep. Hogan); *id.* at 35,307 (remarks of Rep. Scheuer); *id.* at 35,309 (remarks of Rep. Brotzman); *id.* (remarks of Rep. Minshall); *id.* at 35,312 (remarks of Rep. Udall); *id.* (remarks of Rep. Brock); *id.* at 35,319 (remarks of Rep. Roth); *id.* at 35,326 (remarks of Rep. Vanik); *id.* at 35,327 (remarks of Rep. Randall); *id.* at 35,328 (remarks of Rep. Meskill); *id.* at 35,361 (remarks of Rep. Pepper); *id.* at 36,296 (remarks of Sen. Dole).

138. *See, e.g., id.* at 35,199 (remarks of Rep. St Germain) (gambling, usury, and drugs); *id.* at 35,201 (remarks of Rep. Poff); *id.* at 35,206 (remarks of Rep. Kleppe) (gambling, usury, prostitution, drugs, extortion, terrorism, and arson); *id.* at 35,215 (remarks of Rep. Fascell); *id.* at 35,215 (remarks of Rep. Halpern) ("Gambling is the lifeblood of organized crime."); *id.* at 35,216 (remarks of Rep. McDade) (gambling, loan-sharking, and drugs); *id.* (remarks of Rep. Donohue) (gambling, loan-sharking, theft and fencing of property, and drugs); *id.* at 35,300 (remarks of Rep. Mayne) (gambling, usury, drugs pornography, prostitution, terrorism, and arson); *id.* at 35,303 (remarks of Rep. Railsback); *id.* at 35,305 (remarks of Rep. Hogan) (gambling, loan-sharking, numbers racket, and drugs); *id.* at 35,307 (remarks of Rep. Scheuer) (gambling, loan-sharking, and narcotics); *id.* at 35,309 (remarks of Rep. Brotzman) (gambling and drugs); *id.* at 35,311 (remarks of Rep. Broomfield) (drugs, loan-sharking, gambling, and prostitution); *id.* at 35,312 (remarks of Rep. Brock) (gambling, loan-sharking, drugs, and prostitution); *id.* at 35,319 (remarks of Rep. Anderson) (gambling, loan-sharking, and drugs); *id.* at 35,321 (remarks of Rep. Price) (gambling, drugs, and loan-sharking); *id.* (remarks of Rep. Bush); *id.* at 35,326 (remarks of Rep.

House member proposed an amendment that would have defined the term "Mafia," or "La Cosa Nostra organization," and would have criminalized membership.¹³⁹ Without questioning the appropriateness of the label, the House rejected the amendment after other members questioned the constitutionality of status-based crime legislation.¹⁴⁰

The House overwhelmingly passed Senate Bill 30, with minor amendments, on October 7.¹⁴¹ The bill contained the private treble-damage provision in the form recommended by the Judiciary Committee.¹⁴²

Time was growing short. With the congressional session about to end and national elections less than a month away, the Senate did not seek a conference, an unusual decision when considering such significant omnibus legislation. On October 12, the upper chamber adopted the bill passed by the House and sent it to President Nixon, who had strongly supported it as an essential element of his program to restore law and order.¹⁴³

Three days later, the President signed the OCCA in the Great Hall at the Department of Justice Building. The legislation, he told the assemblage, would provide federal law enforcement authorities the legal tools to "launch a total war against organized crime" and strike at its "support of the drug traffic in this country."¹⁴⁴

Vanik) (gambling, loan-sharking, and drugs); *id.* at 35,328 (remarks of Rep. Meskill) (drugs, gambling, and usury).

139. *Id.* at 35,343 (remarks of Rep. Biaggi).

140. *Id.* at 35,343-46.

141. *Id.* at 35,363-64. The House passed the OCCA by a 341-26 vote (63 not voting). *Id.* at 35,363.

142. *Id.* at 35,341.

143. *Id.* at 36,296. See also Special Message to Congress on the Administration's Legislative Program, PUB. PAPERS 719, 728 (Sept. 11, 1970) (discussing proposed anticrime legislation, including the OCCA). "[T]here is no greater need in this free society than the restoration of the individual American's freedom from violence in his home and on the streets of his city or town." *Id.*

144. President Nixon's Remarks, *supra* note 8, at 846. The OCCA's stated purpose was to "seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970) (Statement of Findings and Purpose). The Statement provided:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan-sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or reme-

B. "THE CIVIL RICO LITIGATION EXPLOSION": "[S]OMETHING QUITE DIFFERENT FROM THE ORIGINAL CONCEPTION OF ITS ENACTORS"¹⁴⁵

Senator McClellan, Representative Poff, and their colleagues advanced civil RICO confident that Congress was enacting a private remedy against organized crime and racketeering. But things did not turn out quite as anticipated.

Civil RICO went virtually unnoticed for most of its first decade,¹⁴⁶ largely because RICO is codified in Title 18 of the United States Code (the "Crimes and Criminal Procedure" title), whose pages plaintiffs' lawyers ordinarily do not consult in search of private remedies.¹⁴⁷ Only two reported opinions had considered civil RICO claims by 1978 and only thirteen by early 1981.¹⁴⁸

By late 1981, however, plaintiffs began to discover not only civil RICO's existence, but also its potential as a general federal antifraud remedy.¹⁴⁹ The discovery has been variously attributed to a 1980 law review article that demonstrated civil RICO's breadth¹⁵⁰ and to the movement into private law practice of federal prosecutors who had grown familiar with RICO's criminal remedy during the 1970s.¹⁵¹

In 1983, the American Bar Association's Litigation Section published a two-volume set of seminar materials entitled *RICO: The Ultimate Weapon in Business and Commercial Litigation*.¹⁵² A year later, a lawyer suggested that to omit a civil RICO claim in a private securities complaint

dies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Id. (the Statement of Findings and Purpose was reprinted in 18 U.S.C. § 1961 historical notes (1994)). RICO's purpose was to "eliminat[e] . . . the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." SENATE REPORT, *supra* note 10, at 76.

145. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985).

146. *See, e.g., id.* at 481 (discussing civil RICO's "initial dormancy").

147. *See* 18 U.S.C. §§ 1961-68 (1994), amended by Pub. L. No. 104-67, 109 Stat. 737 (1995).

148. *See* Louis C. Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201, 206 n.32 (1981) (citing decisions).

149. Of the approximately 270 pre-1985 district court civil RICO decisions, 3% were decided throughout the 1970s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. *See* REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORP., BANKING & BUSINESS LAW 55 (1985) [hereinafter ABA REPORT].

150. G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1037-48 (1980).

151. *See, e.g.,* Robert Kessler, *RICO Law's Unexpected Result*, NEWSDAY, Jan. 7, 1985, at 7, col. 1, 17, col. 2.

152. *RICO: The Ultimate Weapon in Business and Commercial Litigation*, A.B.A. SEC. LITIG. (1983). *See also* Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 304 (1983) (civil RICO "could federalize all torts involving business transactions").

was "virtually malpractice."¹⁵³ In 1984, a district judge stated that if civil RICO were given its broadest reading, the statute "would literally make a federal case out of nearly every instance of business fraud."¹⁵⁴ A Commissioner of the Securities and Exchange Commission reported that civil RICO had "turned virtually every securities fraud claim into a potential RICO claim," and that "RICO claims coupled with securities fraud claims seem to have become the rule rather than the exception."¹⁵⁵ In early 1985, another district judge asked rhetorically: "Would any self-respecting plaintiffs' lawyer omit a RICO charge these days?"¹⁵⁶

The Supreme Court first addressed civil RICO in 1985 in *Sedima, S.P.R.L. v. Imrex Co.*¹⁵⁷ Writing for the Court, Justice Byron R. White raised few eyebrows when he observed that the private remedy was "evolving into something quite different from the original conception of its enactors."¹⁵⁸ Of the 270 known district court civil RICO decisions reported before 1985, forty percent involved securities fraud and thirty-seven percent involved common law fraud in a commercial or business

153. *Absence of RICO Claim in Securities Suits Termed "Malpractice" By Attorney*, 16 Sec. Reg. & L. Rep. (BNA) No. 18, at 754 (May 4, 1984) (remarks of Jerold S. Solovy). See also Judah Best et al., *The Racketeer Influenced and Corrupt Organizations Act: Hardly a Civil Statute*, in RICO: EXPANDING USES IN CIVIL LITIGATION 7 (1984) ("Under the law today, it would be a poor attorney who overlooked the possibility of RICO relief."); Donald J. Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma*, 57 TEMP. L.Q. 731, 735 (1984) (stating that counsel risks malpractice suit by omitting any civil RICO claims in an ordinary fraud action).

154. *Bruns v. Ledbetter*, 583 F. Supp. 1050, 1055 (S.D. Cal. 1984). See also *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir.), cert. denied, 464 U.S. 1002 (1983) (calling RICO a "perhaps insufficiently discriminate tool for combating organized crime"; Congress "may well have created a runaway treble damage bonanza for the already excessively litigious"); *Flinders v. Datasec Corp.*, 742 F. Supp. 929, 936 n.12 (E.D. Va. 1990) ("[R]easonable persons might well doubt whether civil RICO was adequately considered before passage and whether it is playing a socially useful role in the administration of civil justice, given the substantial time and resources devoted to solving its puzzles."); *PMC, Inc. v. Ferro Corp.*, 131 F.R.D. 184, 187 (C.D. Cal. 1990) ("[T]his court is legitimately concerned about the misuse of civil RICO and the increasingly familiar phenomenon of expanding a straightforward breach of contract into a claim of promissory fraud."); *MacPeg Ross O'Connell & Goldhaber, Inc. v. Castello*, 686 F. Supp. 397, 398 (E.D.N.Y. 1988) (discussing "the increasingly obligatory RICO count"); *Plount v. American Home Assur. Co.*, 668 F. Supp. 204, 205 (S.D.N.Y. 1987) ("[C]ivil RICO has resulted in a flood of what are and should be state court cases that are being reframed and brought in federal court . . . because of the carrot of treble recovery and the availability of a federal forum."); *Bear Creek Prods., Inc. v. Saleh*, 643 F. Supp. 489, 490 (S.D.N.Y. 1986) (discussing the "seemingly inevitable civil RICO claim now commonly appended in actions sounding in contract and fraud"); *Horsell Graphic Indus., Ltd. v. Valuation Counselors, Inc.*, 639 F. Supp. 1117, 1124 (N.D. Ill. 1986) (discussing "the obligatory RICO counts").

155. *Senate Panel Hears Suggestions for Amending Civil RICO Provisions*, 17 Sec. Reg. & L. Rep. (BNA), No. 21, at 924, 925 (May 24, 1985) (quoting Comm'r Charles L. Marinaccio).

156. *Papagiannis v. Pontikis*, 108 F.R.D. 177, 179 n.1 (N.D. Ill. 1985). See also *Mikva, NAM Tell House Panel of Need for RICO Prior Conviction Requirement*, 17 Sec. Reg. & L. Rep. (BNA) No. 41, at 1837 (Oct. 18, 1985) (quoting U.S. Circuit Judge Abner J. Mikva: "The civil RICO count is today almost boilerplate in commercial lawsuits.").

157. 473 U.S. 479, 481 (1985) (civil RICO does not limit defendant class to persons previously convicted under RICO or a predicate act, or plaintiff class to persons who can establish a "racketeering injury").

158. *Id.* at 500.

setting.¹⁵⁹ Only nine percent of these decisions involved "allegations of criminal activity of a type generally associated with professional criminals," such as arson, bribery, commercial bribery, embezzlement, extortion, gambling, theft, and political corruption.¹⁶⁰ No private plaintiff, however, apparently had ever filed a civil RICO action against a member of an organized crime family.¹⁶¹

As the number of federal civil RICO filings grew considerably during the second half of the 1980s,¹⁶² some courts took the unusual step of publicly urging Congress to amend civil RICO to restrict its reach.¹⁶³ Off the bench, Chief Justice Rehnquist urged Congress to amend civil RICO "to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court."¹⁶⁴ Invitations such as these went unaccepted.¹⁶⁵

From the vantage afforded by the mid-1990s, it is evident that even civil RICO's 1970 congressional opponents underestimated the private remedy's expansive reach. Despite their prescience, opponents did not articulate the fundamentally differing roles private plaintiffs and the government would play in the operation of RICO remedies dependent on proof of expansive congruent elements. In their terse dissenting statement in the House Judiciary Committee report preceding floor debate on RICO, for example, Representative Abner J. Mikva and two colleagues went no further than to predict that civil RICO would invite "disgruntled and malicious competitors to harass innocent businessmen."¹⁶⁶ The statement's hypothetical did not foresee that civil RICO would move well be-

159. See ABA REPORT, *supra* note 149, at 55. The Task Force estimated that the 270 decisions "[did] not come close to representing the total universe of RICO claims brought in federal court." *Id.* at 30. According to another survey of 132 published civil RICO decisions, 57 involved securities transactions and 38 involved commercial and contract disputes; no other category hit double figures. See *Sedima*, 473 U.S. at 499 n.16 (1985) (discussing American Institute of Certified Public Accounts, *The Authority to Bring Private Treble-Damage Suits Under "RICO" Should Be Removed* 13 (Oct. 10, 1984)).

160. See ABA REPORT, *supra* note 149, at 55.

161. See, e.g., *Reform of the Private Civil Action Provision of RICO*, 41 REC. N.Y. CITY B.A. (Comm. on Fed. Legislation), May 1986, at 415.

162. See *infra* text accompanying notes 265-66.

163. See, e.g., *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir. 1985) (holding that state tax agency may maintain civil RICO action against retailer who filed fraudulent state sales tax returns; "We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit . . . the statute's application. . . ."); *Hall Am. Ctr. Assocs. Ltd. Partnership v. Dick*, 726 F. Supp. 1083, 1088 n.10 (E.D. Mich. 1989).

164. William H. Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14 (excerpt from Chief Justice Rehnquist's speech at the Eleventh Seminar on the Administration of Justice sponsored by the Brookings Institute on Apr. 7, 1989), reprinted in *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 13 (1989); see also David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145, 148 (1990) ("[E]very single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice's title in the *Wall Street Journal*.").

165. See *infra* note 368 and accompanying text.

166. 116 CONG. REC. 36,342 (remarks of Rep. Mikva).

yond mere harassment, and mere use by competitors, to become a general federal antifraud remedy: "A competitor need only claim that his rival has derived gains from two games of poker, and, because [RICO] prohibits even the 'indirect' use of such gains . . . litigation is begun."¹⁶⁷ Few, if any, civil RICO claims have ever been grounded in illicit gambling.

The Supreme Court's nine civil RICO decisions demonstrate that the evolution of the private remedy bears no resemblance to the intent of Congress or the President in 1970. *Sedima*, the Court's first civil RICO decision, was a joint venturer's suit alleging that the defendant corporation had submitted inflated bills, and thus had cheated the plaintiff out of proceeds due under the parties' joint venture agreement.¹⁶⁸ In *American National Bank & Trust Co. v. Haroco, Inc.*,¹⁶⁹ *Sedima's* companion case, the plaintiffs alleged that the defendant bank and several of its officers had fraudulently charged excessive interest rates on loans. The essence of the *Haroco* claim was that the plaintiffs were overcharged when the bank lied about its prime rate.¹⁷⁰

In 1987, *Shearson/American Express Inc. v. McMahon*¹⁷¹ demonstrated civil RICO's ready application to securities fraud litigation. The plaintiff securities customers alleged that a Shearson registered representative had engaged in fraudulent, excessive trading on the plaintiffs' accounts, had made false statements, and had omitted material facts from the advice she gave the plaintiffs.¹⁷² In *Agency Holding Corp. v. Malley-Duff & Assocs.*,¹⁷³ decided two weeks later, the plaintiff insurance agent alleged that the defendant insurance company had wrongfully terminated its agency after the agent failed to meet a production quota.¹⁷⁴

167. *Id.* Representative Mikva was Senate Bill 30's most vocal opponent during the floor debate. Focusing on gambling, he hypothesized that RICO's private remedy would be "a dangerous tool . . . to a competitor who wants to go after somebody who is competing too vigorously against [the competitor]":

[The competitor] can show, for example, that his competition won some money gambling in Las Vegas and took the money and put it into an interstate business. If in the State in which he is engaged in an interstate business, gambling is in violation of the law, then that man is guilty of racketeering. . . .

[A]ny competitor may go in and seek threefold damages, which means that he can literally drive his competitor out of business.

Id. See also *id.* at 35,205 (remarks of Rep. Mikva) (OCCA bill "will subject the courts, the prosecutors and indeed every person who studies the law to incredible burdens and problems in trying to decipher, administer, and uphold some of the provisions that we are about to enact.").

168. *Sedima*, 473 U.S. at 483-84.

169. 473 U.S. 606 (1985).

170. *Id.* at 607 (rejecting argument that civil RICO plaintiff's injury must flow not from the predicate acts themselves but from the fact that they were preformed as part of the conduct of an enterprise).

171. 482 U.S. 220 (1987).

172. *Id.* at 223 (holding that predispute arbitration agreements, otherwise enforceable in accordance with the terms of the Federal Arbitration Act, apply to civil RICO claims).

173. 483 U.S. 143 (1987).

174. *Id.* at 145 (holding that four-year statute of limitations applicable to Clayton Act civil enforcement actions applies in civil RICO actions).

H.J. Inc. v. Northwestern Bell Telephone Co.,¹⁷⁵ decided in 1989, was a suit by customers who alleged that the defendant telephone company and several of its individual agents had sought to improperly influence state public utilities commission members in the performance of their duties. The customers alleged they were injured when the commission approved rates for the company in excess of a fair and reasonable amount. The defendants allegedly had made cash payments to commissioners, had negotiated with them regarding future employment, and had paid for the commissioners' parties, meals, and other personal expenditures.¹⁷⁶

In *Tafflin v. Levitt*,¹⁷⁷ decided in 1990, holders of unpaid certificates of deposit alleged fraud in connection with a savings and loan association's failure.¹⁷⁸ In *Holmes v. Securities Investor Protection Corp. (SIPC)*,¹⁷⁹ decided in 1992, SIPC alleged that the defendant had conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers and thus triggered SIPC's statutory duty to advance funds to reimburse the customers.¹⁸⁰ *Reves v. Ernst & Young*,¹⁸¹ decided a year later, involved a bankruptcy trustee's suit against a major accounting firm that had engaged in various activities relating to valuation of a gasohol plant on a farming cooperative's yearly audits and financial statements. After the cooperative filed for bankruptcy, the trustee alleged that the activities rendered the accounting firm liable under civil RICO to holders of some of the cooperative's notes.¹⁸²

National Organization for Women, Inc. v. Scheidler,¹⁸³ the Court's latest civil RICO decision, arose from a dispute entirely outside the business and commercial arena. The plaintiff health care clinics alleged that the defendants, a coalition of anti-abortion groups, were members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity.¹⁸⁴ The Court held that the plaintiffs could recover under civil RICO if they proved their allegations.¹⁸⁵

Civil RICO has become an errant remedy primarily because its expansive elements invite broad private application, which Congress failed to

175. 492 U.S. 229 (1989).

176. *Id.* at 233 (interpreting RICO pattern requirement).

177. 493 U.S. 455 (1990).

178. *Id.* at 457 (holding that state courts have concurrent subject matter jurisdiction over claims arising under civil RICO).

179. 503 U.S. 258 (1992).

180. *Id.* at 262 (to recover under civil RICO, plaintiff must prove that the RICO violation was the proximate cause of its injury).

181. 507 U.S. 170 (1993).

182. *Id.* at 172-75 (to recover for violation of §1962(c) of RICO, plaintiff must allege and prove that the defendant "participate[d] in the operation or management of the enterprise itself").

183. 510 U.S. 249 (1994) (RICO does not require allegation or proof that the enterprise or the predicate acts were motivated by an economic purpose). *See also id.* at 263 (Souter, J., concurring) (plaintiffs may raise First Amendment challenges to RICO's application in particular cases).

184. The pattern consisted of alleged acts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1994); *see also* 18 U.S.C. § 1961 (1).

185. *Scheidler*, 510 U.S. at 263.

anticipate when it legislated amid the tumult of the 1970 election campaign.¹⁸⁶ To state a civil RICO claim, the plaintiff must allege that it suffered (1) injury in its business or property because the defendant, (2) while involved in one or more enumerated relationships with an "enterprise," (3) engaged in a "pattern of racketeering activity."¹⁸⁷ As the next Part demonstrates, a defendant does not have to be an organized crime member or racketeer to qualify.

III. CIVIL RICO'S BREADTH AND COMPLEXITY

A. CIVIL RICO'S BREADTH: "ANY PERSON INJURED IN HIS BUSINESS OR PROPERTY"

1. Injury

Until Congress passed the 1995 Securities Litigation Reform Act, § 1964(c) of RICO provided that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."¹⁸⁸ The 1995 Act amended § 1964(c) by creating an exception for securities suits only: "[N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962," unless the defendant "is criminally convicted in connection with the fraud."¹⁸⁹

By providing that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property," RICO creates a broad class of potential plaintiffs.¹⁹⁰ Virtually all civil RICO claims have been asserted by plaintiffs who allege no injury at the hands of anyone con-

186. Broad application of civil RICO may frequently be encouraged by RICO's uncoded liberal-construction clause: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

187. 18 U.S.C. §§ 1961-68 (1994), amended by Pub. L. No. 104-67, 109 Stat. 737 (1995). The first element is unique to civil RICO, and the second and third elements are common to civil RICO and the government's criminal and civil remedies.

RICO also operates against persons who engage in "collection of an unlawful debt" without necessarily having engaged in a pattern of racketeering activity. 18 U.S.C. § 1962. See, e.g., *United States v. Eufrazio*, 935 F.2d 553, 563 n.12 (3d Cir.), cert. denied, 502 U.S. 925 (1991) (criminal RICO decision; proof of collection of an unlawful debt does not require a showing that the defendant engaged in a pattern of racketeering activity). According to the Senate report, Congress intended the "unlawful debt" concept to operate only in "cases of clear 'loan-sharking.'" See *Senate Report*, supra note 10, at 158-59; see also *id.* at 78-80; H.R. REP. NO. 1574, 90th Cong., 2d Sess. 5 (1970). RICO's definition of "unlawful debt" relates generally to activities involving usury and illegal gambling. 18 U.S.C. § 1961(6). Because these activities are not staples of civil RICO suits, the overwhelming majority of civil RICO claims are grounded in allegations of a pattern.

188. 18 U.S.C. § 1964(c), amended by Pub. L. No. 104-67, § 107, 109 Stat. 737, 758.

189. Pub. L. No. 104-67, § 107, 109 Stat. 737, 758. In such an action, civil RICO's four-year statute of limitations begins to run on the date on which the conviction becomes final. *Id.* The amendment does not affect or apply to any private action arising under Title I of the Securities Act of 1933 or Title I of the Securities Exchange Act of 1934, commenced before and pending on the date of the amendment's enactment. *Id.* § 108.

190. See 18 U.S.C. § 1961(3).

nected with organized crime or racketeering. These civil RICO plaintiffs have included individuals,¹⁹¹ American and foreign corporations,¹⁹² partnerships,¹⁹³ governmental units and agencies,¹⁹⁴ labor unions,¹⁹⁵ churches,¹⁹⁶ universities,¹⁹⁷ estates,¹⁹⁸ and foreign governments.¹⁹⁹

Before the Supreme Court's 1985 *Sedima* decision,²⁰⁰ many lower courts sought to restrict civil RICO's breadth by holding that § 1964(c) conferred standing only on persons who alleged particular types of injury to their business or property.²⁰¹ Because RICO was conceived as antiracketeering legislation, for example, some courts required allegation of "racketeering injury," which the Second Circuit described as "injury caused by an activity which RICO was designed to deter."²⁰² Racketeering injury presumably required proof of some organized-crime involvement by the defendant.

Sedima struck down the racketeering-injury requirement as the product of "statutory amendment [not] appropriately undertaken by the courts."²⁰³ The Court reached the sensible holding that § 1964(c) plainly does not limit the nature of the proprietary injury the plaintiff must allege.²⁰⁴

191. See, e.g., *Cowan v. Corley*, 814 F.2d 223, 226-27 (5th Cir. 1987).

192. See, e.g., *Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1521 (11th Cir. 1990) (English corporation); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840 (2d Cir. 1987) (American corporation); *Thai Airways Int'l Ltd. v. United Aviation Leasing B.V.*, 842 F. Supp. 1567, 1569 (S.D.N.Y. 1994) (Thai corporation).

193. See, e.g., *Manax v. McNamara*, 842 F.2d 808 (5th Cir. 1988); *Meadow Ltd. Partnership v. Heritage Sav. & Loan Ass'n*, 639 F. Supp. 643 (E.D. Va. 1986).

194. See, e.g., *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991); *Town of W. Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990); *County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *City of N.Y. v. JAM Consultants, Inc.*, 889 F. Supp. 103 (S.D.N.Y. 1995).

195. See, e.g., *Butchers Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535 (9th Cir. 1986); *International Bd. of Elec. Workers, Local 340 v. National Elec. Contractors Ass'n, No. Civ. S-86-881*, 1990 U.S. Dist. LEXIS 10634 (E.D. Cal. Aug. 9, 1990).

196. See, e.g., *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987).

197. See, e.g., *University of Md. at Baltimore v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991); *Temple Univ. v. Salla Bros., Inc.*, 656 F. Supp. 97 (E.D. Pa. 1986).

198. See, e.g., *Jones v. Phipps*, 39 F.3d 158, 160 (7th Cir. 1994); *Estate of Dearing v. Dearing*, 646 F. Supp. 903 (S.D. W. Va. 1986).

199. See, e.g., *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1035 (1989); *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64, 66-68 (D. Mass. 1992); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 714 F. Supp. 1362, 1373 (D.N.J. 1989).

200. 473 U.S. 479 (1985).

201. See, e.g., Douglas E. Abrams, *The Place of Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation from Civil RICO and Sedima*, 38 VAND. L. REV. 1477, 1509-16 (1985) (citing decisions).

202. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 494 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

203. *Sedima*, 473 U.S. at 500 (noting that § 1964(c)'s language closely tracks that of § 4 of the Clayton Act, 15 U.S.C. § 15 (1994), and as a result some lower courts had required civil RICO plaintiffs to allege an "antitrust-type" injury, one that placed them at a competitive disadvantage in the marketplace). See Abrams, *supra* note 201, at 1511-13 (citing decisions). The Supreme Court's *Sedima* decision also rejected this requirement. *Sedima*, 473 U.S. at 497 n.15.

204. *Sedima*, 473 U.S. at 495-97.

2. Enterprise

For its part, § 1962 makes it unlawful for "any person" to engage in a pattern of racketeering activity while the person is involved in one or more of four enumerated relationships with an "enterprise."²⁰⁵ RICO's broad inclusive definition of "person" delimits the potential defendant class.²⁰⁶ In actions having nothing to do with organized crime or racketeering, civil RICO defendants have included individuals,²⁰⁷ American and foreign corporations,²⁰⁸ business partnerships,²⁰⁹ labor unions,²¹⁰ receivers,²¹¹ churches,²¹² colleges and universities,²¹³ accounting firms,²¹⁴ lawyers and law firms,²¹⁵ estates,²¹⁶ public utilities,²¹⁷ and political party organizations.²¹⁸

Before *Sedima*, some district courts sought to restrict civil RICO's breadth by holding that although § 1962 operates against "any person," the section could be violated only by persons connected with organized crime.²¹⁹ Even before *Sedima*, however, the organized-crime limit on civil RICO's defendant class was rejected by all courts of appeals and

205. The enterprise must be one "which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a). Under the contemporary conception of Congress's commerce power, this requirement has not been a significant impediment to civil RICO suits. See, e.g., *United States v. Robertson*, 115 S. Ct. 1732 (1995). See also *United States v. Lopez*, 115 S. Ct. 1624 (1995) (striking down Gun-Free School Zones Act of 1990 for exceeding Congress's commerce power), discussed *infra* note 411 and accompanying text. See generally ABRAMS, *supra* note 5, § 4.4.

206. See 18 U.S.C. § 1961(3).

207. See, e.g., *Cowan v. Corley*, 814 F.2d 223 (5th Cir. 1987).

208. See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (Canadian corporation); *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991) (Netherlands corporation); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22 (1st Cir. 1987) (U.S. corporation); *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980) (U.S. corporation and Japanese corporation).

209. See, e.g., *Bath v. Bushkin, Gaims, Gaines, and Jonas*, 913 F.2d 817 (10th Cir. 1990); *In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236 (3d Cir. 1989); *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207 (4th Cir. 1988).

210. See, e.g., *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir.), *modified per curiam on other grounds*, 30 F.3d 1348 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995); *Rodonich v. House Wreckers Union Local 95*, 817 F.2d 967 (2d Cir. 1987); *Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578*, 728 F. Supp. 1142, 1146 (D.N.J. 1990).

211. See, e.g., *In re S. Indus. Banking Corp.*, 872 F.2d 1257 (6th Cir. 1989).

212. See, e.g., *Religious Technology Ctr. v. Scott*, 869 F.2d 1306 (9th Cir. 1989); *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987); *Miceli v. Stromer*, 675 F. Supp. 1559 (D. Colo. 1987).

213. See, e.g., *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Robinson v. City Colleges*, 656 F. Supp. 555 (N.D. Ill. 1987).

214. See, e.g., *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988).

215. See, e.g., *Tribune Co. v. Purciogliotti*, 869 F. Supp. 1076 (S.D.N.Y. 1994), *aff'd sub nom. Tribune Co. v. Abiola*, 66 F.3d 12 (2d Cir. 1995).

216. See, e.g., *State Farm Fire & Cas. Co. v. Estate of Caton*, 540 F. Supp. 673 (N.D. Ind. 1982).

217. See, e.g., *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990).

218. See, e.g., *Jund v. Town of Hempstead*, 941 F.2d 1271 (2d Cir. 1991); *Cullen v. Marjotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987).

219. See, e.g., ABRAMS, *supra* note 201, at 1516-19, 1521-24 (citing decisions).

most district courts that had considered it.²²⁰

Sedima and *H.J.* laid the organized-crime limit to rest. *Sedima* acknowledged that civil RICO actions “are being brought almost solely against [nonracketeer] defendants, rather than against the archetypal, intimidating mobster.”²²¹ The Court held, however, that civil RICO’s use against nonracketeers is “inherent in the statute as written”²²² because § 1962 operates broadly against “‘any person’—not just mobsters.”²²³ *H.J.* later rejected the contention that RICO’s pattern element requires proof of activity “characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator, that is, of an association dedicated to the repeated commission of criminal offenses.”²²⁴

RICO provides that the term “‘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.”²²⁵ Virtually all civil RICO claims have named enterprises that have nothing to do with organized crime or racketeering. Civil RICO private-entity enterprises have included individuals,²²⁶ partnerships,²²⁷ joint ventures,²²⁸ sole proprietorships,²²⁹ corporations,²³⁰ professional corporations,²³¹ law firms,²³² cooperatives,²³³ universities,²³⁴ estates,²³⁵ savings and loan associations,²³⁶ accounting firms,²³⁷ profit sharing plans,²³⁸ pen-

220. See *id.* at 1516 & nn.193-95 (citing decisions).

221. *Sedima*, 473 U.S. at 499.

222. *Id.*

223. *Id.* at 495.

224. *H.J.*, 492 U.S. at 243-44.

225. See 18 U.S.C. § 1961(4).

226. See, e.g., *Flournoy v. Peyson*, 701 F. Supp. 1370, 1381-82 (N.D. Ill. 1988); *Von Bulow v. Von Bulow*, 634 F. Supp. 1284, 1305 (S.D.N.Y. 1986).

227. See, e.g., *Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir. 1989) (en banc), *vacated and remanded*, 492 U.S. 914 (1989).

228. See, e.g., *Sedima*, 473 U.S. at 483-84, and Amended Complaint ¶ 58, *reprinted in* Joint Appendix 18a; *Medallion Television Enters., Inc. v. SelecTV of Cal., Inc.*, 833 F.2d 1360, 1362 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060, 1064 (4th Cir. 1984).

229. See, e.g., *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985).

230. See, e.g., *John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242, 1249 (E.D. Va.), *aff'd*, 829 F.2d 1120 (4th Cir. 1987).

231. See, e.g., *State Farm Mut. Ins. Co. v. Rosenfield*, 683 F. Supp. 106, 109 (E.D. Pa. 1988).

232. See, e.g., *Park S. Assocs. v. Fischbein*, 626 F. Supp. 1108, 1112 (S.D.N.Y.), *aff'd*, 800 F.2d 1128 (2d Cir. 1986).

233. See, e.g., *Reves v. Ernst & Young*, 507 U.S. 170, 172-74 (1993).

234. See, e.g., *Temple Univ. v. Salla Bros.*, No. 85-1426, 1987 U.S. Dist. LEXIS 12099 (E.D. Pa. Dec. 29, 1987).

235. See, e.g., *Norris v. Wirtz*, 703 F. Supp. 1322, 1329 (N.D. Ill. 1989); *Gunther v. Dinger*, 547 F. Supp. 25, 27 (S.D.N.Y. 1982).

236. See, e.g., *In re Sunrise Sec. Litig.*, 916 F.2d 874, 877 (3d Cir. 1990).

237. See, e.g., *Baggio v. EC Solar, Inc.*, No. 88 C 1893, 1990 U.S. Dist. LEXIS 5569 (N.D. Ill. May 8, 1990).

238. See, e.g., *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 351 (7th Cir. 1992).

sion funds,²³⁹ political campaign committees,²⁴⁰ and trusts.²⁴¹ Civil RICO public enterprises have included cities and other municipalities,²⁴² municipal and state agencies,²⁴³ publicly operated railroads,²⁴⁴ and federal district courts.²⁴⁵ An association-in-fact enterprise consists of the associates' acts; in virtually all civil RICO actions, these enterprises also have had nothing to do with organized crime and racketeering.²⁴⁶

RICO's four enterprise relationships are particularly broad. Most civil RICO claims have alleged violation of § 1962(c), which makes it 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 activity. . . ."²⁴⁷

Until the Supreme Court decided *Reves v. Ernst & Young*²⁴⁸ in 1993, § 1962(c) claimants in several circuits normally did not have particular difficulty alleging that a person (unconnected with organized crime or racketeering) who was employed by or associated with an enterprise (also unconnected with organized crime or racketeering) had participated, directly or indirectly, in the enterprise's affairs. Defendants in actions grounded in § 1962(c) included lawyers, accountants, and other professional advisors whose tangential roles established "association with" the affairs of enterprises unconnected with organized crime or racketeering.²⁴⁹

239. See, e.g., *Cox v. Administrator U.S. Steel & Carnegie*, 30 F.3d 1347, 1349 (11th Cir. 1994), *modifying per curiam on this ground* 17 F.3d 1386, 1398 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

240. See, e.g., *Hindes v. Castle*, 937 F.2d 868, 871 & n.1 (3d Cir. 1991).

241. See, e.g., *Appley v. West*, 832 F.2d 1021, 1028-29 (7th Cir. 1987); *Police Retirement Sys. v. Midwest Inv. Advisory Servs., Inc.*, 706 F. Supp. 708, 711 (E.D. Mo. 1989), *aff'd*, 940 F.2d 351 (8th Cir. 1991) (public pension trust created by statute); *Norris*, 703 F. Supp. at 1329 (testamentary trust).

242. See, e.g., *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1478 (7th Cir. 1990) (village); *City of Chicago Heights v. LoBue*, 914 F. Supp. 279, 285 (N.D. Ill. 1996).

243. See, e.g., *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073 n.2 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988) (county planning department; state department of highways and transportation); *Curiale v. Capolino*, 883 F. Supp. 941 (S.D.N.Y. 1995).

244. See, e.g., *North Star Contracting Corp. v. Long Island R.R.*, 723 F. Supp. 902, 906 (E.D.N.Y. 1989).

245. See, e.g., *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016, 1018 (3d Cir.), *cert. denied*, 484 U.S. 822 (1987).

246. See ABRAMS, *supra* note 5, § 4.3.1. Like other enterprises, association-in-fact enterprises must demonstrate requisite purpose and continuity; in many circuits, the evidence offered to prove the enterprise must also be distinct, as a matter of law, from the evidence offered to prove the pattern of racketeering activity. See *id.* at § 4.3.2.

247. 18 U.S.C. § 1962(c). Section 1962(a) makes it unlawful for any person "who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise." *Id.* § 1962(a). Section 1962(b) makes it unlawful for any person, "through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise." *Id.* § 1962(b). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of" § 1962(a), (b), or (c). *Id.* § 1962(d).

248. 507 U.S. 170 (1993).

249. See ABRAMS, *supra* note 5, at § 4.7.3.

Reves held that to “conduct or participate, directly or indirectly, in the conduct of [the] enterprise’s affairs,” the defendant “must have participated in the operation or management of the enterprise itself.”²⁵⁰ Despite this apparently restrictive holding, however, filings of civil RICO claims alleging violations of § 1962(c) have continued in substantial numbers.²⁵¹

3. Pattern of Racketeering Activity

a. Racketeering Activity

“[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering.”²⁵² Contrary to whatever first impression the name might leave, a person does not have to be a racketeer to engage in the pattern.

A person engages in “racketeering activity” by committing any of the more than two dozen so-called “predicate acts” enumerated in RICO.²⁵³ Some of these predicate acts, such as “any act or threat involving murder, kidnaping, gambling, arson, [or] robbery,”²⁵⁴ might frequently be committed by the organized crime members and racketeers whom Congress and the President targeted in 1970. But persons having nothing to do with organized crime and racketeering routinely commit at least three other predicate acts listed in RICO: mail fraud, wire fraud, or fraud in the sale of securities.²⁵⁵

Most civil RICO claims rely primarily or exclusively on mail fraud or wire fraud predicates.²⁵⁶ These two predicates are the “single most signif-

250. *Reves*, 507 U.S. at 182.

251. See, e.g., ABRAMS, *supra* note 5, at § 4.7.3 n.81k (Supp. 1996) (citing decisions). See also *infra* text accompanying notes 267-71 (citing figures concerning federal civil RICO filings).

252. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987) (emphasis in original).

253. See 18 U.S.C. § 1961(1).

254. *Id.*

255. See *id.* § 1961(1)(b), (d). Section 107 of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, 758 (1995), precludes civil RICO plaintiffs from alleging fraud in the purchase or sale of securities as a predicate act unless the defendant is criminally convicted in connection with the fraud. Where the would-be civil RICO claim is based on conduct that would be actionable as fraud in the purchase or sale of securities, § 107 also precludes the plaintiff from bringing the claim against unconvicted defendants based on allegations of other predicate acts, such as mail fraud or wire fraud. See *id.*

Lower courts remain divided on the question of whether a plaintiff who seeks to base a civil RICO claim on securities fraud must have purchased or sold a security. See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 274-76 (1992) (noting conflict among circuits but declining to reach the question). The four concurring Justices in *Holmes* reached the question and answered in the negative. See *id.* at 276-86 (O’Connor, J., concurring); *id.* at 286-90 (Scalia, J., concurring). After the 1995 Act, of course, the question is relevant only where the defendant is convicted of the alleged securities fraud.

256. See *Malley-Duff*, 483 U.S. at 149. See also ABA REPORT, *supra* note 149, at 57. Approximately 44[%] of the cases for which the predicate offenses can be determined from the opinion appear to rely solely on allegations of mail or wire fraud. Another 13[%] rely primarily on mail or wire fraud, but also allege another predicate offense. Twelve percent focus on another predicate offense, but also allege mail or wire fraud violations. Approximately 35[%]

icant" reason why civil RICO has become a general federal antifraud remedy.²⁵⁷ Under settled law, each fraudulent use of the mails or interstate wires constitutes a separate indictable mail fraud or wire fraud offense, even if multiple uses are made pursuant to a single fraudulent scheme or artifice.²⁵⁸ Each fraudulent use thus constitutes a RICO predicate act.²⁵⁹ Because nearly all business dealings involve some use of the mails or interstate wires, civil RICO plaintiffs can allege mail fraud or wire fraud predicates (and, thus, perhaps a pattern of racketeering activity) almost on mere allegation of intentional fraud against defendants having no connection with organized crime and racketeering.

Also inviting broad application of civil RICO is another category of predicates: "indictable" Hobbs Act extortion violations and acts or threats involving extortion chargeable under state law and punishable by imprisonment for more than one year.²⁶⁰ In suits having nothing to do with organized crime and racketeering, this category has enabled plaintiffs to join civil RICO claims against nonracketeers that arise from business pressure, labor-management disputes, and disputes concerning public policy matters.²⁶¹

b. Pattern of Racketeering Activity

RICO's pattern definition provides only a floor. A pattern "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."²⁶²

rely solely or primarily on allegations of securities fraud. No other predicate offense occurs in as many as [2%] of the cases.

Id.

257. *Sedima*, 473 U.S. at 501 (Marshall, J., dissenting).

258. See *Badders v. United States*, 240 U.S. 391, 394 (1916); *Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 533 (5th Cir. 1992) (civil RICO action) (citing *United States v. McClelland*, 868 F.2d 704, 706 (5th Cir. 1989)).

259. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1130 (5th Cir. 1988), *vacated and remanded sub nom. Fryar v. Abell*, 492 U.S. 914, *cert. denied sub nom. Abell v. Wright, Lindsey & Jennings*, 492 U.S. 918 (1989).

260. See The Hobbs Act, 18 U.S.C. § 1951; *id.* § 1961.

261. See, e.g., *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252-53 (1994) (civil RICO action against antiabortion protesters); *Turkish v. Kasenez*, 27 F.3d 23, 27 (2d Cir. 1994) (civil RICO claim resulting from business pressure); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1347-48 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) (successful civil RICO action against antiabortion protesters); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 956 (D.C. Cir. 1990) (*en banc*) (holding that where a union merely conducts a recognition strike against an employer, the union does not conduct or participate, directly or indirectly, in the conduct of the employer's affairs within the meaning of § 1962(c); however, a § 1962(c) action could proceed against union's business agent-trustee, who allegedly took control of union and caused it to engage in the predicate acts of extortion), *cert. denied*, 501 U.S. 1222 (1991). See generally ABRAMS, *supra* note 5, at § 5.3.5.

262. 18 U.S.C. § 1961(5).

B. CIVIL RICO'S COMPLEXITY: "[O]NE OF THE MOST CONFUSING CRIMES EVER DEvised BY" CONGRESS²⁶³

Only a handful of federal district court filings carried civil RICO claims throughout the 1970s.²⁶⁴ In most years since the onset of the "civil RICO explosion" in the early 1980s, civil RICO filings have represented a relatively modest number of the total civil filings. It was estimated that approximately 100 filings carried civil RICO claims in 1984, and more than 400 in 1986.²⁶⁵ The years 1987 through 1988 saw approximately 1000 civil RICO filings annually.²⁶⁶ In the 1991 Annual Report, the Director of the Administrative Office of the United States Courts began according civil RICO filings a discrete category in the summary of the Judicial Business of the United States Courts. The number of annual civil RICO district court filings has diminished somewhat in recent years, but remains near the high-water mark of the late 1980s. Even without the federal question subject matter jurisdiction of civil RICO, diversity of citizenship would have enabled a small percentage of the filings (absent the civil RICO claims, of course) to be heard and decided in the federal forum:

<u>12-month period ended:</u>	<u>Civil RICO Cases</u>	<u>Federal Question</u>	<u>Diversity</u>
June 30, 1990	1,214 ²⁶⁷		
June 30, 1991	954	846	108 ²⁶⁸
Sept. 30, 1992	889	813	76 ²⁶⁹
Sept. 30, 1993	895	826	69 ²⁷⁰
Sept. 30, 1994	823	742	81 ²⁷¹

These numbers, however, obscure the true measure of civil RICO's ongoing burden on the federal courts. As District of Columbia Circuit Judge David B. Sentelle wrote in 1990, the burden has emanated not only from numbers, but also from the judicial time required to resolve civil RICO's ambiguities and unravel the sheer complexity of attendant fac-

263. *Casey v. Department of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992).

264. See *supra* notes 146-49 and accompanying text.

265. Sentelle, *supra* note 164, at 148; see also *Senate Panel Hears Suggestions for Amending Civil RICO Provisions*, *supra* note 155, at 925 (according to a Justice Department study, reported civil RICO filings in federal court through the end of 1984 constituted less than 1% of the federal courts' total annual civil caseload attributable to private litigation).

266. Sentelle, *supra* note 164, at 148. See William H. Rehnquist, *supra* note 164, at A14; see also 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, 878 (1990) (estimating that approximately 2902 federal filings carried civil RICO claims from Dec. 1979 to Jan. 1988).

267. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 191 (1991).

268. *Id.*

269. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 180 (1992).

270. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR A1-56 (1993).

271. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR A1-57 (1994).

tual and legal issues.²⁷²

Docket pressures frequently leave federal courts struggling to remain timely with criminal cases and to calendar civil trials within months or years.²⁷³ Under this circumstance, a meaningful assessment of a cause of action's effect on the docket transcends numbers and also measures the judicial time required for disposition.²⁷⁴ Hours are limited and thus precious in judicial chambers, both for the judge and for the clerks (normally two clerks in the district court and three in the court of appeals).²⁷⁵ Hours devoted to one case or opinion are hours not devoted to others.

In the reporters and the computerized retrieval systems, hundreds of lengthy opinions for more than a decade testify to the drain on judicial time caused by civil RICO's persistent complexity and ambiguities. In a 1992 decision, the District of Columbia Circuit reached the heart of the matter when it called RICO "one of the most confusing crimes ever devised by" Congress.²⁷⁶ Courts have characterized civil RICO with such daunting descriptions as "intricate,"²⁷⁷ "agonizingly difficult and confus-

272. See Sentelle, *supra* note 164, at 148 (discussing civil RICO's "amorphous and seemingly boundless character").

273. See *infra* note 377 and accompanying text.

274. See, e.g., William H. Rehnquist, Remarks at a United States Sentencing Commission Symposium on "Drugs and Violence in America," (June 18, 1993), in REUTER TRANSCRIPT REP., June 18, 1993, available in LEXIS, News Library, Script File (criminal cases occupy only approximately 15% of the federal docket, but time studies indicate that they occupy about 48% of a typical federal district judge's time and 80% of the time of some district judges); *Criminal Trials Dominate U.S. District Courts' Workload*, THIRD BRANCH, Dec. 1992, at 5, 5 (in 37 of the 94 federal districts, more than half of the trials related to criminal cases during the twelve-month period ending June 30, 1992; districts with particularly high percentages of criminal trials were S.D. Cal. (86%), M.D.N.C. (84.8%), D.N.M. (76.4%), D. Ariz. (74.4%), D. Haw. (72.3%), W.D. Tenn. (68%), S.D. Fla. (66%), D. Or. (64.9%), N.D. Iowa (63.5%), E.D. Wash. (63.5%), D. Idaho (62.3%), and D.N.D. (62.3%)).

275. See, e.g., Leonard I. Garth, *Views From the Federal Bench: Past, Present & Future*, 47 RUTGERS L. REV. 1361, 1361-63 (1995). Judge Garth sits on the Third Circuit, whose active members prepared an average of 417 unconsolidated cases for disposition the prior year. *Id.* at 1363. From the appellate perspective, Judge Garth explained time constraints this way:

[I]f you were to divide the 255 working days which a court of appeals judge spends in chambers reviewing appeals (I exclude for the moment the holidays, Saturdays, Sundays, late evening and early morning hours . . .), you would come up with 1.6 cases a day that a court of appeals judge must decide. Based on a normal eight-hour day, this results in about five hours a case . . . [T]he briefs have to be read, the internal citations have to be examined, and the issues have to be analyzed. Discussion with law clerks and conferences with one's colleagues must take place. Oral argument, if scheduled, must be heard. Hopefully, the judges should give some thought to the ultimate decision, its ramifications, and its place and effect on the circuit's jurisprudence. Apart from the time taken to travel to the place where arguments are heard . . . and the decision is made, an opinion or order must still be drafted, circulated, approved and filed to conclude the exercise.

Id. at 1363-64.

276. *Casey*, 980 F.2d at 1477.

277. See, e.g., *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 644 (D. Alaska 1982).

ing,"²⁷⁸ and "unusually confusing and convoluted."²⁷⁹ Other courts have discussed RICO's "amorphous legal standards"²⁸⁰ and "murky language."²⁸¹ The Supreme Court has referred to "the complexities of civil RICO actions."²⁸² After the federal courts had wrestled with an array of intractable civil RICO issues for nearly a decade, a district court noted that "[e]very element of pleading a RICO claim has given rise to a plethora of conflicting decisions."²⁸³

Factual and legal issues alike have produced civil RICO's burden on the courts. Civil RICO's character as a dual-level cause of action has helped to generate particularly intricate issues on dispositive motions, at trial and on appeal. At one level, plaintiffs must allege and prove their injuries with requisite causation and the defendant's engagement in a proscribed enterprise relationship. At the other level, civil RICO also requires plaintiffs to allege and prove that for at least several months and usually for a year or more, the defendant violated one or more distinct predicate statutes with sufficient frequency to establish a pattern of racketeering activity.²⁸⁴

Allegation and proof of civil RICO causation has frequently consumed the courts. Where the complaint alleges an association-in-fact enterprise, the plaintiff must also prove the various associates' activities and must

278. *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987) (Burns, J., concurring). See also *id.* at 197 (Burns, J., concurring) ("amorphous" and "ill-defined"); *Yellow Bus Lines*, 913 F.2d at 957 (Mikva, J., concurring) ("nettlesome"); *Combs v. Baker*, 886 F.2d 673, 677 (4th Cir. 1989) (calling RICO a "tormented statute"); *Warren v. Manufacturers Nat'l Bank of Detroit*, 759 F.2d 542, 543 (6th Cir. 1985) (discussing RICO's "complications"); *Macy's E., Inc. v. Emergency Envtl. Servs., Inc.*, 925 F. Supp. 191, 193 (1996) (discussing "the arcane eccentricities of RICO jurisprudence"; this jurisprudence "continues to evolve in uncertain fashion"); *Darocha v. Crusader Sav. Bank*, No. 94-7264, 1995 WL 118208, at *3 (E.D. Pa. Mar. 10, 1995) (calling RICO "a complicated statute"); *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 24 (N.D. Ill. 1982) (discussing "the arcane mysteries of RICO").

279. *Old Time Enters., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1220 (5th Cir. 1989); see also *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 522 (7th Cir. 1995) (discussing RICO's "vagaries"), *cert. denied*, 116 S. Ct. 916 (1996).

280. *Davies v. Continental Bank*, 122 F.R.D. 475, 480 (E.D. Pa. 1988).

281. *Waldo v. North Am. Van Lines, Inc.*, 669 F. Supp. 722, 737 (W.D. Pa. 1987). See also *Uniroyal Goodrich*, 63 F.3d at 522 (discussing the "murkiness of RICO's parameters").

282. *Taffin v. Levitt*, 493 U.S. 455, 465 (1990). See also *Central Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184, 186 (6th Cir. 1993) (Wellford, C.J., dissenting) (calling RICO "one of the most complex statutes ever enacted by Congress" and "a difficult statute fraught with problems in its interpretation"), *cert. denied*, 114 S. Ct. 2678 (1994); *Chapman & Cole v. IteL Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir.) ("A RICO cause of action by definition involves complex litigation and high legal costs."), *cert. denied*, 493 U.S. 872 (1989); *Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982) (discussing "the complex syntax of the RICO statute"), *rev'd in part on other grounds and aff'd in part en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983); *Witt v. South Carolina Nat'l Bank*, 613 F. Supp. 140, 144 (D.S.C. 1985) (calling RICO a "complex statute").

283. *Occupational-Urgent Care Health Sys., Inc. v. Sutro & Co.*, 711 F. Supp. 1016, 1022 (E.D. Cal. 1989).

284. After initial uncertainty, courts of appeals now uniformly hold that the ordinary "preponderance of the evidence" standard applies to proof of all elements of the civil RICO claim. See, e.g., *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 249 (7th Cir. 1995).

establish that these activities evinced a common or shared purpose for a significant period of time.²⁸⁵ To complicate matters further, many multicount civil RICO actions allege separate and distinct enterprises in support of the various counts.²⁸⁶

Efforts to allege and prove a pattern of racketeering activity may produce complex factual and legal questions and ultimately a trial-within-a-trial. The pattern may consist of either (1) acts in violation of a single predicate statute or provision, such as the mail fraud statute, or (2) acts in violation of more than one predicate statute or provision, such as the mail fraud statute and the Hobbs Act.²⁸⁷ To establish violation of a predicate statute, the plaintiff must allege and prove all elements of the violation.²⁸⁸ To establish a pattern of racketeering activity, the plaintiff must allege and prove a substantial number of predicate violations extending over the requisite period.²⁸⁹ The frequent result is lengthy pleadings whose analysis consumes a considerable amount of judicial time even when dismissal results.²⁹⁰

While struggling to surmount hurdles such as these, the court must grapple with civil RICO elements characterized by a "murkiness of . . . parameters"²⁹¹ that frequently has denied meaningful guidance. In the effort to cast its wide net to snare organized crime members and racketeers, Congress left several RICO elements open-ended and largely undefined in 1970. The lawmakers' evident assumption was that courts could place Mafia and Cosa Nostra mobsters inside RICO's confines without precisely determining these confines. When the defendant is an ordinary business or commercial entity rather than a reputed gangster, the task has been quite a different matter.

These factual and legal issues are time-consuming at each step of the judicial process. In a civil RICO action, as in any other, the court must study the parties' submissions and must frequently participate in oral proceedings on dispositive motions and appeals. The court's writings must marshal and present the operative facts after reflective analysis. RICO's pattern element makes it likely that these facts will concern intricate transactions extending back several years.

The court's research and writing then must unravel civil RICO's amorphous legal doctrine and relate it to the facts alleged or proved. In the

285. ABRAMS, *supra* note 5, § 4.3.2, at 193-94.

286. *See id.* § 4.7.1, at 222-28.

287. *See id.* § 5.4.1, at 290.

288. *See id.* § 5.3, at 264-65.

289. *See id.* § 5.7, at 302.

290. *See, e.g.,* Jennings v. Emry, 910 F.2d 1434, 1435-36 (7th Cir. 1990) (affirming dismissal of civil RICO complaint for failing to contain a short and plain statement of the claim pursuant to Rule 8 of the Federal Rules of Civil Procedure); *In re* Catanella and E.F. Hutton & Co. Sec. Litig., 583 F. Supp. 1388, 1392-93 (E.D. Pa. 1984) (denying defendants' motion to dismiss civil RICO counts for failure to satisfy Rule 8). *Catanella* found the civil RICO counts "indeed prolix," but concluded that "[t]he plaintiffs . . . are alleging the violation of numerous provisions in the federal securities laws, which are complex in their application. This makes 'concise' pleading difficult." *Id.* at 1401.

291. *Uniroyal Goodrich*, 63 F.3d at 522.

frequent situation in which civil RICO's breadth leaves the operative rule of law unclear, the court must reason toward the result through largely opaque statutory language and legislative history. Where the rule of law is shrouded in conflicting civil RICO precedent, the court must analyze the precedents before determining which authorities are persuasive. Unless the court dismisses without leave to replead, the action may involve continued proceedings and multiple opinions.

The remainder of this Part of the Article discusses representative examples of the legal uncertainties that have plagued each element of civil RICO. The discussion, of course, does not suggest that each and every civil RICO filing has required mental gymnastics from the court en route to decision. Civil RICO's record does suggest, however, that in a substantial number of decisions, uncertainty has persisted despite judicial efforts to parse available sources of congressional intent.

1. Injury

Section 1964(c) of RICO provides recovery when the plaintiff proves proprietary injury "by reason of a violation of section 1962."²⁹² At the very least, this section requires proof of causation in fact. In the absence of resolution in civil RICO's language and sparse legislative history, however, courts remained split on the precise nature of the causation requirement for more than a decade. Circuits disagreed about whether the section requires proof that the RICO violation proximately caused the injury.²⁹³ Circuits also disagreed about whether the section limits recovery to the "direct" victims of the violation.²⁹⁴ Because of RICO's Clayton Act antecedents, some courts sought to resolve the direct-injury question by applying a pass-on theory and then by precluding proof of pass-on.²⁹⁵

The profound nationwide split continued until 1992, when the Supreme Court held that to recover under civil RICO, the plaintiff must prove that

292. See 18 U.S.C. § 1964(c), amended by Pub. L. No. 104-67, § 107, 109 Stat. 737, 758. Section 1964(c) is discussed *supra* in the text accompanying notes 188-89.

293. See ABRAMS, *supra* note 5, § 3.3.3, at 142. Most of the court of appeals and district court decisions discussed in the remainder of Part III were followed by decisions that dissected their rationales and holdings and proceeded either to apply or reject them. Most of these citations are omitted from this Part's ensuing footnotes, but appear in ABRAMS, *supra* note 5.

294. *Id.* § 3.3.4., at 142.

295. *Id.* § 3.3.5, at 144.

[A] suit may implicate so-called "defensive pass-on," where the civil RICO defendant contends that the plaintiff (the direct victim) suffered no legally cognizable proprietary injury because the plaintiff passed on any loss to others in the form of higher costs or prices. . . . [A] suit may [also] implicate "offensive pass-on," where the civil RICO plaintiff (assertedly the indirect victim) alleges that it suffered legally cognizable proprietary injury because another party passed on loss to it.

The Supreme Court has precluded proof of pass-on in most actions under civil RICO's model, section 4 of the Clayton Act.

the RICO violation was the proximate cause of its injury.²⁹⁶

Civil RICO's injury element also left other thorny questions unanswered. Must the plaintiff allege proprietary injury from all the predicate acts, or at least from sufficient predicate acts to constitute a pattern of racketeering activity?²⁹⁷ May the plaintiff secure injunctive or other equitable relief on a civil RICO claim?²⁹⁸ May the defendant secure contribution or indemnity for liability incurred under civil RICO?²⁹⁹

Perhaps the most troublesome issue concerning the injury element has been the statute of limitations for a civil RICO cause of action. Congress enacted civil RICO without providing an express limitations period. In the ensuing effort to borrow the most suitable period from another source, courts could not agree on a single source. Some decisions borrowed the forum state's limitations period for the cause most similar to the alleged RICO predicate offenses.³⁰⁰ Even within a particular state, however, this approach invited inconsistency and uncertainty, depending on which predicate acts the plaintiff alleged in establishing a pattern of racketeering activity.³⁰¹ Particular confusion abounded in the frequent case in which the plaintiff alleged violations of more than one predicate statute.

On the other hand, some courts applied a uniform state "catchall" statute of limitations to all civil RICO actions brought within the state.³⁰² In 1985, the American Bar Association's Ad Hoc Civil RICO Task Force characterized the civil RICO limitations issue as "confused, inconsistent, . . . unpredictable . . . [and] virtually guaranteed to incite complex and

296. See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992).

297. Most courts have answered this question in the negative, holding that where the plaintiff proves the violation, a civil RICO judgment may be sustained where only one predicate act caused the plaintiff proprietary injury. See, e.g., *Deppe v. Tripp*, 863 F.2d 1356, 1366 (7th Cir. 1988). The plaintiff would recover damages for whatever proprietary injury is caused by any predicate act that helps constitute the pattern. See *Pelletier v. Zweifel*, 921 F.2d 1465, 1497 & n.67 (11th Cir.), cert. denied, 502 U.S. 855 (1991); *Environmental Tectonics v. W.S. Kirkpatrick Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988), aff'd on other grounds, 493 U.S. 400 (1990); *Deppe*, 863 F.2d at 1366-67. But see *Pujol v. Shearson/American Express, Inc.*, 829 F.2d 1201, 1205 (1st Cir. 1987) ("There are . . . two requirements for standing under § 1964(c): (1) a plaintiff must show that there has been a violation of § 1962, and (2) he must show that his injury was caused by the violation. A violation of § 1962 occurs if the defendant committed at least two 'predicate acts.'").

298. Most courts have answered this question in the negative. See, e.g., *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); see also *ABRAMS*, supra note 5, at § 3.4.3, at 158 (citing several cases). But see *National Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1082-83 (N.D. Ill. 1995) (holding that private civil RICO plaintiffs may secure injunctive relief and noting the conflict among the circuits on the question).

299. Courts reaching this question conclude in the negative. See, e.g., *Conklin v. St. Lawrence Valley Educ. Television Council, Inc.*, No. 93-CV-984, 1995 WL 118465, at *1 (N.D.N.Y. Mar. 8, 1995) (citing *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)); see also *ABRAMS*, supra note 5, at § 3.4.4, at 162.

300. *Malley-Duff*, 483 U.S. at 148 (citing authorities that borrowed a state limitations period).

301. *Id.*

302. *Id.* at 148-49 (citing decisions).

expensive litigation over what should be a straightforward matter.”³⁰³

In its 1987 decision in *Agency Holding Corp. v. Malley-Duff & Assocs.*,³⁰⁴ the Supreme Court finally held that the four-year statute of limitations applicable to Clayton Act civil enforcement actions applies to civil RICO actions.³⁰⁵ The Court, however, did not decide when a civil RICO claim accrues.³⁰⁶ Largely because civil RICO recovery depends on proof of injury caused by a pattern of predicate statutory violations, the accrual question remains unresolved after dozens of decisions grappling with RICO’s intricacies.³⁰⁷

Several circuits have applied the general federal “discovery” rule, holding that a civil RICO claim accrues when the plaintiff discovered or had reason to discover the proprietary injury that is the basis of the claim.³⁰⁸ Critics of the discovery rule, however, have asserted that a civil RICO plaintiff might suffer proprietary injury (and thus might discover or have reason to discover that injury) well before commission of sufficient predicate acts to constitute a pattern of racketeering activity. Critics thus suggest that the rule might conceivably bar a civil RICO claim before the claim could survive a motion to dismiss.

To avoid this contingency, some courts hearing civil RICO actions apply a “continuing offense” exception to the general federal rule.³⁰⁹ This exception sometimes finds application in actions alleging continuous conduct. It provides that a civil RICO claim is timely if at least one predicate act causing the injury occurs within the four-year limitations period.³¹⁰

303. ABA REPORT, *supra* note 149, at 391-92. See also *Reform of the Private Civil Action Provision of RICO*, *supra* note 161, at 431 (“there are potentially hundreds of limitations periods for civil RICO claims”). See generally Michael J. Lane, *Civil RICO: A Call For a Uniform Statute of Limitations*, 13 FORDHAM URB. L.J. 205, 212-225 (1985) (discussing the inconsistent decisions that preceded *Malley-Duff*).

304. 483 U.S. 143 (1987).

305. *Id.* at 156.

306. *Id.* at 157. The Judicial Improvements Act of 1990, 28 U.S.C. § 1658 (1994), enacted a catchall civil statute of limitations: “Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than [four] years after the cause of action accrues.” Congress rejected suggestions that § 1658 apply to previously enacted causes. See H. REP. NO. 101-734, 101st Cong., 2d Sess. 24 (1990), reprinted in 1991 U.S.C.C.A.N. 6870. Because the section does not apply to previously enacted causes of action, it does not disturb *Malley-Duff*’s holding concerning civil RICO’s statute of limitations.

307. Although the Securities Litigation Reform Act of 1995 determines the accrual period of civil RICO claims actionable as fraud in the purchase or sale of securities, such claims may no longer be brought unless the defendant is convicted of the fraud. Pub. L. No. 104-67, § 107, 109 Stat. 737, 758. Where there is a conviction, civil RICO’s four-year statute of limitations begins to run on the date on which the conviction becomes final. *Id.*

308. See, e.g., *Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990) (citing *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987)); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *La Porte Constr. Co. v. Bayshore Nat’l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1015 (11th Cir. 1986); *Alexander v. Perkin Elmer Corp.*, 729 F.2d 576, 577-78 (8th Cir. 1984).

309. See, e.g., *Long Island Lighting Co. v. General Elec. Co.*, 712 F. Supp. 292, 302 (E.D.N.Y. 1989); see also *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

310. The Third Circuit applies a variation of this exception:

Other civil RICO authorities apply a "separate accrual" rule. Each time a plaintiff suffers a proprietary injury caused by a § 1962 violation, a cause of action to recover damages based on that injury accrues to the plaintiff at the time it discovered or should have discovered the injury.³¹¹ For example, the Eighth, Tenth, and Eleventh Circuits have held that "with respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern."³¹²

On the other hand, the Seventh Circuit applies a discovery-separate accrual rule, holding that the limitations period for civil RICO actions begins to run when a RICO violation exists and the plaintiff knows or should have known of the injury, even if the plaintiff has not yet discovered the pattern of racketeering activity.³¹³ Nevertheless, a pattern must exist before the claim accrues, a requirement that may delay accrual until after the plaintiff discovers the injury.³¹⁴ The Seventh Circuit also holds that a new civil RICO cause of action accrues on the occurrence of each separate injury.³¹⁵ Each wrongful act that causes injury is a new cause of action, and suit to recover for that injury must be brought within the limitations period.³¹⁶

The Supreme Court recently granted certiorari in a case that will enable the Justices to unravel the mess that characterizes civil RICO accrual decisions.³¹⁷ The upcoming decision will be the Court's tenth interpreta-

[T]he limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same "pattern."

Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130-31 (3d Cir. 1988). See also Glessner v. Kenny, 952 F.2d 702, 707-08 (3d Cir. 1991) ("there can be separate accrual of the statute of limitations from new [and independent] injuries").

311. Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988), cert. denied, 490 U.S. 1007 (1989); Reeder v. Kermit Johnson, Alphagraphics, Inc., 723 F. Supp. 1428, 1438-39 (D. Utah 1989).

312. Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991) (quoting Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla., Inc., 906 F.2d 1546, 1554-55 (11th Cir. 1990), cert. denied, 500 U.S. 910 (1991)); Vesta State Bank v. Independent State Bank, 924 F.2d 155, 156 (8th Cir. 1991); Bath v. Bushkin, Gaims, Gains & Jonas, 913 F.2d 817, 820-21 (10th Cir. 1990). See also Caproni v. Prudential Sec., Inc., 15 F.3d 614, 619-20 (6th Cir. 1994).

313. McCool v. Strata Oil Co., 972 F.2d 1452, 1465 (7th Cir. 1992).

314. *Id.*

315. *Id.*

316. *Id.* at 1465-66.

317. See Grimmett v. Brown, 75 F.3d 506 (9th Cir.), cert. granted, 116 S. Ct. 2521 (1996).

tion of civil RICO since 1985.³¹⁸ This spate of decisions, each following a conflict among the circuits, graphically demonstrates civil RICO's persistent complexities and ambiguities.

2. *Enterprise*

One of RICO's most enigmatic provisions is § 1962(c),³¹⁹ the basis of most civil RICO claims. In particular, courts have struggled for more than a decade to make sense of the clause that makes it unlawful for any person employed by or associated with an enterprise "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ."³²⁰ Much of the semantic difficulty arises because the provision inartfully uses the word "conduct" as a verb and a noun in the same sentence.

For example, in *Bennett v. Berg*,³²¹ the Eighth Circuit suggested (without deciding) that § 1962(c) requires "some participation in the operation or management of the enterprise itself."³²² However, most decisions reaching the "conduct or participate" element rejected *Bennett's* restrictive view for overlooking § 1962(c)'s broad language, particularly the "directly or indirectly" phrase.³²³ The courts rejecting *Bennett* frequently concluded that § 1962(c) applies to "insiders and outsiders—those merely 'associated with' an enterprise—who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity. . . . The RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise."³²⁴

A District of Columbia Circuit panel rejected *Bennett* in 1988,³²⁵ but the panel decision was upset on review by the en banc court, which concluded that of the circuits' proliferating tests for determining conduct or participation, *Bennett's* formulation "hit closest to the mark."³²⁶ The law stood in disarray until 1993, when the Supreme Court resolved the profound conflict among the circuits by adopting *Bennett's* "operation or management" test.³²⁷

318. See *supra* text accompanying notes 168-87.

319. 18 U.S.C. § 1962(c).

320. *Id.*

321. 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).

322. *Id.* at 1364.

323. See, e.g., *Bank of Am. Nat'l Trust Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986); *First Fin. Sav. Bank, Inc. v. American Bankers Ins. Co.*, 699 F. Supp. 1167, 1172 (E.D.N.C. 1988) ("Section 1962(c) requires only that a defendant be associated with the alleged RICO enterprise and that he participates directly or indirectly in the management or conduct of the enterprise affairs.")

324. See, e.g., *Schacht v. Brown*, 711 F.2d 1343, 1360 (7th Cir.) (citations omitted) (emphasis added), *cert. denied*, 464 U.S. 1002 (1983).

325. See *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union* 639, 839 F.2d 782, 793 (D.C. Cir. 1987), *cert. denied*, 488 U.S. 926 (1988), *vacated and remanded*, 492 U.S. 914 (1989).

326. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union* 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1222 (1991).

327. See *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993).

3. *Pattern of Racketeering Activity*

Before the Supreme Court decided *Sedima, S.P.R.L. v. Imrex Co.*³²⁸ in 1985, courts deciding civil RICO claims paid only scant attention to the pattern element. A few decisions concluded or assumed that commission of merely two predicate acts within the ten-year period constituted a pattern.³²⁹ *Sedima* concluded that civil RICO's apparent breadth stemmed partly from the "failure of Congress and the courts to develop a meaningful concept of 'pattern.'"³³⁰ *Sedima* invited future development in a terse footnote that lower courts dissected until the Supreme Court amplified on the pattern element four years later in *H.J. Inc. v. Northwestern Bell Telephone Co.*³³¹ The footnote indicated that proof of merely two acts of racketeering activity, without more, would normally be insufficient to form a RICO pattern.³³² The footnote stated that the predicate acts must be marked by "continuity plus relationship," but it provided the lower courts little guidance in their struggle to apply these dual concepts.³³³

If the Court believed that the *Sedima* footnote would help the lower courts fashion a body of coherent law, the Justices were quickly disappointed. "Relationship," the footnote's second requirement, usually was not a matter of serious dispute because civil RICO plaintiffs ordinarily allege predicate acts that have the same or similar purposes, results or methods of commission.³³⁴ The "continuity" prong, however, was quite another matter. Justice Scalia was not wide of the mark when he stated that the four-year struggle to interpret and apply the continuity prong had produced "the widest and most persistent circuit split on an issue of

328. 473 U.S. 479 (1985).

329. See, e.g., *Beth Israel Medical Ctr. v. Smith*, 576 F. Supp. 1061, 1065 (S.D.N.Y. 1983).

330. *Sedima*, 473 U.S. at 500.

331. *Id.* at 497 n.14. The footnote provided:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," . . . not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern. . . ." Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern"

Id. (alteration in original) (citations omitted).

332. *Id.*

333. See *id.*

334. See, e.g., *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928 (10th Cir. 1987) ("It is clear that when . . . the acts are part of a common fraudulent scheme, they satisfy the relationship requirement of *Sedima*.").

federal law in recent memory.”³³⁵

The Eighth Circuit had staked out the most restrictive position, holding that continuity required allegation of the defendant’s engagement in more than one “scheme.” In *Deviries v. Prudential-Bache Securities, Inc.*,³³⁶ for example, the court of appeals dismissed the civil RICO count against securities brokers who allegedly made fraudulent misrepresentations to secure the plaintiff’s account and then churned the account for six years by recommending transactions unsuitable to the plaintiff’s investment needs.³³⁷ The court held that the predicate acts constituted only one scheme, even though the acts allegedly continued for a considerable period.³³⁸ According to the Seventh Circuit in *Morgan v. Bank of Waukegan*,³³⁹ “defendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts. . . .”³⁴⁰

No other circuit adopted this multiple-scheme test. In *United States v. Ianniello*,³⁴¹ the Second Circuit adopted a lax approach to continuity, holding that when a defendant committed two or more predicate acts within ten years that had the common purpose of furthering a continuing criminal enterprise with which the defendant was associated, this commission established both relationship and continuity.³⁴² In a later civil RICO action, another Second Circuit panel stated that “*Ianniello* confirms that two related predicate acts will suffice to establish a pattern. . . .”³⁴³ No other circuit embraced *Ianniello*’s continuing-enterprise test—a test that the Fourth Circuit concluded would “eliminate the pattern requirement altogether.”³⁴⁴ Because commission of fraud invariably involves use of mail or interstate wire at least twice within ten years, “every fraud would constitute ‘a pattern of racketeering activity.’”³⁴⁵

In a pair of en banc decisions, the Second Circuit reversed its position five months before the Supreme Court decided *H.J.*³⁴⁶ The en banc court explicitly rejected the multiple-scheme test, but it declared that proof of two predicate acts without more did not establish a pattern and that the

335. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring). See also *id.* at 252 (Scalia, J., concurring) (concluding that the continuity-plus-relationship standard seems “about as helpful . . . as ‘life is a fountain’”). A circuit-by-circuit description of the profoundly conflicting decisions appears in ABRAMS, *supra* note 5, at § 5.7.

336. 805 F.2d 326 (8th Cir. 1986).

337. *Id.* at 329.

338. *Id.*

339. 804 F.2d 970 (7th Cir. 1986).

340. *Id.* at 975, quoted in *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987).

341. 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987).

342. *Id.* at 192.

343. *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988).

344. *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).

345. *Id.* at 154.

346. *Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir.) (en banc), vacated and remanded, 492 U.S. 914, on remand, 893 F.2d 1433 (2d Cir.), cert. denied, 493 U.S. 992 (1989); *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.) (en banc) (same).

pattern element required related racketeering acts evincing continuous criminal activity or a threat of continuity.³⁴⁷

The Seventh Circuit also rejected the multiple-scheme test and announced a multiple-factor test that assumed a middle ground between the extremes of the Eighth Circuit and Second Circuit. For the Seventh Circuit, continuity depended on such factors as "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries."³⁴⁸

The First Circuit refused to adopt the Eighth Circuit's multiple-scheme test,³⁴⁹ cited the Seventh Circuit's multiple-factor test with approval,³⁵⁰ and concluded that "no one characteristic can be considered as controlling in determining whether a pattern exists."³⁵¹

The Third Circuit rejected the multiple-scheme test³⁵² and announced a multiple-factor test of its own, holding that a pattern's existence depended on "specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity."³⁵³

On the other hand, the Fourth Circuit "deliberately declined to adopt any mechanical rules to determine the existence of a RICO pattern. . . ." ³⁵⁴ It opted for a case-by-case determination³⁵⁵ based on congressional intent that RICO "serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being."³⁵⁶ In a decision handed down just three months after *Sedima*, the Fifth Circuit held that, as a matter of law, two related acts of mail fraud constituted a pattern.³⁵⁷

With the law in utter disarray, *H.J.* attempted to resolve the imbroglio by distinguishing between open-ended and closed-ended patterns. To prove a closed-ended pattern or "a closed period of repeated conduct,"

347. *Indelicato*, 865 F.2d at 1390-91.

348. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

349. *Roeder*, 814 F.2d at 31.

350. *Id.*

351. *Id.*

352. *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987) (multiple-scheme test "would exempt from RICO liability defendants who engage in only a single unlawful scheme, however extensive and injurious").

353. *Id.* at 39.

354. *Brandenburg v. Seidel*, 859 F.2d 1179, 1185 (4th Cir. 1988).

355. *Id.*

356. *International Data Bank v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).

357. *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985). Later Fifth Circuit panels criticized this holding, but they applied it because only the court sitting en banc may overrule a prior panel's determination. See *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 n.3 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989).

In an appeal decided a few days before *H.J.*, the Sixth Circuit rejected the Eighth Circuit's multiple-scheme test and expressed approval of the Third and Seventh circuits' multiple-factor approaches. *Fleischhauer v. Feltner*, 879 F.2d 1290, 1297-98 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074, and *cert. denied*, 494 U.S. 1027 (1990).

the RICO plaintiff must prove a "series of related predicates extending over a substantial period of time."³⁵⁸ To prove an open-ended pattern, the plaintiff must prove a series of related predicates that, without extending over such a period, demonstrates "the *threat* of continuity."³⁵⁹

H.J. has finally provided a measure of coherence to civil RICO pattern jurisprudence, though it has done little to relieve the burden of complex factual proceedings.³⁶⁰ Lower courts generally dismiss civil RICO claims that are based on allegations of relatively short-lived patterns.³⁶¹ On the other hand, lower courts generally sustain civil RICO claims whose alleged patterns demonstrate significant duration, a significant number of predicate acts, a significant number of participants, a significant number of victims, or some combination of these factors.³⁶² In either event, the evolving pattern jurisprudence continues to invite assertion of civil RICO claims in private disputes that are entirely beyond the realm of organized crime and racketeering, the targets Congress and the President were aiming at in 1970 when they enacted RICO.

Unresolved issues thus have plagued civil RICO adjudication for several years, prompting one exasperated court to liken civil RICO to the proverbial Flying Dutchman: No sooner would courts unravel one enigma than another would surface in its place.³⁶³ Conflicts in civil RICO interpretation have diminished in recent years, but only after more than a decade of Herculean efforts by the federal courts to make sense of the remedy. In the few weeks between civil RICO's appearance in the OCCA bill in 1970 and the bill's enactment, nothing in the private remedy's scant legislative history suggests that Congress or President Nixon had any inkling about the burdens the remedy would ultimately impose on the federal judiciary.

IV. CIVIL RICO'S ENDURING LESSONS

This Part discusses lessons from civil RICO's unhappy legacy which can help guide future legislative and executive consideration of crime legislation. The overarching lesson is that when Congress enacts crime legislation without reflective study in the shadows of an impending political campaign, the lawmakers run a particular risk that the legislation will fail to achieve the intended results. Haste makes waste.

Civil RICO also teaches that when Congress seeks to regulate antisocial behavior and to impose sanction for violation of social norms, the lawmakers must jealously guard the federal judiciary's finite resources. Lawmakers need to resist the knee-jerk reaction to federalize criminal law traditionally within the province of the states unless state courts are

358. *H.J.*, 492 U.S. at 241-42.

359. *Id.* at 242 (emphasis in original).

360. *ABRAMS*, *supra* note 5, § 5.6, at 301.

361. *Id.*

362. *Id.* at 301-02.

363. See *In re Dow Co. "Sarabond" Prods. Liability Litig.*, 666 F. Supp. 1466, 1470 (D. Colo. 1987).

found incapable of performing their traditional role,³⁶⁴ or unless the behavior at issue affects a particularly federal interest or otherwise has significant interstate or international connections.³⁶⁵

Federalization may appear as a "quick fix" to the intractable crime problem. Like many quick fixes, however, federalization may be destined for ultimate failure, as civil RICO has failed to advance the battle against organized crime and racketeering. Even where federalization holds the potential to achieve some measure of success, however, Congress should remain wary of upsetting state authority over administration of the criminal law. First, federal entry embarrasses state courts and state prosecutorial authorities, which appear as subjects of an apparent national mandate that they are no longer equal to the regulatory task. Second, federalization may worsen the already debilitating docket pressures in the federal courts. New volumes of criminal cases necessarily diminish the federal courts' capacity not only to focus on criminal prosecutions truly within their particular competence, but also to expeditiously try civil actions raising claims under federal statutes central to our polity.

Civil RICO's ultimate lesson is that when Congress and the President consider crime legislation, they must strive to get it right the first time. Initial competence may be no mean feat because the legislative process normally fashions standards before the occurrence of events the standards seek to regulate. Legislation reviews the past and seeks to anticipate the future; courts and litigants later enjoy the relative comfort of parsing statutory language amid existing disputes from the more secure vantage of hindsight.

Because legislation normally requires a healthy measure of foresight, the legislative process frequently features periodic amendment grounded in wisdom derived from experience with initial legislation. The practical truth, however, is that initial miscalculation in crime legislation is not always readily correctable. Amendment or repeal may appear prudent when experience suggests particular crime legislation is ineffective, counterproductive or unduly harsh. Correction, however, may remain politically unpalatable because only the hardiest legislators care to risk appearing "soft on crime" in the age of sound bites and negative advertising.

In 1985, an American Bar Association Task Force found "a demonstrated need for legislative amendment" of civil RICO.³⁶⁶ In light of the private remedy's widespread invocation in suits having nothing to do with

364. See *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) ("Our Federalism").

365. See *National Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476, 1483-84 (D. Nev. 1992) (a state statute may violate the Commerce Clause if it imposes an improper burden on interstate commerce), *aff'd*, 10 F.3d 633 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1543 (1994). Congress has usually grounded federalization of criminal law in the commerce power, which is augmented by the Necessary and Proper Clause. See U.S. CONST., art. I, § 8, cl. 18. Occasionally federalization has been grounded in the taxing power, *id.* cl. 1, or the postal power, *id.* cl. 7.

366. ABA REPORT, *supra* note 149, at 1.

organized crime and racketeering, the Task Force found the remedy "grossly overbroad, encompassing business transactions that could not have been foreseen or intended by Congress."³⁶⁷ From 1985 to 1991, Congress regularly debated bills to limit civil RICO, whose expansive reach had indeed blanketed American law.³⁶⁸ Until the 1995 Securities Litigation Reform Act, however, each amendment effort failed, largely because battle lines had been drawn. Powerful constituencies lined up in favor of amending civil RICO, and powerful constituencies lined up in opposition. As ill-considered as civil RICO's enactment was in 1970, the private remedy had assumed a life of its own, fiercely resistant to change.

A. THE VIOLENT CRIME CONTROL ACT OF 1991

By the summer and autumn of 1991, efforts to enact crime legislation had been stalled in Congress for three years. President Bush had repeatedly upbraided the lawmakers for inaction,³⁶⁹ polls reported crime as a

367. *Id.*

368. Congressional amendment efforts began in early 1985, even before *Sedima*, opened the door to broad application of civil RICO. See, e.g., *Senate Judiciary Chairman Promises Hearings on RICO Civil Liability Reform*, 17 Sec. Reg. & L. Rep. (BNA) No. 2, at 57 (Jan. 11, 1985). In 1986, legislation restricting civil RICO's scope passed the House but was defeated in the Senate. See "*Small Investor*" *Clause May Break Stalemate over RICO Compromise Talks*, 19 Sec. Reg. & L. Rep. (BNA) No. 23, at 814 (June 5, 1987); *Dispute Over Securities Exemption May Block Progress on RICO Compromise*, 19 Sec. Reg. & L. Rep. (BNA) No. 782, at 801 (May 29, 1987). After much rancor, renewed efforts to enact compromise amending legislation failed in 1987. See, e.g., *Small Investor Proposal Engenders Controversy Over Civil RICO Reform*, 19 Sec. Reg. & L. Rep. (BNA) No. 44, at 1691 (Nov. 6, 1987); *Metzenbaum, Boucher Dispute Threatens Future of Civil RICO Reform Legislation*, 19 Sec. Reg. & L. Rep. (BNA) No. 29, at 1047 (July 17, 1987). Efforts failed again each year from 1988 to 1991. In 1988, House bills never emerged from subcommittee, while restrictive legislation was favorably reported out of the Senate Judiciary Committee in May, but was not introduced on the Senate floor despite efforts of some supporters in October. See, e.g., *Attempts to Add RICO Bill as Amendment to Drug Bill Fail Before Reaching Floor*, 20 Sec. Reg. & L. Rep. (BNA) No. 41, at 1586 (Oct. 21, 1988). Widespread disagreements also stalled amending legislation throughout 1989. See, e.g., *Senate Judiciary Delays Vote on Bill to Reform Civil RICO*, 21 Sec. Reg. & L. Rep. (BNA) No. 46, at 1730 (Nov. 24, 1989); *DeConcini, Boucher Bill Would Curtail Scope of Civil RICO*, 21 Sec. Reg. & L. Rep. (BNA) No. 8, at 309 (Feb. 24, 1989). Legislation also stalled in 1990 and 1991. See, e.g., *Elections Make '92 Unpredictable Year for Legislative Action, Observers Say*, 24 Sec. Reg. & L. Rep. (BNA) No. 3 at 76, 78 (Jan. 17, 1992); *House Judiciary Committee Approves Proposal to Curb Use of Civil RICO*, 22 Sec. Reg. & L. Rep. (BNA) No. 37, at 1343 (Sept. 21, 1990); *Senate Judiciary Committee Approves Controversial RICO Reform Measure*, 22 Sec. Reg. & L. Rep. (BNA) No. 6, at 197 (Feb. 9, 1990).

369. See, e.g., *Remarks at a Luncheon Meeting With Law Enforcement Officials*, PUB. PAPERS 721, 722 (June 25, 1991) ("I'm having great difficulty getting [the Administration's crime bill] through the Congress, so I hope the American people will speak up and let the Congress know that this kind of strong anticrime legislation has their support."); *Remarks at a White House Briefing for Law Enforcement Officials on Crime Legislation*, PUB. PAPERS 690-91 (June 18, 1991).

We sent a crime bill up [to Congress] [two] years ago, and the American people say: What in the world is going on? What is taking so long? And I know I run the risk of 'bashing' the Congress. But that is not what this is about. It is trying to encourage this lethargic system to do that which the people want

Id. See also *Remarks at the Federal Bureau of Investigation Academy Commencement Ceremony*, PUB. PAPERS 581, 582 (May 30, 1991) (In 1989, "we called on the United States

major concern of voters,³⁷⁰ and crime appeared destined to be a major issue in the national elections the following year.

Against this background, Congress debated the Violent Crime Control Act of 1991. On the floor in late June, a Senator introduced two amendments that would have conferred federal jurisdiction over all crimes committed through use of a firearm that "has moved at any time in interstate or foreign commerce."³⁷¹ The first amendment would have made any intentional, knowing, or reckless homicide committed with such a firearm a federal crime punishable by "death or imprison[ment] for any term of years or for life."³⁷² The second amendment would have made any other "crime of violence or drug trafficking" committed with such a firearm a federal crime punishable by a ten- to thirty-year imprisonment term without release, plus any term otherwise imposable for the underlying crime.³⁷³ Both amendments stated that federal jurisdiction would "be used to supplement but not supplant the efforts of state and local prosecutors."³⁷⁴

The two firearms amendments were unaccompanied by findings that state courts had grown unable or unwilling to fulfill their traditional role in punishing violent street crime. Nor was there any analysis of the institutional costs of federalizing the substantial volume of criminal cases the two amendments were designed to reach.

At the very least, the Senate should have considered the year-old findings and recommendations of the Federal Courts Study Committee, which Congress itself had created in 1988. The lawmakers had directed the fifteen-member Committee to make a complete study of the courts of the United States and of the several states.³⁷⁵ The Committee was to "examine problems and issues currently facing the courts of the United States," and to "develop a long-range plan for the future of the Federal judiciary, including assessments involving . . . the types of disputes resolved by the Federal courts."³⁷⁶ Pursuant to the congressional mandate, the Chief Justice had appointed committee members from the three federal branches, state governments, universities, and private practice.

The Study Committee's 1990 report warned that the dramatic increase in federal drug prosecutions had already "threaten[ed] to overwhelm the

Congress to pass our crime package, legislation designed to protect our cops by giving them the tools they need to get their job done. . . . Two years have passed, and Congress has still not acted on our request."); *Remarks Announcing Proposed Crime Control Legislation*, PUB. PAPERS 244 (Mar. 11, 1991) (In 1989, "we launched an effort to pass our crime legislation. . . . And today . . . the Congress has still failed to act. . . .").

370. See, e.g., Howard Goldberg, *AP Poll Shows Huge Majority Expects Bush Re-election*, AP, June 5, 1991, available in WESTLAW, 1991 WL 6188880.

371. 137 CONG. REC. S8666, S8846 (1991).

372. *Id.* at S8666 (introduced by Sen. D'Amato for himself and Sen. Thurmond and Sen. Mack).

373. *Id.* at S8846 (introduced by Sen. D'Amato for himself and Sen. Dole).

374. *Id.* at S8666, S8846.

375. See Judicial Improvements and Access to Justice Act, tit. I, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (codified as amended at 28 U.S.C. 1 (1994)).

376. *Id.*

resources of the federal courts.”³⁷⁷ The Committee concluded that “[b]oth the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with crime.”³⁷⁸

Sheer numbers underscored the Study Committee’s findings and gave the lawmakers reason to question the wisdom of the two firearm amendments. The most recent Uniform Crime Reporting document compiled by the Federal Bureau of Investigation reported approximately 11,830 firearm homicides nationally in 1989, the last year for which figures were available.³⁷⁹ Approximately 143,000 violent crime and drug trafficking cases involving firearms were filed in state courts annually.³⁸⁰ About 95% of firearms have passed through interstate or international commerce at some point, which in 1989 would have accounted for 11,240 homicide cases and 135,850 violent crime and drug trafficking cases.³⁸¹ If only a relatively small percentage of the new federal criminal defendants defined by the two firearms amendments would have proceeded to trial in federal court, federalizing such a vast array of state crimes would likely have debilitated the federal judiciary.³⁸²

377. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 160 (1990) [hereinafter STUDY COMMITTEE]. See also *id.* at 6 (“The expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog.”); *id.* at 36 (providing statistics).

378. *Id.* at 36. The Committee stated:

Many of the new drug cases now flooding the federal system could be prosecuted just as effectively in state courts, under state laws. Over-reliance on federal courts for drug prosecutions will either force Congress to bloat the federal courts beyond recognition or force the federal courts to stop meeting their other constitutional and statutory responsibilities.

Id.

379. See JUDICIAL IMPACT OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL IMPACT STATEMENT: VIOLENT CRIME CONTROL ACT OF 1991 8 (Sept. 23, 1991) [hereinafter JUDICIAL IMPACT STATEMENT].

380. *Id.* at 18.

381. *Id.* at 8, 18; see also 137 CONG. REC. S8668 (remarks of Sen. D’Amato) (quoting U.S. Justice Department figures).

382. Docket pressures threaten the quality of justice not only in the federal courts, but also in the state courts. See, e.g., BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1994: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 50 (reporting that “[c]riminal case loads the state courts reached an all-time high of nearly 13.5 million filings in 1994”); J. Anthony Kline, Comment, *The Politicalization of Crime*, 46 HASTINGS L.J. 1087, 1087-88 (1995) ([P]ressure created by increased criminal caseloads “has had a much greater impact on state than federal courts. . . .”); Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1994, at A29, (“A solution that eases the burden on the Federal courts without taking into account the effect on the state court system is no solution at all.”). But see, e.g., Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 194 (1993) (“A reallocation of 70,000 cases from federal courts to state courts would reduce federal court volume by 30 percent while increasing state court volume only 1 percent.”).

As an alternative to federalization, the Committee on Long Range Planning of the Judicial Conference of the United States recommends additional federal support for state authorities in the prosecution and adjudication of crime: “There should be an increase in federal resources allocated to state criminal justice systems for prosecution of matters now handled by federal prosecutors because of lack of state resources.” COMMITTEE ON LONG

The two firearms amendments threatened to compromise further the federal courts' capacity to devote requisite attention to criminal prosecutions truly within their particular competence and concern. These would include prosecutions whose magnitude lies beyond an individual state's capabilities, such as major criminal RICO conspiracy prosecutions, prosecutions of major white collar crime, and other offenses of substantial scope. They would also include prosecutions otherwise involving particularly federal interests or significant interstate or international connections.³⁸³ Federal concern does not become weighty merely because the defendant is charged with using one of the ninety-five percent of domestic firearms that happen to have passed through interstate or international commerce at one time or another.

The two firearms amendments also would likely have further eroded the federal courts' capacity to expeditiously try civil actions, including ones raising claims under federal statutes central to our polity, such as the civil rights acts, securities and antitrust laws, and legislation regulating health, environmental protection, and workplace safety. The Study Committee found that because the Speedy Trial Act effectively gives criminal actions precedence on crowded dockets, "some districts with heavy drug caseloads are virtually unable to try civil cases and others will

RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, Recommendation 4a, at 26 (Mar. 1995) [hereinafter PROPOSED LONG RANGE PLAN].

Even if we agree that lawmakers should be wary of proposals that would ease federal pressures by redirecting substantial categories of criminal or civil cases to state courts, the concerns are different when the debate concerns proposals to federalize a particular category of criminal cases. Because the category has traditionally been within state jurisdiction, maintenance of the status quo would not increase state dockets. Where the category does not otherwise involve particular federal concerns, the determinative question should be whether state prosecutors and courts can continue effectively to prosecute and adjudicate cases within the category (with or without federal assistance), or whether federal jurisdiction would enhance effectiveness.

383. See PROPOSED LONG RANGE PLAN, *supra* note 382, at 23-25. The Committee recommended the following:

Congress should allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses:

(a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity. . . .

(b) The proscribed activity involves substantial multistate or international aspects. . . .

(c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. . . .

(d) The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter. . . .

(e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system. . . .

soon be at that point."³⁸⁴

Aside from federal judicial docket constraints, questions remained concerning whether federal law enforcement budgets could have borne the costs of investigating and prosecuting yet another inundation of criminal actions throughout the nation and whether federal corrections authorities could have borne the costs of incarcerating yet more prisoners in already overcrowded federal prisons. The truth is that when Congress creates new federal crimes, it frequently does not couple the legislation with appropriations to help manage the new burden.

The two firearms amendments warranted Senate study even if significant numbers of the new alleged federal criminals ultimately were tried and sentenced in state court or agreed to federal plea bargains. Where prosecution of an alleged firearms-related crime remained in the federal system, the Speedy Trial Act and chronic docket pressures suggested that plea bargaining might frequently be driven more by the federal courts' limited institutional capacities, than by a particular prosecution's merits. Evenhanded administration of criminal justice would suffer whenever the choice between charging a defendant in federal or state court would depend not only on these limits, but also on the relative ambitions of federal and state prosecutors who share dual jurisdiction. Fairness issues would also arise because, as Professor Beale has written, dual jurisdiction helps lead to inequitable treatment of similarly situated defendants.³⁸⁵ Because of limits on federal prosecutorial resources, most persons accused of particular conduct will continue to be tried in state courts, with only a relative few subject to ordinarily harsher federal penalties.³⁸⁶

384. STUDY COMMITTEE, *supra* note 377, at 36. See also Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 686 (1992) [hereinafter Miner, *Crime and Punishment in the Federal Courts*] (recounting conversation with judge, who said that the criminal caseload had prevented him from trying any civil cases for more than a year); Stephen Labaton, *Federal Judges Blame Money Woes for Slowdown*, N.Y. TIMES, Apr. 9, 1993, at B16; Michael deCourcy Hinds, *Bush Aides Push State Gun Cases into U.S. Courts*, N.Y. TIMES, May 17, 1991, at A1 ("Federal judges . . . are alarmed that their dockets are increasingly filled by cases involving drugs and guns, while important constitutional issues like civil rights . . . actions await hearings for months or years"; "civil cases are slipping farther down the Federal court docket" and federal courts' "backlogs are growing," in significant part because the number of drug cases increased five-fold from 1980 to 1990, while the number of district judges increased by only about 10%); Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1 ("Drug cases are dominating already overcrowded dockets, and . . . tens of thousands of civil lawsuits . . . are being pushed aside and subjected to enormous delays as a result"; surge in drug-related prosecutions is "leading to unprecedented delays in Federal courts for civil litigants who are seeking to resolve . . . civil rights actions . . ."; stating that one district judge could try only one civil action in two years and had twenty civil actions prepared for trial without the time to try them).

The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (1994), requires that a criminal defendant in federal court be given a trial within seventy days of indictment. See, e.g., STUDY COMMITTEE, *supra* note 377, at 36 (discussing the Speedy Trial Act's effect on federal civil docket).

385. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 981-82 (1995).

386. *Id.* at 982.

Beyond the pressures and potential inequities created by docket constraints, the Senate should have considered what one judge has called "the disappointment of promises unfulfilled."³⁸⁷ When Congress federalizes a crime, the inevitable message is that the federal presence will be a potent force to combat the perceived threat. If (as is unfortunately likely) homicides and other violent firearms crimes continue with a frequency beyond the effective nationwide control of federal law enforcement authorities and the federal courts, Congress and the federal government will likely bear the lion's share of public scorn for perceived ineffectiveness.³⁸⁸

Before voting on the two firearms amendments, the Senate failed to address any of these questions. After only a few minutes of floor debate and without hearings, the Senate overwhelmingly approved the two amendments. The first amendment, which would have federalized homicides committed with a firearm that had passed through interstate or international commerce, was approved by a vote of sixty-five to thirty-three.³⁸⁹ The second amendment, which would have imposed a mandatory ten- to thirty-year federal prison sentence for any other crime committed with such a firearm, was approved by a vote of eighty-eight to eleven.³⁹⁰ A few days later, the Bush Administration expressed its support for both amendments.³⁹¹ On July 11, 1991, the Senate approved the entire crime bill by a vote of seventy-one to twenty-six and sent it to the House.³⁹²

Judges then began posing the hard questions the Senate had ignored when it hurriedly approved the two firearms amendments. In late September, the Judicial Conference of the United States publicly opposed the amendments, which it said "will swamp the Federal courts with routine cases that states are better equipped to handle, and will weaken the ability of the federal courts effectively to deal with difficult criminal cases that present uniquely federal issues."³⁹³ Federal courts would also be left

387. Roger J. Miner, *The Consequences of Federalizing Criminal Law: Overloaded Courts and a Dissatisfied Public*, 4 CRIM. JUST. 16, 19 (Spring 1989). See also Miner, *Crime and Punishment in the Federal Court*, *supra* note 384, at 687 ("Great expectations lead to great disappointments, an unfortunate consequence of too many federal crimes.").

388. *FBI Director Sees Danger of Overload*, L.A. TIMES, Dec. 9, 1993, at A32 (address by FBI Director Louis J. Freeh, warning that "unchecked federalization of crime could overwhelm federal law enforcement, including the FBI, and create unrealistic expectations among the public").

389. 137 CONG. REC. S8672 (June 26, 1991) (2 not voting).

390. *Id.* at S8851 (one not voting).

391. Michael deCourcy Hinds, *Citing Caseload, Federal Judges Assail 2 Provisions in Crime Bill*, N.Y. TIMES, July 14, 1991, at 19 [hereinafter Hinds, *Citing Caseload*] (statement of Assistant Att'y Gen. for Legislative Affairs Lee Rawls).

392. 137 CONG. REC. S9832 (3 not voting) (July 11, 1991). See *id.* at S9982, for the text of Senate Bill 1241.

393. *Position of the Judicial Conference of the U.S., Enclosed in Letter from Chief Justice Rehnquist, Presiding Officer of the Judicial Conference, to Rep. Jack Brooks, Chairman of the House Comm. on the Judiciary*, 140 CONG. REC. S6090 (May 19, 1994) (remarks of Rep. Biden). See also Gwen Ifill, *Rehnquist Opposes Bill That Seeks Shift in Gun Trials to U.S. Courts*, N.Y. TIMES, Sept. 21, 1991, at 8 (quoting letter from Chief Justice Rehnquist to the House Judiciary Committee); WILLIAM H. REHNQUIST, *Chief Justice's 1991 Year-End Re-*

“unable to carry out their vital responsibilities to provide timely forums for civil cases.”³⁹⁴

Judge Vincent L. Broderick of the Southern District of New York, formerly the New York City Police Commissioner, denounced the amendments as “simplistic” and “politically expedient,”³⁹⁵ stating that “once these cases move into Federal court, we would do nothing else; we’d be like a municipal court.”³⁹⁶ “There’s a deathly fear out there . . . of running for office and being thought to be soft on crime,” Judge Broderick continued, “and that is what is driving us today.”³⁹⁷

Also questioning the wisdom of the two firearms amendments was the Judicial Impact Statement on the Act, prepared by the Judicial Impact Office of the Administrative Office of the U.S. Courts.³⁹⁸ The Statement estimated that possible annual costs to the federal judiciary of the first amendment (relating to homicides with firearms) would range from \$31 million and 187 work years, to \$2.7 billion and 16,365 work years.³⁹⁹ (The estimates included the cost of judicial officers and their support staff time, as well as the cost of other court personnel, public defenders, and administrative support. A “work year” represents one person working full-time for one year.)⁴⁰⁰

Equally daunting was the Impact Statement’s estimates of the possible annual costs of the second amendment (relating to other violent crimes with firearms). If all cases involving such crimes were prosecuted in the federal courts, the estimated resource cost would exceed \$1.030 billion and 14,970 work years. If only 5% of such cases were prosecuted in the federal courts, the projected cost would be about \$54.6 million and 793 work years.⁴⁰¹

The House passed its crime bill October 22, 1991.⁴⁰² Perhaps influenced by the judicial voices and by the Judicial Impact Statement, the

port on the Federal Judiciary 24 THIRD BRANCH 1, 5 (1992) (The two firearms amendments “would have insured that the already overburdened federal courts could not provide a timely forum for civil cases.”).

394. *Id.*

395. Henry J. Reske, *Get-Tough Crime Bill Spurs Critics: Former ABA President, Judges Say Amendments Would Burden Federal Courts*, 77 A.B.A. J. 32, 32 (Oct. 1991).

396. Hinds, *Citing Caseload*, *supra* note 391, at 19.

397. Reske, *supra* note 395, at 32.

398. See JUDICIAL IMPACT STATEMENT, *supra* note 379.

399. *Id.* at 8. The higher figures represent the annual cost if all firearm homicide cases nationally were prosecuted in federal court and if authorities sought the death penalty in each case. The lower figures represent the annual costs if only 5% of firearm homicide cases were brought in federal court in the fifteen jurisdictions that did not provide for the death penalty. Each calculation is based on the premise that approximately 95% of firearm homicides involve firearms that have moved through interstate or foreign commerce. *Id.* at 8-9.

400. *Id.* at 1. The Statement’s impact estimates did not include annual resource costs to the Supreme Court and the United States Sentencing Commission. *Id.*

401. *Id.* at 18. These calculations are based on the premise that approximately 95% of firearm homicides involve firearms that have moved through interstate or foreign commerce. *Id.*

402. See 137 CONG. REC. D1288 (Oct. 22, 1991); see also OMNIBUS CRIME CONTROL ACT OF 1991, H.R. 3371, 102d Cong., 1st Sess., 137 CONG. REC. H7892, H7916 (1991).

House-Senate conference committee approved a compromise bill that deleted the two amendments. The compromise bill died in a last-minute filibuster by Senators who asserted that it did not go far enough in restricting death penalty appeals and in relaxing restrictions on illegally seized evidence.⁴⁰³

B. THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

With efforts to enact crime legislation again thwarted, crime became a central issue during the 1992 presidential campaign. Shortly after President Clinton's Inauguration, crime legislation again assumed center stage in Congress, whose members recognized voters' continuing concerns.⁴⁰⁴ After floor debate spanning nearly a year, the Omnibus Violent Crime Control and Law Enforcement Act became law on September 13, 1994.⁴⁰⁵ The 1994 Act contains provisions that confer federal jurisdiction over a number of state crimes.

When the federalization provisions arose, House and Senate debates heard only fleeting discussion of two crucial questions: (1) Were the state courts unable or unwilling to perform their traditional role in administering the criminal law? and (2) Would federal jurisdiction produce docket pressures that would compromise the federal courts' capacity to perform their core functions in adjudicating civil and criminal law within their particular competence?⁴⁰⁶ The findings and recommendations of the 1990 Federal Courts Study Committee again went unmentioned.

Before the 1994 crime bill reached the President's desk, Senate-House conferees had deleted sections, resurrected from 1991, that would have federalized virtually all crimes committed with firearms.⁴⁰⁷ As it was, however, the 1994 Act added more than one hundred new federal crimi-

403. See 137 CONG. REC. H11678 (Nov. 26, 1991); see also Paul Houston, *Crime Bill Succumbs to Republican Senate Filibuster*, L.A. TIMES, Nov. 28, 1991, at A30.

404. See, e.g., Stephen Braun & Judy Pasternak, *A Nation with Peril on its Mind; Crime Has Become the Top Concern of Many People*, L.A. TIMES, Feb. 13, 1994, at A1 (in L.A. Times poll, 43% of Americans put crime issues at the top of the nation's problems); Richard Morin, *Crime Time: The Fear, The Facts; How the Sensationalism Got Ahead of the Stats*, WASH. POST, Jan. 30, 1994, at C1 (in a Washington Post-ABC News poll, 31% of Americans name crime as the nation's top problem, and half the persons interviewed named it as one of the country's top two problems).

405. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13701 (1994).

406. See, e.g., 139 CONG. REC. S14,948-49 (Nov. 3, 1993) (remarks of Sen. D'Amato); *id.* at S15,393 (Nov. 9, 1993) (remarks of Sen. Biden); *id.* at S15,395 (Nov. 9, 1993) (remarks of Sen. D'Amato); *id.* at S15,396 (Nov. 9, 1993) (remarks of Sen. Feingold); *id.* at S15,398 (Nov. 9, 1993) (remarks of Sen. Biden); *id.* at S15,524-25 (Nov. 10, 1993) (remarks of Sen. Leahy); 140 CONG. REC. H2325 (Apr. 14, 1994) (remarks of Rep. Scott); *id.* at H2325-26 (Apr. 14, 1994) (remarks of Rep. Glickman); *id.* at H2326 (Apr. 14, 1994) (remarks of Rep. Edwards); *id.* at S6090-93 (May 19, 1994) (remarks of Sen. Biden); *id.* at S6092-94 (May 19, 1994) (remarks of Sen. D'Amato); *id.* at S6099-S6104 (May 19, 1994) (remarks of Sen. Biden); *id.* at S12,296-98 (Aug. 23, 1994) (remarks of Sen. Feingold); *id.* at S12,309-11 (Aug. 23, 1994) (remarks of Sen. Leahy).

407. See Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103d Cong., 1st Sess. § 2405.

nal provisions.⁴⁰⁸ Some of the provisions authorized enhanced penalties for existing federal crimes (including the death penalty for approximately sixty offenses) or created new circumstances in which federal courts may impose existing penalties. Other provisions created new federal crimes.

Two examples illuminate the issues raised by the latter category of provisions.⁴⁰⁹ The 1994 Act grants federal courts jurisdiction over prosecutions alleging drive-by shootings in furtherance of or to escape detection of a major drug offense.⁴¹⁰ The Act also reaffirms federal jurisdiction over persons charged with knowingly possessing guns in or near public, private, or parochial schools.⁴¹¹

408. See William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 746-54 (1995) (appendix listing the provisions).

409. See also Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, §§ 40001-40703, 108 Stat. 1902-55 (federalizing specified interstate acts of domestic violence); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XV, §§ 150001-09, 108 Stat. 2033-36 (Criminal Street Gangs; federalizing specified acts involving participation in such gangs).

Unlike other recent congressional enactments federalizing crime, VAWA was preceded by several hearings and reports that illuminated the issue of, and enabled lawmakers to make more informed judgments about, whether states were able to shoulder the prosecutorial burden and whether federal involvement might have a positive effect. See, e.g., SENATE COMM. ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT OF 1993, S. REP. NO. 103-138, 103d Cong., 1st Sess. (1993); SENATE COMM. ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 102-197, 102d Cong., 1st Sess. (1991); *Crimes of Violence Motivated By Gender, Hearings Before the Subcomm. on Civil and Constitutional Rights, House Judiciary Comm.*, 103d Cong., 1st Sess. (1993); *Violence Against Women: Fighting the Fear, Hearings Before the Senate Judiciary Comm.*, 103d Cong., 1st Sess. (1993); *Violence Against Women, Hearings Before the Senate Judiciary Comm.*, 103d Cong., 1st Sess. (1993); *Hearings on Domestic Violence, Hearings Before the Senate Judiciary Comm.*, 103d Cong., 1st Sess. (1993); *Violence Against Women, Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); *Violence Against Women: Victims of the System, Hearings Before the Senate Judiciary Comm.*, 102d Cong., 1st Sess. (1991); *Women and Violence, Part I, Hearing Before the Comm. on the Judiciary, U.S. Senate*, 101st Cong., 2d Sess. (1990); *Women and Violence, Part II, Hearings Before the Comm. on the Judiciary, U.S. Senate*, 101st Cong., 2d Sess. (1990).

410. 18 U.S.C. § 36 (1994), added by Pub. L. No. 103-322, tit. VI, § 60008(b), 108 Stat. 1796, 1971 (1994). See also *id.* § 36(a) (defining "major drug offense").

411. 18 U.S.C. § 922(q), added by Pub. L. No. 103-322, tit. XXXII, § 320904, 108 Stat. 1796, 2125 (1994). The 1994 legislation amended the Gun-Free School Zones Act of 1990, which the Supreme Court struck down a few months later for exceeding Congress's commerce power. *United States v. Lopez*, 115 S. Ct. 1624 (1995). The 1990 Act forbade "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A), *quoted in Lopez*, 115 S. Ct. at 1626. A "school zone" was "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." *Id.* § 921(a)(25), *quoted in Lopez*, 115 S. Ct. at 1626 n.l. See also *id.* § 921(a)(26) (defining "school"). Writing for five-member majority, Chief Justice William H. Rehnquist concluded that the Act fell outside the commerce power because it neither regulated a commercial activity nor contained a requirement that possession be connected in any way to interstate commerce. *Lopez*, 115 S. Ct. at 1630-31. (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy and Thomas, J.J.).

The *Lopez* majority noted that the 1990 Act was unaccompanied by a jurisdictional element and by congressional findings stating how the proscribed conduct, in the aggregate, affected interstate commerce. *Id.* In an evident effort to save the constitutionality of the 1990 Act, the 1994 legislation articulated such findings even before the Court's *Lopez* decision. See Pub. L. No. 103-322, 108 Stat. 1796, 2125 (amending 18 U.S.C. § 922(q)(1)(A)-

Not only did the provisions creating new federal crimes further challenge the federal courts' institutional capacities, but they also left the state courts embarrassed again by the apparent national mandate that they were unequal to the regulatory task. Federal presence is not warranted by the mere fact that the defendant happens to be charged with shooting someone while committing or escaping from a major drug offense on a city street or with possessing a firearm in or near a schoolyard. All states already criminalize such shootings. More than forty states criminalize possession of firearms on or near school grounds,⁴¹² and Congress in 1994 did not cite any findings indicating that states were unable or unwilling to prosecute.

Shortly after the President signed the crime bill, the Long-Range Planning Committee of Judicial Conference of the United States warned of "nightmarish" consequences arising in part from the already exploding federal criminal docket.⁴¹³ The Planning Committee report did not consider the effects of the 1994 Act's extension of federal criminal jurisdiction. Committee chair Judge Otto R. Skopil, Jr. of the Ninth Circuit warned, however, that the extensions "could have a very, very large effect on criminal caseload [making t]he possibilities . . . staggering."⁴¹⁴

The Committee had been created after the 1990 Federal Courts Study Committee recommended that the judiciary should establish a "permanent capacity to determine long-term goals and develop strategic plans by which they can reach those goals."⁴¹⁵ The Planning Committee report, written by the Committee's nine federal judges, advised that if present

(1)). *Lopez*, however, did not consider the 1994 findings because the government did not rely on them as a substitute for the absence of findings in the 1990 Act. *Lopez*, 115 S. Ct. at 1632 n.4.

Evidently concerned that mere congressional findings might not be sufficient to withstand commerce clause challenge, the President submitted proposed legislation less than two months after *Lopez* to amend the 1990 Act by requiring proof that the firearm had moved in interstate commerce. See 141 CONG. REC. S6459 (May 10, 1995) (message from the President); *id.* at S7920 (June 7, 1995) (text of proposed legislation).

412. See *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring). See also Respondent's Brief at 24, *United States v. Lopez*, cert. granted, 114 S. Ct. 1536 (Apr. 18, 1994) (No. 93-1260) (naming forty-two states).

413. See PROPOSED LONG RANGE PLAN, *supra* note 382, at 18. While Congress was debating the 1994 Act, the Judicial Conference reiterated its opposition to widespread federalization of crime, which would "adversely impact on the ability of the federal courts to function as intended." 139 CONG. REC. S15,398 (remarks of Sen. Biden, presenting letter of Judge Maryanne Trump Barry, chair of the Judicial Conference Committee on Criminal Law). Judge Barry wrote:

[T]he federal courts are designed to handle complex criminal cases . . . with nationwide impact that states lack the resources and/or jurisdiction to investigate and prosecute. . . . [T]he potential addition to the federal caseload of thousands of cases that the states routinely and efficiently prosecute would severely reduce if not cripple the federal courts' ability to handle those types of cases that we are best able—and geared—to handle.

Id. See generally WILLIAM W. SCHWARZER & RUSSELL W. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CRIMINAL JUSTICE (1994).

414. Robert Pear, *Judges Proposing to Narrow Access to Federal Court*, N.Y. TIMES, Dec. 5, 1994, at A1.

415. STUDY COMMITTEE, *supra* note 377, at 147.

trends continue, federal district court civil filings could number more than a million annually by the year 2020, compared to approximately 230,000 filings in 1993. Also, criminal filings could number nearly 90,000, compared to approximately 47,000 filings in 1993. To manage and dispose of this projected caseload would require more than 2500 district judges and nearly 1600 court of appeals judges, as compared to the current number of 649 district judges and 167 court of appeals judges.⁴¹⁶

The Planning Committee recommended that “[w]hen legislation is considered that may affect the federal courts directly or indirectly, Congress should take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for federal courts.”⁴¹⁷ The recommendation explicitly cited crime legislation, which “inevitably imposes financial and other burdens on the judicial branch associated with . . . investigation, prosecution, resolution and punishment. . . .”⁴¹⁸ The Planning Committee further recommended that “criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount.”⁴¹⁹

V. CONCLUSION

Irony has marked civil RICO's record since the private remedy's enactment in the politically charged 1970 crime bill. The roll of civil RICO defendants has included individuals and entities from nearly all walks of American life. Virtually absent from this roll, however, have been RICO's intended targets: persons engaged in organized crime and racketeering. Civil RICO's war against organized crime and racketeering has spared the targets, while producing a continuing casualty list of ordinary individuals and businesses tarred as “racketeers” in civil pleadings and court decisions throughout the nation.⁴²⁰

For most of the last quarter-century, civil RICO has sullied public perceptions of the congressional process and has exposed Congress to persistent ridicule.⁴²¹ Civil RICO has been an ongoing national embarrassment, not only because its operation has never been faithful to congressional intent, but also because Congress should have foreseen civil RICO's failure to hit the intended targets.⁴²²

416. See PROPOSED LONG RANGE PLAN, *supra* note 382, at 18.

417. *Id.* at 36.

418. *Id.*

419. *Id.* at 23.

420. See, e.g., Douglas E. Abrams, *Should Crime in the Suites Come Under Racketeering Law?: A Burden Congress Shouldn't Impose*, WALL ST. J., Feb. 4, 1986, at 30; Douglas E. Abrams, *Making Racketeers Of Everyone*, ST. LOUIS POST-DISPATCH, Mar. 3, 1985, at 3B.

421. See, e.g., James D. Gordon, III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1696-97 (1991) (describing an “honest list” of law school course descriptions, including “RICO: Learn how to use this powerful anti-extortion law to extort large settlements out of honest business people”).

422. RICO also exemplifies a disturbing trend that has frequently seen Congress enact ill-defined and overly broad legislation, evidently complacent that the courts would some-

By the time the 1995 Securities Litigation Reform Act finally limited civil RICO's expansive reach, Congress had already begun to look silly as persons from all walks of life found themselves named as a racketeering statute's defendants, with the House and Senate unable to do anything about it for more than a decade. As it is, the 1995 Act is a piecemeal amendment, affecting only securities fraud actions, while leaving civil RICO otherwise untouched.

In the years since RICO's enactment, congressional consideration of crime legislation has frequently followed the disquieting scenario that helped produce civil RICO. A stern measure creating federal jurisdiction is brought to a House or Senate vote without careful consideration of the measure's likely effect on crime or on the courts' institutional capacities. Observers have suggested that lawmakers frequently introduce stern crime measures without expecting enactment, and even privately hoping against enactment because they sense the measure's imprudence.⁴²³

In the age of sound bites and negative political advertising, however, merely introducing a stern crime measure may serve at least two immediate purposes. Supporters can boast about being "tough on crime," and they can tar opponents with the obloquy of being "soft on crime." If cooler heads prevail and the measure fails on the floor or is deleted in conference, supporters nonetheless have positioned themselves for the next election campaign. If some lawmakers doubt the measure's wisdom or wish further study, but nonetheless feel disabled from voicing opposition, the measure may find its way into the United States Code.

Congress's civil RICO mistakes are capable of repetition because in the contemporary climate, "hardly a congressional session goes by without an attempt" to advance the "trend toward large-scale federalization of the criminal law."⁴²⁴ In 1991 and 1994, lawmakers again debated measures to federalize aspects of crime control. With respect to at least

how fill in the gaps. Courts, after all, may not decline to hear cases properly brought before them, even when the decision turns on inartfully drafted legislation. See, e.g., *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 595 (1980) (Rehnquist, J., dissenting) ("The effort to determine congressional intent here might better be entrusted to a detective than to a judge."); Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539, 547 (1981) (discussing "the murky, buck-passing brand of legislation that casts unwanted construction and application burdens on the courts"); Douglas E. Abrams, *Lack of Clarity in Writing Laws Leads to Confusion, Court Cases*, NEWSDAY, Apr. 8, 1985, at 50 ("RICO is yet another example of poorly written legislation whose scope far exceeds the mischief Congress sought to remedy. . . . In an era of heightened sensitivity to finite judicial budgets and resources, dozens of inconsistent private RICO decisions demonstrate the burden that ill-defined, imprecise legislation casts on the judicial system.").

423. See, e.g., *Crime Bills: A Lethal Batch, But Many Will Die*, ATLANTA J. & CONST., Oct. 28, 1991, at F6 (quoting Professor of Government Benjamin Ginsberg, Cornell Univ. Center, Washington, D.C.).

424. William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 7. See also Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 540 (1995) ("[T]he urge in Congress to create new federal causes of action, civil and criminal, is not abating."); William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1660 (1992) (calling for "congressional self-restraint" in the federalization of crime).

some of the proposed new federal crimes, they left the disturbing sense that they had barely paused to study the measures' likely efficacy or their potential effect on the courts. Commentators could not be faulted for concluding that many lawmakers again opted for federalization more from desire for personal publicity, than from serious belief that enactment would truly advance the battle against crime.⁴²⁵

If our streets are to be safe and our federal and state courts are to use their finite resources efficiently in the administration of civil and criminal law, we need to demand more fortitude from elected leaders who debate crime legislation in the public interest. A quarter-century of experience

Even before enactment of the 1994 crime bill, the 1990s had already seen an acceleration in the federalization of crime. See, e.g., Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified in various sections of 15 U.S.C.) (federalizing car theft by person possessing a handgun); Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (codified at 18 U.S.C. § 43) (federalizing disruption of animal enterprises, such as laboratories); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified in various sections of 18, 42 U.S.C.) (federalizing failure to pay child support); Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844 (codified at 18 U.S.C. §§ 921(a)(25), 922(q)(1)(A)) (federalizing possession of a gun within 1000 feet of a school; struck down by the Supreme Court for exceeding Congress's commerce power, but its ultimate constitutionality remains uncertain after the 1994 crime bill's amendments, see *supra* note 411 and accompanying text). See also False Identification Crime Control Act of 1982, Pub. L. No. 97-398, 96 Stat. 2009 (codified in 18 U.S.C. §§ 1028, 1738, 39 U.S.C. § 3001) (prohibiting fraud in connection with identification documents); Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (codified in 18 U.S.C. § 1030) (prohibiting computer fraud).

425. See, e.g., Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835, 875 (1995) ("[T]his generation of politicians views the federal laws as a public policy panacea and the federal courts as one of their services to their constituencies."); Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248-49 (1995) (discussing "congressmen and women following the politically profitable example of state legislators in buying popularity with essentially bogus anticrime laws"); Marshall, *supra* note 408, at 724 ("[I]t is seldom a vote winner to assert that one is not going to vote for a popular crime measure on the grounds that it conflicts with a theoretical vision of federalism."); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 504, 507 (1995) ("[W]e live at a time when legislators, state as well as federal, are zealous in their efforts to be tough on crime, or at least to create the appearance of toughness"; discussing "most elected officials' overwhelming political incentive to fight the war on crime by legislating it to death"; "persuading Congress to stop federalizing most criminal behavior . . . may be politically naive."); H. Scott Wallace, *The Drive to Federalize Is a Road to Ruin*, 8 CRIM. JUST. 8, 51 (Fall 1993) (discussing "public impatience and political pressures"); Michael Kinsley, *The Case Against the States*, TIME, Jan. 16, 1995, at 78 ("Although crime is traditionally a matter for state and local government, politicians in Washington these days compete vigorously to federalize the most categories of criminal behavior. . . ."); Anthony Lewis, *Response to a Threat*, N.Y. TIMES, May 23, 1994, at A15 ("The public is fearful and members of Congress vote to federalize law enforcement so they can say they are against crime."); Robert D. Raven, *Don't Wage War on Crime in Federal Courts*, TEX. LAW., Aug. 31, 1992, at 12 ("Because being tough on crime plays well at the ballot box, federal politicians in both the legislative and executive branches have embarked on a well-publicized war against crime."); George F. Will, *Government on a Leash*, WASH. POST, Nov. 20, 1994, at C7 ("It is no longer startling when Congress asserts that some local problem—any problem—comes within its purview, and the 1990 [Gun-Free School Zones] act, another step in the federalization of criminal law, doubtless was compatible with public opinion."). The 1990 Act is discussed *supra* note 424 and accompanying text.

with civil RICO serves as a grim reminder of what can happen when haste overcomes reasoned analysis.